

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

IN THE MATTER OF THE HEARING CALLED  
BY THE OIL CONSERVATION COMMISSION FOR  
THE PURPOSE OF CONSIDERING:

CASE NOS: 21529

APPLICATION OF WILDEARTH GUARDIANS  
FOR AMENDMENTS TO RELEASE/SPILL RULES  
19.15.29.6 and 19.15.29.8 NMAC.

REPORTER'S TRANSCRIPT OF VIRTUAL PROCEEDINGS  
COMMISSIONER HEARING  
Agenda Item 5  
February 25, 2021  
Santa Fe, New Mexico

BEFORE: ADRIENNE SANDOVAL, CHAIRWOMAN  
GREG BLOOM, COMMISSIONER  
CHRIS MOANDER, ESQ.

This matter came on for hearing before the New Mexico Oil Conservation Commission on Thursday, February 25, 2021, via Webex Virtual Platform, hosted by New Mexico Energy, Minerals, and Natural Resources Department.

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APPEARANCES

FOR THE APPLICANT:

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Case Called  
Status Conference  
Reporter Certificate

1                   CHAIRWOMAN SANDOVAL: All right. Let's move  
2 on to Item Number 5, which is case Number 21529, which is  
3 also a status conference on the application of WildEarth  
4 Guardians to the Release Spill Rule 19.15.29.6 and  
5 19.15.29.8. Mr. Timmons, are you on? I see you. Can we  
6 hear you?

7                   MR. TIMMONS: Chair Sandoval, yes, this is Daniel  
8 Timmons on behalf of WildEarth Guardians.

9                   CHAIRWOMAN SANDOVAL: Mr. Ames, I want to make  
10 sure you are on and can we hear you?

11                  MR. AMES: Good morning, Ms. Sandoval.

12                  CHAIRWOMAN SANDOVAL: Good morning. And then I  
13 think, Mr. Feldewert, you will continue to be on this matter  
14 as well.

15                  MR. FELDEWERT: Yes, ma'am. On behalf -- I  
16 should say, Michael Feldewert of the Santa Fe office of  
17 Holland & Hart on behalf of the New Mexico Oil & Gas  
18 Association.

19                  CHAIRWOMAN SANDOVAL: Okay. Great. Well, we  
20 have everybody then, so let's go ahead and proceed on this  
21 matter. I believe today we want to discuss the schedule and  
22 some of the logistics. We had discussed this back in  
23 November, I think the November 4 hearing.

24                  But there have, I believe, been some changes  
25 potentially to the timing and process that the Commission

1 needs to consider. And I believe Mr. Moander yesterday  
2 circulated a draft scheduling order to the parties -- I'm  
3 sorry -- procedural order.

4 Mr. Timmons, since you are representing WildEarth  
5 Guardians and submitted the application, do you have any  
6 statements on the procedural order or the process to the  
7 Commission?

8 MR. TIMMONS: Chair Sandoval, yes, we do have  
9 some specific -- there are a few sort of blank dates to be  
10 filled in on that proposed procedural order that I have  
11 seen. So I mean, we certainly have thoughts on those, and a  
12 couple of comments that we would like to make with respect  
13 to the public comment at the hearing. I'm not sure if this  
14 is the time to sort of get into the details of that. Okay.

15 CHAIRWOMAN SANDOVAL: I think now would be great.  
16 Let's -- I would like to hear from you and other parties and  
17 other Commissioners can take that information under  
18 advisement and figure out a path forward.

19 MR. TIMMONS: First of all, I think, overall,  
20 just for context, I have checked, and it does appear that  
21 the New Mexico Register notice did get put out on the 23rd,  
22 so I think we are on track to have a full 30 days' public  
23 notice prior to the April 1 hearing date, so I don't see an  
24 issue there.

25 The primary thing was that, that notice went out

1 later than anticipated in November, and so in order to  
2 provide the 60 days of public comment that the Commission  
3 was in favor of back in November, with Mr. Moander extending  
4 the public comment period past the hearing date to I believe  
5 April 26, which would allow for that full 60 days of public  
6 comment, Guardians is in support of that. We think it  
7 provides a good opportunity for the public in particular to  
8 provide informed comment after the hearing for the  
9 Commission to make an informed decision.

10 With respect to sort of the blank spaces in the  
11 proposed notice, motion hearing prior to rulemaking hearing,  
12 we would, we would request that those motions be filed  
13 essentially as soon as possible. I think that perhaps a  
14 March -- well, I guess it's sort of -- I should maybe go  
15 to the technical testimony first before we talk about that  
16 date.

17 We would suggest a technical testimony filing, so  
18 that would be, technical testimony date, I would say March  
19 17, I believe, would be appropriate, which would provide two  
20 weeks for counsel to review the other party's testimony and  
21 prepare for the hearing itself. That would be our  
22 recommendation.

23 The motion hearing, I think it would be  
24 appropriate for dispositive motions to be filed by March 10,  
25 would be our recommendation. And responses -- and what was

1 I -- I lost my notes here -- March 24. And then, you know,  
2 essentially any hearing -- this is a little tricky because  
3 of the tight time frame. I guess our general inclination  
4 would be to have any dispositive motions heard as soon as  
5 possible just in order to avoid having to prepare for the  
6 hearing while dealing with motions, in particular, preparing  
7 for the hearing that might not go forward if there is a  
8 dispositive motion.

9 I don't anticipate one. Perhaps the other  
10 parties have thoughts on that. Certainly Guardians is not  
11 intending to dismiss the hearing, so maybe I will just punt  
12 on that one for now. I think our -- the other issue that  
13 we (unclear audio) is in Part 6, the public comment at  
14 hearing, kind of two issues there.

15 One, in Part A.1 or A.I, it appears that the  
16 language with the sole exception of the first day of the  
17 hearing, you know, starting April 2, 2021, it appears there  
18 is no public comment contemplated for the first day of the  
19 hearing, April 1, which, I believe, does not comport with  
20 the regulations at 19.15.3.12, and at 19.15.3.12.A(2)(f)  
21 which indicates that if the hearing continues for more than  
22 one day, the Commission shall provide an opportunity each  
23 day for public comment.

24 So I believe that public comment by the rules  
25 should be -- an opportunity for public comment should be

1 provided each day at the hearing. I understand that  
2 that's -- sometimes can seem a little unwieldy, but that's  
3 my reading of the rules, so I think we should abide by the  
4 rules.

5 The other issue is, in that same section, it says  
6 the public may make comment at the hearing at a time and  
7 place to be identified. It seems appropriate that this  
8 would be the time and place to identify where those comments  
9 could be made in this procedural order.

10 I think that it's -- the public is served by  
11 having specific times in particular of the day or a time or  
12 two in which that public comment will be made available so  
13 that they can schedule accordingly. And so, I mean, I  
14 would -- I would propose there be an opportunity for public  
15 comment at the start and at the close of each day. Or maybe  
16 not at the start of the very first day, but that, you know,  
17 early in that first day, say 9:30 a.m. and then 4 o'clock on  
18 each day that that be opened up, or 4:30, even, be opened up  
19 for public comment.

20 Based on the level of public engagement that we  
21 saw at the produced water hearing, I would anticipate  
22 significant public interest in this rulemaking as well. So  
23 I think we want to provide ample opportunity for public  
24 comment here. I believe those are my only comments, and I  
25 will now turn it over to the other counsel.

1 CHAIRWOMAN SANDOVAL: Thank you.

2 MR. MOANDER: Just a comment, Madam Chair. So I  
3 took a look at the order, and I agree with Mr. Timmons. I  
4 want to remove the sole exception language and edit it to  
5 get the the dates clarified, and was it 6(A)(i).

6 CHAIRWOMAN SANDOVAL: Okay. All right. And  
7 after we hear from the parties, we can also -- I think there  
8 needs to be some discussion probably from the commissioners  
9 on what that structure is. But I don't want to do that  
10 until we have heard all the parties.

11 I think at this point we have some lessons  
12 learned from all the hearings, some things that worked well,  
13 some things that haven't, but at least we have some  
14 experience at this point to go off of. This is not the  
15 first rodeo.

16 All right. Mr. Ames?

17 MR. AMES: Yes, Madam Chair. I do, thank you.  
18 Just a couple of points I would like to make, first with  
19 respect to the date for filing the prehearing statements,  
20 Mr. Timmons, March 17, that was -- that's the date we are  
21 planning on or were planning on filing, in any event, per  
22 the rule, and so we have no objection to that.

23 As for motion practice, at the current time we  
24 are not anticipating filing any motions, but March 10 seems  
25 a little short.

1           As you noted, we -- this is not our first rodeo,  
2 we had a pretty significant hearing recently working within  
3 tight time frames within that context. And in the context  
4 of that rule, the venting and flaring rule, we filed motions  
5 on the day that the prehearing statements were due, had  
6 responses shortly thereafter and a hearing before the  
7 evidentiary proceeding even started. So I don't see any  
8 reason to deviate from that tried-and-true practice. There  
9 is nothing significantly more complex here than existed in  
10 that rule that warrants some earlier filing date.

11           My -- my last point is really a point of  
12 concern. I am concerned about the 60-day public comment  
13 period extending beyond the evidentiary hearing itself.

14           When the hearing ends, my understanding is  
15 normally the record would close. So if the Commission  
16 appears intent on accepting public comment after the hearing  
17 has ended, after the parties have presented their cases, my  
18 presumption is that the Commission would, would want to  
19 consider that public comment in the context of its  
20 deliberations.

21           But that would present a problem for the parties  
22 and potentially an appealable point because the parties  
23 would not have an opportunity to address that public comment  
24 in any meaningful way.

25           There is a couple of options here, some more

1 palatable than others. The one that I would suggest, given  
2 the Commission has already published public notice extending  
3 the public comment period until after the hearing, would be  
4 to allow the parties, if they deem so public -- some public  
5 comment worthy of response, to request an opportunity to  
6 reopen the proceedings to address that public comment before  
7 the Commission makes its final decision.

8 That's all, thank you.

9 CHAIRWOMAN SANDOVAL: I just have a quick  
10 question. Wouldn't -- so you said -- let's see -- request  
11 an opportunity to reopen. Wouldn't it inherently still be  
12 open, though?

13 MR. AMES: The parties will -- I'm not entirely  
14 clear, Madam Chair. The parties will conclude their cases  
15 presumably on no later than April 9, hopefully before that,  
16 but they will conclude their cases. They will present their  
17 testimony, it's subject to cross, present a rebuttal, the  
18 case will be done.

19 And then the Commission will be accepting public  
20 comments. Presumably the Commission is accepting that  
21 comment because it wants to consider it. And Mr. Timmons in  
22 fact indicated he fully expects the Commission to consider  
23 public comment after the hearing has ended. We just want to  
24 be sure that the parties have the ability to address any  
25 public comment that comes in after the hearing is closed,

1     which would mean that the record would have to be reopened  
2     for the parties to present additional testimony if  
3     necessary.

4                   MR. MOANDER: From looking at the rules, just to  
5     clarify, I think there is some sections that address Mr.  
6     Ames' concerns. It's Section 3 point -- or 3.12AG, it  
7     contemplates that the Commission can keep the record open  
8     for purposes of written submittals, including arguments,  
9     statement of reason supporting a decision by the Commission.  
10    There is a variety of them.

11                   If parties and the Commission will look at 3 dot  
12    14 Sub B, the official record does need to contain comments  
13    and material received. So I think the Commission is in a  
14    position where if it wishes to leave the record open, it  
15    doesn't actually need to close it until, in this instance,  
16    two events occur, the close of the comment period, and then  
17    a responsible but any necessary or responsive pleadings by  
18    the parties, so I think that's achievable through the rules.

19                   MR. AMES: Madam Chair, if I may respond. With  
20    all due respect to Mr. Moander's comment, OCD does not agree  
21    that the provision cited allow the parties to submit  
22    additional evidence. The provision cited in Section 12  
23    concerns the submittal of written documents based on  
24    evidence already in the record.

25                   If comments are accepted after the hearing has

1 concluded, the parties would not have the ability to submit  
2 additional evidence, in my view, because any such evidence  
3 would have to be subject to examination by the other  
4 parties, and that would not be possible unless a hearing was  
5 held.

6 MR. MOANDER: So just to clarify this a bit, is  
7 it my -- am I getting this right, that the concern here  
8 would be that a written comment introducing evidence not  
9 previously discussed at the actual substantive rule hearing,  
10 how would the Commission proceed with examining a witness  
11 that provides written comment? Like how would that work?  
12 How would that witness be compelled for examination with the  
13 -- I'm assuming you are talking about a general comment and  
14 not a technical comment which would necessitate, of course,  
15 a prehearing statement well in advance of the rulemaking  
16 here. I'm trying to figure out how that would work.

17 MR. AMES: Madam Chair, OCD is not suggesting  
18 that a public commenter would be compelled to appear and  
19 testify. OCD is suggesting that it would -- it may want an  
20 opportunity to present its own evidence in response to a  
21 public comment, as well as the other parties may want to.

22 It's hard to know what parties may -- what  
23 commenters may submit after the record is closed, after the  
24 hearing is over, I should say, and we want to be sure that,  
25 that evidence is not submitted into the record after the

1 parties have concluded their cases that the Commission,  
2 having read those comments, could then rely on in making its  
3 decision without the parties having an opportunity to  
4 counter it if necessary.

5 All I'm asking for is the opportunity to request  
6 that the hearing be reopened to allow the parties to present  
7 evidence if necessary to address public comment. I'm not  
8 sure it will be necessary, but I'm concerned that, absent  
9 the matter being addressed in the procedural order, we may  
10 be left with a potential problem with the process.

11 CHAIRWOMAN SANDOVAL: Okay. Commissioner Bloom,  
12 do you have any questions for Mr. Ames before we go to Mr.  
13 Feldewert? I mean, there will be more opportunity if you  
14 have questions later, too.

15 COMMISSIONER BLOOM: Thank you, Madam Chair. I  
16 think I would like to hear from Mr. Feldewert first, and  
17 then I do have some concerns about leaving the record open  
18 after we have had the hearing. So actually, Madam Chair, I  
19 will turn that back to you.

20 CHAIRWOMAN SANDOVAL: Thank you. Mr. Feldewert,  
21 do you have any comments on the draft procedural order or  
22 any other comments you (unclear audio).

23 COMMISSIONER BLOOM: I believe you are muted, Mr.  
24 Feldewert.

25 CHAIRWOMAN SANDOVAL: I can't hear you, yeah.

1 MR. FELDEWERT: Now can you hear me?

2 CHAIRWOMAN SANDOVAL: Yes.

3 MR. FELDEWERT: Sorry about that. Thank you. On  
4 the issue Mr. Ames raised, I do agree with him on that.  
5 There is a couple of things I can offer. One is, the usual  
6 practice is that you have public comment before the hearing.  
7 In fact, that's what the rules contemplate when you read  
8 them is that public comment is to exist no later than the  
9 date of the scheduled hearing, unless, okay, unless the  
10 Commission chair extends the time.

11 So the normal course of event is to have a public  
12 comment before the hearing, and if there is something that  
13 comes up and the Commission decides additional public  
14 comment is warranted, they determine it at that time.

15 The other thing is others have pointed out, it is  
16 part of the record, it is part of the record. It's not  
17 necessarily evidence, but it certainly is part of the record  
18 and will form, in time, formulate how the parties to the  
19 case are going to present their case.

20 So Mr. Ames is correct is that we do raise an  
21 issue when we automatically allow public comment to extend  
22 in this case well beyond the anticipated hearing dates  
23 because it raises the potential issue that something is  
24 said, something is presented that shouldn't be presented  
25 because it's technical in nature, which can happen, right,

1 it should be excluded, or in other words, it's not a true  
2 comment or it brings forth some issues that one or more of  
3 the parties feel like they should address given the nature  
4 of the comments.

5           So I'm not sure why we would automatically at  
6 this point in time extend the public comment period well  
7 beyond the hearing date. As Mr. Timmons pointed out, there  
8 is going to be 30 days available for public comment for the  
9 hearing. This is not an extensive rulemaking. I don't know  
10 what Mr. Timmons intends to do, but if you look at the  
11 language that they seek to add to the rule, it's not  
12 that -- there is not a whole lot there. It's very simple.  
13 They want to make releases prohibited. There is nothing  
14 more than that.

15           So I don't see this being an extensive hearing.  
16 I don't see this one generating a lot of public comment that  
17 would require this unusual procedure. I am concerned by  
18 having this period extend well beyond the hearing date.

19           If the Commission feels like it wants to have a  
20 60-day period, there is no reason not to have this hearing  
21 in May, just wait until May and you can have your 60-day  
22 period, but I don't see why you need that. And I think  
23 having a 30 day period starting the hearing, and then having  
24 additional 30 days after the hearing creates some problems  
25 that are unwarranted here.

1           So I have to agree with Mr. Ames, I think it's  
2 unusual. I think it raises a lot of issues, and I just  
3 don't see, in this type of rulemaking, that it's, that it's  
4 warranted.

5           The second concern I have is with the application  
6 itself. And this, I guess, goes again to what Mr. Timmons  
7 intends to do at the hearing. The Commission's rules,  
8 19.15.3.9.B(7), requires an applicant at the time that they  
9 file the application for rulemaking to provide citations to  
10 the technical information forming the basis for the  
11 application.

12           That identical requirement exists in the State  
13 Rules Act, Section 14.4-5.2. This requirement has existed.  
14 It exists now and exists for good reason, because it allows  
15 the Commission, it allows the general public, it allows the  
16 affected parties to understand the technical information  
17 that an applicant feels supports the rulemaking and to  
18 prepare for the hearing, and to prepare for the hearing.

19           Now, WildEarth Guardians in their application  
20 have brought forth a very finite and limited amendment to  
21 the rule, but they have done so with an application that has  
22 some very disturbing, factual allegations that I guess they  
23 consider purportedly support this rule.

24           And I'm talking -- their limited change. I'm  
25 talking about statements like, "It's well established

1 radioactivity of oil and gas waste, well-established  
2 radioactivity of oil and gas waste, that a vast majority of  
3 toxic chemicals found in oil and gas releases are not  
4 covered by the Commission's clean-up rules."

5 Another statement in here, approximately 700,000  
6 gallons of toxic produced water has been lost to the  
7 environment.

8 Another statement: "13.3 million gallons of  
9 toxic potentially radioactive oil and gas waste remaining in  
10 the soils of New Mexico."

11 Now, those types of statements seem to me to go  
12 well beyond the language that they have brought forth. But  
13 my point is, is that if they intend to present this as part  
14 of their case, if this is what they are relying upon to  
15 support their rule change, then they have an obligation at  
16 the time they filed the application to cite to technical  
17 evidence that supports that.

18 And I'm talking about specific citations to  
19 technical evidence that would support, for example, an  
20 allegation that it's well established of radioactivity of  
21 oil and gas waste; that there is 13.3 million gallons of  
22 toxic, potentially radioactive oil and gas waste remaining  
23 in the soils in New Mexico, they have an obligation to  
24 support those allegations with technical information when  
25 they file the application so we can look at it, you can look

1 at it, the public can look at it and adequately prepare for  
2 a hearing, and they haven't done that yet.

3 Now, if they don't intend to pursue that at the  
4 hearing, and if this is an effort for them to raise money  
5 and make it look bad, but if they don't intend to pursue it  
6 at the hearing, it's not an issue.

7 But if they intend to pursue these types of  
8 allegations at the hearing, they then have an obligation at  
9 the time they filed the application to cite to specific  
10 technical evidence that supports those allegations so that  
11 the public and affected parties can adequately prepare for a  
12 hearing.

13 You don't wait until shortly before the hearing  
14 with your prehearing statement and say, "Uh-huh, here is all  
15 of our evidence. Here is our technical information that we  
16 rely upon."

17 No, the rule says the applicant cites to that at  
18 the time they file the application, which is not done here.  
19 So that's what the rules require, and that requirement has  
20 not been made, so I think there is a problem.

21 But again, if Mr. Timmons and his group don't  
22 intend to pursue those allegations, fine, it's not an issue.  
23 But if they do, then they have a defect in their  
24 application.

25 So I have a couple of concerns; one, the public

1 comment period; and, two, this matter going forward if  
2 indeed Mr. Timmons intends to pursue those types of  
3 allegations in this kind of hearing because it changes the  
4 whole nature of the hearing and they have not met the  
5 procedural requirements bringing those types of issues to  
6 (unclear audio).

7 MR. MOANDER: Mr. Feldewert it's Mr. Moander  
8 again. Are you requesting the Commission take sua sponte  
9 action vis-a-vis WEG's application or -- I ask that because  
10 this sounds like fertile ground to plow with a motion to  
11 dismiss. So I'm trying to figure out what, what avenue  
12 NMOGA is looking at to seek a remedy to its concerns.

13 MR. FELDEWERT: That depends on what Mr. Timmons  
14 and his group intends to do here. If they intend to pursue  
15 these types of allegations, then, yes, this would be, as you  
16 say, fertile ground for a motion. I don't think it's very  
17 complicated because the rule and statute is very clear.

18 CHAIRWOMAN SANDOVAL: Can we, so maybe at this  
19 point, let Mr. Timmons address some of those questions, and  
20 then the Commissioners can circle back around and ask  
21 questions to all three counselors as is needed. Mr.  
22 Timmons, you want to address each of the items that were  
23 brought up by Mr. Ames or Mr. Feldewert?

24 MR. TIMMONS: Yes, Chair Sandoval. First, with  
25 respect to the timing, I mean, I -- I think that Mr. Ames'

1 concern, I'm not sure that I fully share it, but I don't  
2 necessarily object to allowing the parties to request to  
3 reopen the hearing, you know. I don't know that that  
4 necessarily has to be through a -- through an in-person  
5 hearing or if that could be done in a written format, but if  
6 Mr. Ames is, you know, really thinks coming back before the  
7 Commission in a public manner is required to meet that, we  
8 don't object to that requirement.

9           With respect to Mr. Feldewert's concerns  
10 regarding our citation to technical information, in our  
11 application, we did cite to the spill database in OCC. We  
12 did not cite to all technical information that's underlying  
13 this with respect to concerns about why oil spills are a  
14 problem, why spilled produced water are a problem.

15           I would be curious if Mr. Ames agrees with that  
16 when the Division puts forth a rule, if they provide all  
17 technical information that supports the rule as part of the  
18 application, because that is not my understanding that is  
19 the process.

20           I will note that the rulemaking notice cites, I  
21 believe cites to a hydraulic fracturing report from EPA that  
22 does include significant information regarding radioactivity  
23 and toxicity with respect to oil and gas lease. I need to  
24 double check that public notice that went out, and now I'm  
25 not seeing it.

1           MR. MOANDER: I believe that study is cited in  
2 the notice. I'm looking at it right now.

3           MR. TIMMONS: The public notice does cite the  
4 hydraulic fracturing report from EPA. So I mean, I guess  
5 there is a question with respect to, I guess, potentially a  
6 question the public notice did not match up with what was in  
7 the application itself.

8           If that's a concern of Mr. Feldewert's, I would  
9 appreciate understanding that distinction there, if it's an  
10 application problem or a public notice problem because I'm  
11 unclear there. It does appear the public notice did include  
12 significant information with respect to the toxicity issue.

13           Of course it does not include all the  
14 information, all the technical information that would be  
15 presented. I don't read the rules as requiring that, and  
16 that's why the technical testimony is provided.

17           I don't think we are required to put on our  
18 entire case as part of the application. I don't think  
19 that's what the Division's practice (unclear audio). Thank  
20 you.

21           CHAIRWOMAN SANDOVAL: Thank you, Mr. Timmons.  
22 Mr. Ames?

23           MR. AMES: Yes, Madam Chair. Mr. Timmons  
24 suggested that -- can you hold on for one second. I  
25 apologize. There is someone vacuuming outside the room.

1 One second.

2 CHAIRWOMAN SANDOVAL: That's better than the UPS  
3 man at my house.

4 COMMISSIONER BLOOM: My coworkers operate from  
5 fifth grade. He's making a lot of noise in the background.  
6 He goes back into class in one minute, so --

7 MR. AMES: Thank you. Apologize for the delay.  
8 Mr. Timmons asked what OCD's position is on this. As a  
9 matter of the rule, OCD agrees that technical information  
10 needs to be provided with the application, and the rule also  
11 said it needs to be provided with public notice.

12 In the last rulemaking, OCD did provide all its  
13 technical information in with its petition, and it was all  
14 published in the notice as well. We had about more than 60  
15 references supporting our draft rules.

16 There are a couple of factual claims raised in  
17 the petition that concern us, but we weren't going to make a  
18 deal about it, but I think that it's important to, to note  
19 that the EPA report that's referenced doesn't, I don't  
20 believe, contain New Mexico-specific information.

21 One of the factual claims that's raised in the  
22 petition concerns how much produced water and oil field  
23 waste is, quote-unquote, lost in the environment. And I  
24 don't believe there is anything in the EPA report on  
25 hydraulic fracturing that's going to address that concern.

1           I would suggest one solution which -- to the  
2 situation, to this problem, if the Commission perceives one,  
3 which is that WildEarth Guardians could agree not to present  
4 technical testimony regarding those factual claims for which  
5 it does not have -- for which it did not disclose the  
6 technical information.

7           From our perspective, OCD doesn't oppose  
8 WildEarth Guardians's proposal. We will be proposing some  
9 changes of our own to ensure that we can effectively and  
10 efficiently implement the proposed change. We think that  
11 the petition can go forward without those factual  
12 allegations.

13           We believe that there is position basis in the  
14 references to the OCD's website and database regarding the  
15 number of spills and the policy arguments to be made for  
16 which technical information isn't necessary. So I would  
17 suggest to Mr. Timmons that WildEarth Guardians could solve  
18 the problem by agreeing not to present testimony on those  
19 factual claims for which there is no technical information  
20 disclosed in its petition or public notice.

21           CHAIRWOMAN SANDOVAL: All right. Mr. Feldewert,  
22 you get one more shot at this since everybody else got two  
23 times.

24           MR. FELDEWERT: You know, Mr. Timmons aptly noted  
25 that apparently the public notice does not match up with

1 what was filed with the application, which I think itself is  
2 a potential problem. And certainly what the WildEarth  
3 Guardians filed with their application -- and you can look  
4 at it yourself -- was nothing more than a high-level,  
5 generic citation to the entire database of the Division's  
6 spill records. Nothing specific, no records identified, no  
7 indication of what they are relying upon within those  
8 records for their allegations that they put fourth.

9 Same thing with the EPA report, and it sounds  
10 like they did it for a good reason, because there is nothing  
11 in there that supports what they report. But all of that  
12 being said, I agree with Mr. Ames. That's why I said, I'm  
13 not sure we have to file a motion.

14 My understanding is that NMOGA is not intending  
15 to oppose this effort. I think there is some rules, there  
16 is some language tweaks that can be made to accommodate the  
17 effort that's being done. That's why I don't think this is  
18 going to be a big deal and a big hearing. And I agree with  
19 Mr. Ames, I don't see that we need to pursue all of these  
20 other allegations to accomplish the limited amendment that  
21 the WildEarth Guardians seek to pursue.

22 My intent is if they intend to pursue the  
23 allegations then there is a defect that needs to be  
24 addressed, because this application is not in a position to  
25 allow it to go forward to address all of these factual

1 allegations that they have put in this application.

2 So I -- I don't know, at this point, whether we  
3 need to file a motion. I would hope not. And if Mr.  
4 Timmons is not going to pursue these allegations with his  
5 witnesses, because I don't think they need to, then we don't  
6 need to deal with the defect and then prepare for a more  
7 extensive hearing.

8 CHAIRWOMAN SANDOVAL: All right. Thank you.  
9 Commissioner Bloom, do you have questions for the  
10 counselors?

11 COMMISSIONER BLOOM: Madam Chair, thank you.  
12 Yes. First, I -- well, do we want to stick with the issue  
13 of the application and technical citations or should we go  
14 back to the comment period?

15 CHAIRWOMAN SANDOVAL: I think we have a handful  
16 of things that we need to determine. We need the motion  
17 dates. We need to probably discuss some of this technical  
18 issue. We need to talk about what the structure of public  
19 comment looks like, potentially the written comments, and  
20 what that looks like keeping that door open.

21 So I would say, at this point I would ask any  
22 questions of the counselors that you want on any of the  
23 topics, and then we can, both of us, discuss sort of where  
24 we want to go after that. And if you need me to go first,  
25 I'm happy to do that.

1           COMMISSIONER BLOOM: I will stick to the issues  
2 around the application, and I guess Mr. Feldewert's and Mr.  
3 Ames' views that technical citations would be necessary if  
4 some of the claims were to be argued during the hearing. I  
5 guess I would like to know from you, Mr. Timmons, if you  
6 intend to do that.

7           And, I mean, ultimately it sounds like Mr.  
8 Feldewert for his clients would file a motion to take that  
9 issue on and we would simply hear it, and I'm fine doing  
10 that. So why don't we stick to this, and then I want to  
11 talk about public comment.

12           MR. TIMMONS: Thank you, Commissioner. Yes,  
13 WildEarth Guardians does intend to pursue the technical  
14 evidence, I think, based on essentially that EPA report, as  
15 well as the OCD spills database, I believe, provides  
16 sufficient information to inform the Commission regarding  
17 the scale of the problem of the spills in the state.

18           I think that there is sort of, you know, the --  
19 the numbers that Mr. Feldewert describes, those all come out  
20 of the spills database. I don't believe that the spills  
21 database is citable in a more specific manner in terms of  
22 the aggregation of those numbers. I mean, it's a -- so I  
23 do believe that that's an appropriate citation there.

24           I am now a little bit concerned about the lack of  
25 citation to the database in the public notice given the

1 issue that Mr. Feldewert has raised here, and so I don't  
2 want to be in a position where we are not able to present  
3 information from OCD's spills database at the hearing. I  
4 think that that would be very limiting. And so if that is a  
5 concern of the Commissioners and Mr. Feldewert, I think that  
6 perhaps we do need to -- I hate to say -- refile.

7 I mean, we filed this back in -- I don't  
8 remember, back in the fall, and we pushed it out probably  
9 six months now, so I'm a little concerned about pushing it  
10 out even further. I am wondering if it's possible for us to  
11 refile and get on the May calendar if we were to refile and  
12 get it publicly noticed. And I would certainly try to  
13 discuss with Mr. Feldewert his concerns in more detail to  
14 resolve that.

15 It does sound like perhaps we are sort of in  
16 procedural territory here. It's a little concerning to me  
17 given Mr. Feldewert saying that his clients are not going to  
18 oppose this, but then raising all of these procedural hoops  
19 to jump through to try to get this on the books. It feels  
20 like opposing it.

21 So I'm just trying to figure out how we navigate  
22 this since everyone says that they don't actually oppose  
23 banning oil spills in New Mexico.

24 COMMISSIONER BLOOM: Thank you, Mr. Timmons. You  
25 said you had some thinking to do there, and again, I think

1 we heard concerns about having technical citations to issues  
2 with hydraulic fracturing in New Mexico and also with  
3 respect to radioactivity. If we can take that part of your  
4 case, it appears to me that citing the technical references  
5 in the application would be appropriate. I don't know if  
6 it's about a refile or -- I don't believe there is an  
7 amendment cite as we are looking at a refile here. I don't  
8 know if that's something you want to do. I don't know that  
9 I have a dog in that fight. I do like to see, I guess, a  
10 case come before us that is not encumbered by these sorts of  
11 issues.

12 And Madam Chair, I will turn this back to you and  
13 maybe finish this part of the conversation, and, if  
14 necessary, can we can talk about public comment later.

15 CHAIRWOMAN SANDOVAL: Okay. Thank you,  
16 Commissioner Bloom. And here is a question from  
17 Mr. Moander. What exactly is the issue between the legal  
18 notice and what was filed? Like where did that -- what  
19 happened?

20 MR. MOANDER: I will acknowledge here that there  
21 is an inconsistency that I did not -- I don't know why I did  
22 not catch that technical information in the application  
23 originally just -- it -- it just cites to a database  
24 inside the OCD, and I, I'm not clear why I ended up with  
25 just citing the EPA study. That may be an issue of me

1 misunderstanding what qualifies as technical. So there is a  
2 distinction there. There is a difference.

3 And if the parties are -- do have some  
4 concern -- and now we've got all three parties. And so we  
5 are clear on this, I did circulate this for any additional  
6 input, so having this raised at this point is -- is a little  
7 frustrating for me as I'm trying to get this accomplished  
8 for the Commission.

9 But I think that what this essentially means is  
10 the technical information section in the notice as it stands  
11 now would have a paragraph added that would be identical,  
12 substantially similar to the one in the original proposed  
13 notice, and that would change -- that would be the only  
14 change that I'm aware of other than comment period that  
15 could be accomplished.

16 Now, if we are going -- if there is going to be a  
17 reapplication here, the other issue is going to be New  
18 Mexico Register publication. I'm looking for the schedule  
19 right now, and that, that always works on a two-week  
20 schedule, so I would need to look into that.

21 CHAIRWOMAN SANDOVAL: If it's refiled, I guess  
22 I'm wondering what -- that would be my second question.  
23 Like if it was refiled, what would the next schedule look  
24 like, because I know there are these set dates and sort of  
25 hoops to go through.

1           MR. MOANDER: Right. The first issue I think  
2 this can be done on a -- one second, please, Madam Chair,  
3 let me find that.

4           MR. AMES: Madam Chair, as an initial point, I  
5 believe the Commission cannot consider a petition until a  
6 certain number of days after it's filed. So that's the  
7 first step. So there will have to be a hearing sometime  
8 after the petition is filed. It's not a lengthy period, but  
9 it's about, I'm thinking, like a week or something like  
10 that.

11           And then when the Commission makes its decision  
12 to hold a hearing, then the notice needs to get published in  
13 the Register, but the Register is continuous. It's on  
14 two-week submission schedule. So the hearing would have to  
15 be set 30 days out from the date of publication, so that  
16 could be roughly 45 days after the Commission decides to  
17 have a hearing. So you are looking at about a two-month  
18 time lag between when the petition is filed and when it can  
19 be heard, I mean to account for if you want to create a  
20 longer public comment period longer than 30 days.

21           MR. MOANDER: 3.8 Sub C, a petition has to be  
22 sort of outstanding at least 15 days. It cannot be  
23 outstanding no later than 60 days of the filing. So then  
24 two, approximately two weeks of the process could begin upon  
25 filing for petition is the actual activity.

1           CHAIRWOMAN SANDOVAL: But we would also -- I'm  
2 just thinking about procedural. Let's assume that was filed  
3 tomorrow. Okay -- I'm making things up right now -- but the  
4 Commission wouldn't meet again scheduled until March 25, so  
5 the Commission would likely have to schedule a special  
6 meeting in order to consider this, and I don't -- I don't  
7 know offhand what the notice requirements for that are. It  
8 seems like it's like 20 days, but maybe if it's an emergency  
9 meeting or a special meeting or, there is a shorter time  
10 frame, I just -- I very much -- I think I'm not -- the two  
11 pieces here, I very much agree with Commissioner Bloom. I  
12 want everything procedurally to be clean so that the  
13 Commission can actually take into account, you know, the  
14 policy, the legal or the technical or whatever, you know,  
15 pieces of information at the hearing and we're not stuck on  
16 procedural stuff.

17           But the other side of me does understand that,  
18 you know, this was scheduled for April originally because of  
19 the waste rule hearing and a session, and pushing it back  
20 any more is not my ideal scenario. So I'm -- I would like  
21 to have all the information so that we can sort of balance  
22 those two priorities.

23           I also sort of wonder if the appropriate place to  
24 discuss these technical problems is in a dispositive motion  
25 or in a motion and not in this venue. I'm not necessarily

1 asking for a response, that's more me just sort of trying to  
2 figure out where to go here.

3 MR. MOANDER: Madam Chair, I'm pulling up a bunch  
4 of .pdf's. I'm looking for information to give more  
5 guidance, so give me just a minute.

6 COMMISSIONER BLOOM: Madam Chair, while  
7 Mr. Moander does that, if there is a refiling, that could  
8 potentially give us more time to have the public comment  
9 done, the 60 days completely before the -- before the  
10 hearing, and I know they are all interested in having robust  
11 public comment, or at least treating public comment with the  
12 seriousness that it deserves, I have some concerns about  
13 public comment coming in, along the lines of what Mr. Ames  
14 discussed, after, after the hearing before deliberation.

15 I am not sure that that creates the cleanest path  
16 for the Commission. I don't know if 30-day public comment  
17 is technically allowable, or if we push back and get all 60  
18 days done, I think that would be cleanest.

19 CHAIRWOMAN SANDOVAL: I believe the requirement,  
20 it has to have 30 days. I think 30 days is a minimum, and  
21 then extending it from there is by choice.

22 COMMISSIONER BLOOM: I'm sorry, Mr. Timmons, are  
23 you still with us?

24 MR. TIMMONS: (No response.)

25 COMMISSIONER BLOOM: Can you hear us, Mr.

1 Timmons? Are you muted? I saw a little distress signal on  
2 the.

3 CHAIRWOMAN SANDOVAL: It looks like a little  
4 caution symbol. Maybe internet issues.

5 COMMISSIONER BLOOM: I'm thinking internet  
6 issues. He went down suddenly. We might want to take a  
7 five-minute break and see if Mr. Timmons comes back and give  
8 Mr. Moander a moment to find his material.

9 CHAIRWOMAN SANDOVAL: That's a good idea. Why  
10 don't we take a five-minute break. It's 10:20 right now.  
11 Let's come back at 10:25.

12 COMMISSIONER BLOOM: Thank you, Madam Chair.

13 (Recess taken.)

14 CHAIRWOMAN SANDOVAL: Mr. Timmons, were you able  
15 to rejoin us?

16 MR. TIMMONS: Yes, Madam Chair. My apologies.

17 CHAIRWOMAN SANDOVAL: Mr. Moander, are you there?

18 MR. MOANDER: I am.

19 CHAIRWOMAN SANDOVAL: All right. Where are we  
20 at?

21 COMMISSIONER BLOOM: Madam Chair and Mr. Ames,  
22 are you back?

23 MR. AMES: I am, Commissioner, thank you.

24 MR. FELDEWERT: Do we have Mr. Timmons?

25 CHAIRWOMAN SANDOVAL: Yes.

1           MR. FELDEWERT: Madam Chair and Members of the  
2 Commission, I'm going to interject here if I might. I have  
3 been thinking about this while this conversation has been  
4 going on, and I appreciate the break. I had a chance to  
5 visit with my client.

6           I think there is a real possibility here that if  
7 the Division, if the parties who are on the phone, if the  
8 Division and NMOGA and WildEarth Guardians had a chance to  
9 sit down and talk about the language, that there is decent  
10 chance the parties will be able to agree on language and  
11 avoid this whole -- all of these issues that have been --  
12 that have arisen and exist.

13           So I offer that as a method to try to move this  
14 forward, because I do think there hasn't been a lot -- there  
15 hasn't been any collaboration or an effort, and I think I  
16 would like to hear Mr. Timmons' and Mr. Ames' view. But I  
17 just have to believe, given the limited, you know, the  
18 effort that's being made here is finite, and I would suspect  
19 that if the parties can sit down and talk there might be  
20 some consensus on the language.

21           MR. AMES: Madam Chair, OCD concurs. As I said  
22 earlier, OCD doesn't oppose the petition, we just have a few  
23 changes we would propose to make the change workable, but we  
24 think a consensus proposal is possible.

25           MR. MOANDER: Just to clarify, which language are

1 the parties referring to?

2 MR. AMES: Mr. Moander, I am referring to  
3 WildEarth Guardians' proposal to make major and minor  
4 releases a violation of the rules.

5 MR. MOANDER: I just wanted to make sure whether  
6 we were talking about procedural orders or what, but thank  
7 you.

8 MR. AMES: Talking about substantive,  
9 Mr. Moander. Thank you.

10 CHAIRWOMAN SANDOVAL: Mr. Timmons, do you have  
11 any comment?

12 MR. TIMMONS: I'm happy to hear that. I would, I  
13 certainly would like to sit down with Mr. Ames and Mr.  
14 Feldewert and discuss this. I don't believe I'm in a  
15 position to okay either proceeding with this proposal or  
16 refiling a new proposal until that happens just given the  
17 delay that we have seen to this point, and just given sort  
18 of the procedural time delay before we would be able to get  
19 to a hearing. It seems if I were to refile a new  
20 application for a third time, we would -- there would be  
21 ample time for us to discuss the substantive language prior  
22 to, you know, filing a prehearing statement and suggested  
23 amendments to where we could potentially come up with some  
24 suggested amendments or have a joint filing with respect to  
25 that language.

1           So I'm certainly, me and my client are certainly  
2 open to having these discussions. Had we not been in the  
3 position with, you know, the session and the methane  
4 hearings, I think that probably those discussions would have  
5 occurred by now.

6           So I say, in general, I appreciate that. I look  
7 forward to the discussions. I support the discussions.

8           MR. MOANDER: Would the parties be able to  
9 discuss this today?

10          MR. AMES: I'm sure we could start to discuss it  
11 today. From my experience, you know, when you have three  
12 parties, counsel and three parties, it could take time to  
13 reach agreement, but we certainly can start a discussion.

14          CHAIRWOMAN SANDOVAL: To me, just a clarifying  
15 question, Mr. Timmons, did you mean it might be -- am I  
16 hearing you correctly that it might actually be beneficial  
17 for the parties, all of them, to refile and have that  
18 opportunity for that discussion? Is that sort of what you  
19 were saying?

20          MR. TIMMONS: Well, I mean, I was more saying  
21 that given the sort of procedural issues that have been  
22 identified here today, I don't want those procedural issues  
23 to become the focus of a hearing or a potential challenge to  
24 a rule, and though I'm also assured that the proposal is not  
25 fully opposed, so, yeah, I want us to be able to focus on

1 the substance of what we are proposing here.

2 Frankly, I was not expecting this to be this type  
3 of hearing, and so I'm feeling a little out over my (unclear  
4 audio) because I don't have my client here with me. And  
5 that said, given the procedural challenges here, I think it  
6 makes sense for us to plan to refile.

7 And, again, even just I think the public notice  
8 issue that both Mr. Feldewert has raised and that I have  
9 identified in just the list of -- the inconsistency between  
10 what will be filed and what is in the public notice, I don't  
11 think that should ultimately be a major issue, but I don't  
12 want it to take the focus off of what we are trying to do  
13 here.

14 So I'm going to propose that, I guess, the  
15 Commission take no action on this here today, and that  
16 myself and Mr. Feldewert and Mr. Ames and Mr. Moander have a  
17 conversation as soon as possible in order to -- I would  
18 anticipate that, you know, if -- I would say, if we are not  
19 in agreement on language, then WildEarth Guardians will file  
20 a new proposal within a matter of days and try to get this  
21 back on the calendar as soon as possible.

22 CHAIRWOMAN SANDOVAL: Okay.

23 MR. AMES: Madam Chair, we appreciate Mr.  
24 Timmons' perspective on this. It sounds like the right  
25 course. One suggestion I would make is that the Commission

1 would need to vacate the hearing scheduled for April 1 in  
2 order for us to proceed on that course of action.

3 MR. MOANDER: That is correct. Let me get a  
4 citation. A few things that I do want to get addressed here  
5 is, first of all, I apologize to everybody. Not very often  
6 you get private-party rulemaking, so I do accept some  
7 culpability on some of this.

8 But I, just for the sake of clarifying the next  
9 steps, so I mentioned earlier the 15- to 60-day window that  
10 the Commission needs to act. Three special meetings can be  
11 generally convened with 72-hour notice or three-day notice.

12 So that can be done fairly quickly. Once the  
13 application is submitted, that could be dealt with well in  
14 advance of the three-day notice period, which I would  
15 strongly recommend. The publication schedule, it's going to  
16 depend on how quickly the Commission moves to get the  
17 special meeting set in light of the 15- to 60-day window.

18 Next publication for the submittal deadline is  
19 March 11, which I don't think the Commission could make, but  
20 the March 25, I see no reason why it wouldn't. That would  
21 be a publication date of April 6. And setting aside whether  
22 it's 30- or 60-day comment period, that could get a hearing  
23 set fairly quickly in May, it's achievable. It is doable.

24 Something that I would be remiss if I didn't  
25 bring up just for the parties' consideration as well as the

1 Commission, I did talk with Dr. Engler to get his schedule  
2 in case something like this pops up. He would probably  
3 struggle to meet in the first week of May and maybe in  
4 the second week, but I do think it is, that could be  
5 managed. So that's what we are looking at in terms of time  
6 lines.

7           When it comes to vacating the hearing or the  
8 hearing, there are provisions in rulemaking for that. I  
9 have got too many .pdf's up right now. It's getting to  
10 where I can't find anything because I have too much up. So  
11 I can pull that up. If the Commission votes to vacate those  
12 dates, I know that is doable which in the rule I just need  
13 to find the -- here it is -- 3. or 3.13 Sub D, motion  
14 approved at a meeting is required. There will be a notice  
15 of termination of this specific rulemaking through the  
16 Register.

17           And then there is a prohibition in here just for  
18 the sake of thoroughness, if the Commission doesn't act on  
19 this two years after the publication of notice of rulemaking  
20 it will be terminated so the Commission would want to act on  
21 that.

22           You know, I think that's not a concern here, but  
23 it's prudent to just note there is essentially a statute of  
24 limitation. So I would craft the -- I would craft the  
25 notice. As is my practice, I would circulate among the

1 parties for review and comment and then get that submitted  
2 as soon as possible to the Register so it will be, that  
3 would be, again, we would be looking at -- well, today have  
4 a submission date, so I can move as fast as humanly possible  
5 and probably get that in, but that's what we are looking at.

6 CHAIRWOMAN SANDOVAL: Okay, thank you  
7 Mr. Moander. So it sounds like we need to take a vote on  
8 vacating the hearing dates in April.

9 MR. MOANDER: That is correct, Madam Chair. And  
10 then basically at this point I think what the Commission  
11 could do, because the Commission was going to meet to vote  
12 on some new deadlines today, anyway, is the Commission could  
13 vote to vacate its vote from November 4, the November 4  
14 meeting, and then that would subsequently vacate the April  
15 dates and all surrounding deadlines.

16 CHAIRWOMAN SANDOVAL: Is there a motion to vacate  
17 the Commission's vote from November 4 regarding the  
18 WildEarth Guardians proposal in Case Number 21529?

19 COMMISSIONER BLOOM: Yes, Madam Chair, I so move.

20 CHAIRWOMAN SANDOVAL: I second. Mr. Moander,  
21 would you do a roll call vote, please?

22 MR. MOANDER: Yes, Madam Chair. Commissioner  
23 Bloom?

24 COMMISSIONER BLOOM: Yes.

25 MR. MOANDER: And Madam Chair?

1                   CHAIRWOMAN SANDOVAL: Yes. All right. That  
2 motion passes unanimously.

3                   (Motion passed unanimously.)

4                   CHAIRWOMAN SANDOVAL: You know, I would just say,  
5 I think once we see the petition come through, you know, I  
6 would encourage we try to set a special meeting in order to  
7 consider that so that the deadlines don't get pushed out too  
8 far.

9                   MR. MOANDER: And Madam Chair, I would like to  
10 ask the parties, because of what's gone on thus far, I want  
11 to make sure this goes smoothly, please keep me in the loop  
12 on negotiations and such so that way I can guide the  
13 Commission.

14                   I want to -- it is a priority of mine to get  
15 this moving efficiently, quickly and properly, so the more  
16 info I've got, usually the better. I think it also will be  
17 helpful, if the scope gets narrowed of the rule change, that  
18 would also be beneficial, I think, in consideration in terms  
19 of comment periods as well. Will the parties agree to work  
20 with me on this?

21                   MR. TIMMONS: Absolutely.

22                   MR. AMES: Absolutely. We intend to reach out  
23 to -- I apologize, Madam Chair. Mr. Moander, yes, OCD  
24 intends to work with you in the process going forward, and  
25 we intend to reach out to Mr. Timmons very soon to initiate

1 discussion.

2 MR. FELDEWERT: I echo that, Mr. Moander.

3 MR. MOANDER: I appreciate that from everybody.

4 CHAIRWOMAN SANDOVAL: All right. Do we have any  
5 other matters to discuss in this case? It sounds like -- it  
6 sounds like we have covered it.

7 (No audible response.)

8 CHAIRWOMAN SANDOVAL: All right.

9 (Status conference concluded.)

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1 STATE OF NEW MEXICO  
2 COUNTY OF BERNALILLO

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4 REPORTER'S CERTIFICATE

5

6 I, IRENE DELGADO, New Mexico Certified Court  
7 Reporter, CCR 253, do hereby certify that I reported the  
8 foregoing virtual proceedings in stenographic shorthand and  
9 that the foregoing pages are a true and correct transcript  
10 of those proceedings to the best of my ability.

11 I FURTHER CERTIFY that I am neither employed by  
12 nor related to any of the parties or attorneys in this case  
13 and that I have no interest in the final disposition of this  
14 case.

15 I FURTHER CERTIFY that the Virtual Proceeding was  
16 of poor to good quality.

17 Dated this 25th day of February 2021.

18

/s/ Irene Delgado

19

\_\_\_\_\_  
Irene Delgado, NMCCR 253  
License Expires: 12-31-21

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