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

IN THE MATTER OF PROPOSED AMENDMENT TO THE COMMISSION'S RULES TO ADDRESS CHEMICAL DISCLOSURE AND THE USE OF PERFLUOROALKYL AND POLYFLUOROALKYL SUBSTANCES AND IN OIL AND GAS EXTRACTION, 19.15.2, 19.15.7, 19.15.14, 19.15.16, AND 19.15.25 NMAC **Case No. 23580**

WILDEARTH GUARDIANS,

PETITIONER.

New Mexico Oil & Gas Association's Proposed Findings of Fact and Conclusions of Law

The New Mexico Oil & Gas Association ("NMOGA"), through undersigned counsel, submits its Proposed Findings of Fact and Conclusions of Law that outline the bases for the Oil Conservation Commission ("Commission" or "OCC") to adopt the respective amendments to 19.15.2; 19.15.7; 19.15.14; 19.15.16; and 19.15.25 NMAC (collectively, "Proposed Amendments") pursuant to 19.15.3.13(C) NMAC. *See* 19.15.3.13(C) (mandating that the Commission, "issue a written order or refusing to adopt the proposed rule changes, or adopting the proposed rule change in parts, and shall in the order the reasons for the action taken") for the hearing that the Commission conducted November 12-15, 2024, in Case No. 23580.

Proposed Findings of Fact

I. Definitions for the Proposed Amendments at 19.15.2.7 NMAC

A. "PFAS" Definition:

1. Depending on how "PFAS" is defined, it could encompass a class of compounds that may include between a few hundred to more than 10,000 chemicals. However—and importantly—not all of these potential 10,000+ compounds have the same physical,

chemical, or toxicological properties, which matters for purposes of the Proposed Amendments. **[NMOGA Exhibit E, at pg. 3]**; **[Nov. 15, 2024, Tr: 58: 13-20, Tr: 87: 12-23 Anderson Testimony]**; [**Nov. 13, 2024, Tr: 145: 3-25, Tr: 146: 1-5 Sandau Testimony]**; **[Nov. 14, 2024, Tr: 153: 16-23 Hansen Testimony].**

2. For example, some PFAS are not environmentally persistent. **[NMOGA Exhibit E, at pg. 3]**; **[NMOGA Rebuttal Exhibit E30, at pg. 3]**; **[Nov. 15, 2024, Tr: 62:18-25, Tr: 63: 1-4 Anderson Testimony]**; **[Nov. 15, 2024, Tr: 213: 12-25 Richardson Testimony]**.

3. Some PFAS are practically insoluble and not considered mobile in the environment. *See* **[NMOGA Exhibit E, at pg. 3]**; *see* **[NMOGA Rebuttal Exhibit E30, at pg. 3]**; *see also* **[NMOGA Exhibit D3]**; **[Nov. 15, 2024, Tr: 107: 10-16 Anderson Testimony]**; **[Nov. 15, 2024, Tr: 210: 16-22 Richardson Testimony]**.

4. Some PFAS are rapidly eliminated from the human body. **[NMOGA Exhibit E, at pg. 3]**; **[NMOGA Rebuttal Exhibit E30, at pg. 3]**; **[Nov. 15, 2024, Tr: 92: 5-19, Tr: 93: 1-10 Anderson Testimony]**.

5. Some PFAS are inert polymers. *See* **[NMOGA Exhibit E, at pg. 3]**; *see* **[NMOGA Rebuttal Exhibit E30.3]**; *see* **[NMOGA Exhibit D3]**; *see also* **[Nov. 15, 2024, Tr: 98: 5-18 Anderson Testimony]**; *see also* **[Nov. 13, 2024, Tr: 211:20-25, Tr: 212:1-7 Martin Testimony].**

6. Only two specific PFAS have been previously reported by FracFocus, which may have been previously used as minor ingredients in hydraulic fracturing fluids at select wells in New Mexico. *See* **[NMOGA Exhibit D, at pg. 3, ¶ 7]**; *see* **[WG Exhibit 19]** (PSR: "Fracking with 'Forever Chemicals' in New Mexico" Report identifying 2 PFAS historically used in New Mexico); *see also* **[Nov. 15, 2024, Tr: 200: 20-25 Richardson Testimony].**

7. These two reported PFAS, polytetrafluoroethylene ("PTFE") and fluoroalkyl alcohol substituted polyethylene glycol ("FPEG"), are polymeric PFAS that were components of friction reducers or surfactant additives in hydraulic fracturing fluids, according to FracFocus disclosures. *See* **[WG Ex. 19]** (identifying PTFE and FPEG is historically, but not currently used in hydraulic fracturing); *see* **[NMOGA Rebuttal Exhibit E30.3]**; *see also* **[NMOGA Exhibit D, at pg. 3, ¶ 7]**; *see also* **[NMOGA Exhibit D2]**; *see also* **[Nov. 15, 2024, Tr: 291: 4-11 Richardson Testimony]**.

8. PTFE, commonly known by its tradename "Teflon," is a fluoropolymer, a large molecular weight molecule containing a carbon backbone with fluorine attached to each carbon. This structure allows the molecule to be stable at high temperatures and provides water repelling properties. As a result, PTFE has a multitude of commercial uses including medical devices, cables and wiring, electronics, gaskets and seals, friction reducers, outdoor gear and clothing, and non-stick coatings for household products. Similar to other fluoropolymers, PTFE is <u>not</u> water soluble. *See* [**NMOGA Exhibit D, at pg. 5]**; *see also* **[NMOGA Exhibit D5]**.

9. Combined with its high molecular weight and stability, PTFE is <u>not</u> considered bioavailable. [**NMOGA Exhibit D, at pg. 5]**; *see also* [**NMOGA Exhibit D3]**; *accord* **[Nov. 15, 2024, Tr: 212: 1-6 Richardson Testimony].**

10. FPEG is a polymeric perfluoropolyether and has friction reducing properties like PTFE. A former trade name of FPEG is "Zonyl," which was voluntarily phased out in accordance with the U.S. Environmental Protection Agency's (USEPA) 2010/2015 PFOA Stewardship Program. *See* **[NMOGA Exhibit D6]**; *see also* [**NMOGA Exhibit D, at pg. 5]**; *accord* **[Nov. 15, 2024, Tr: 274: 13-16 Richardson Testimony].**

11. According to FracFocus—the mandated chemical disclosure registry for hydraulic fracturing fluids in New Mexico—the use of these two PFAS—PTFE and FPEG—in hydraulic fracturing operations in New Mexico is very limited; only 2.2% and 0.38% of the over 9,000 FracFocus records between 2013 and 2023 referenced PTFE or FPEG, respectively. *See* **[NMOGA Exhibit D, at pg. 3, ¶ 7]**; *see also* **[Nov. 15, 2024, Tr: 271: 20-25 Richardson Testimony].**

12. After 2020, PTFE was not listed as an ingredient in hydraulic fracturing fluids. *See* **[NMOGA Exhibit D, at pg. 3, ¶ 8]**; *see also* **[Nov. 15, 2024, Tr: 235: 13-23 Richardson Testimony]**.

13. After 2015, FPEG was not listed as an ingredient in hydraulic fracturing fluids. *See* **[NMOGA Exhibit D, at pg. 3, ¶ 8]**; *see also* **[Nov. 15, 2024, Tr: 235: 13-23 Richardson Testimony]**.

14. From an environmental perspective, large molecular weight polymeric PFAS—such as, PTFE and FPEG—are practicably insoluble in water, not bioavailable (*i.e.*, too large to cross the cell membrane) and, as such, are considered, "polymers of low concern." *See* **[NMOGA Exhibit D3]**; *see also* **[NMOGA Exhibit D, at pg. 3, ¶ 8, at pgs. 5-6];** *see also* **[Nov. 15, 2024, Tr: 212: 1-6 Richardson Testimony].**

15. WEG's Proposed Amendments include the following definition for "PFAS": " means a perfluoroalkyl or polyfluoroalkyl substance with at least *one* fully fluorinated carbon atom." *See* [**WG Ex. 1, at pg. 12]**.

16. "*One* fully fluorinated carbon atom," in other words means, single -CF_3 and -CF_2- PFAS. *See* **[NMOGA Exhibit D7];** *see also* **[NMOGA Exhibit D, at pg. 11].**

17. “One fully fluorinated carbon atom” includes substances that are regularly used in pharmaceuticals prescribed to both adults and children, with long-term exposure levels that have been deemed safe for human use, including in the following medications: “Paxlovid,” the oral antiviral medication used to treat COVID-19; “Lipitor,” a medication to lower cholesterol levels; and “Flonase,” an allergy nasal spray medication, amongst a number of other such medications. *See* **[NMOGA Exhibit E, at pg. 4]** (emphasis added)**;** *see also* **[NMOGA Rebuttal Exhibit E30.4]**

18. WEG proposed its definition of “PFAS” to make the prohibition on PFAS in hydraulic fracturing fluids as broad as possible, “to encompass the full class of PFAs,” *aka* more than 10,000+ substances. *See* [**New Energy Economy Exhibit B, at pgs. 1-7]**; *see also* **[Nov. 13, 2024, Tr: 146-147: 14-25, 1-8 Sandau Testimony]** (discussing how broad OCD’s single-fully fluorinated carbon atom definition is and would be if it was not qualified by the included standardized analytical methods).

19. In fact, New Energy Economy’s (“NEE”) witness, Dr. Kristen Hansen, testified that WEG and NEE proposed their same broad definition of “PFAS” because “*any* scientific uncertainty [about PFAS] must be resolved by prevention,” not because single-carbon atom PFAS had a demonstrated relationship to or use in oil and gas operations. *See* [**New Energy Economy Exhibit B, at pg. 9]** (emphasis added); *but see* **[Nov. 13, 2024, Tr: 146-147: 1-8 Sandau Testimony]** (Suggesting narrower, industry-specific PFAS definition is most appropriate).

20. Neither WEG nor NEE provided any evidence, testamentary or documentary, to demonstrate that single fully fluorinated PFAS are, have been, or are contemplated to be used in oil and gas operations. *See* [**New Energy Economy Exhibit B]**; *see*

[**New Energy Economy Exhibit KH-1 to KH-3]** (containing no evidence linking single fully fluorinated carbon PFAs to use in oil and gas operations).

21. This class of single fully fluorinated carbon atom PFAS is so broad—at least 10,000+ substances broad—that the respective experts (Drs. Hansen, Anderson, and Sandau) who testified during the hearing about the definition of "PFAS" could not identify with any certainty *how many* substances would be included in or excluded from WEG's proposed definition of single-fully-fluorinated-carbon-atom "PFAS." *See* **[Nov. 14, 2024, Tr: 153: 16-23 Hansen Testimony]**; *see also* **[Nov. 13, 2024, Tr: 143: 19-25, Tr: 144: 1 Sandau Testimony];** *accord* [**Nov. 15, 2024, Tr: 87: 12-23 Anderson Testimony].**

22. At page 2 of its Application, WildEarth Guardians ("WEG"), cites to a 2023 report entitled: "Fracking with 'Forever Chemicals' in New Mexico: Evidence Shows Oil and Gas Companies Have Used PFAS in New Mexico Wells; Water Risks Especially High for Groundwater-Dependent State" (hereafter, "2023 PSR Report") as the basis for its Proposed Amendments. *See* **[NMOGA Exhibit D4]**.

23. Excluding, PTFE and FPEG, no other known PFAS were listed in the 2023 PSR Report and, notably, no PFAS that are regulated under federal standards (such as the drinking maximum contaminant levels (MCLs)) were identified in the 2023 PSR Report. *See* **[NMOGA Exhibit D4];** *see also* **[NMOGA Exhibit D, at pg. 6];** *see also* **[Nov. 15, 2024, Tr: 200: 20-25 Richardson Testimony]**.

24. Neither PTFE nor FPEG contain a "single fully fluorinated carbon atom," they are polymeric and contain multiple single-fully fluorinated carbon atoms. *See* **[Nov. 15, 2024, Tr: 207: 6-19 Richardson Testimony]**. Importantly, both PTFE and FPEG conform to the "at-least two fully fluorinated carbon atoms" definition that NMOGA proposes. *See id.*

25. The Definition of "PFAS" under the proposed regulations should be:

a. "PFAS" means a perfluoroalkyl or polyfluoroalkyl substance with two or more fully fluorinated carbon atoms (hereafter, "NMOGA Definition").

26. The NMOGA Definition for PFAS is consistent with the definition of "PFAS" under the U.S. Environmental Protection Agency's ("EPA") Toxic Substances Control Act ("TSCA") Section 8(a)(7). *See* **[NMOGA Exhibit D7];** *see also* **[NMOGA Exhibit D, at pg. 11];** *accord* **[Nov. 15, 2024, Tr: 57: 20-21 Anderson Testimony]**.

27. NMOGA's definition is also consistent with the definition of "PFAS" recently adopted by other States, such as Delaware, Virginia, West Virginia, and Wisconsin. *See* **[NMOGA Exhibit D, at pg. 11]**.

28. In the alternative, the NMOCD's definition of "PFAS" under the proposed regulations should be adopted:

a. "PFAS" means any substance with at least a perfluorinated methylgroup (−CF3) or a perfluorinated methylene group (−CF2−), excluding those with a Hydrogen [H], Chlorine [Cl], Bromine [Br], or Iodine [I] atom attached to the subject carbon atom. For the purposes of completing environmental investigations, the specific PFAS chemicals that can be included in the chemical analysis include those listed in United States Environmental Protection Agency (US EPA) Standard Analytical Methods documents (specifically, Method 537.1 [drinking water], Method 533 [drinking water], Method 8327 [groundwater, surface water, and wastewater], Method 1633 [wastewater, surface water, groundwater, soil, biosolids, sediment, landfill leachate, and fish tissue] including updated versions for each standard method) (hereafter, "NMOCD Definition").[1] *See* **[OCD**

[1] The OCD's definition of "PFAS" in OCD Exhibit 1-0003 included two draft, non-standardized analytical methods (1) Other Testing Method ("OTM") 50 and (2) OTM 51. Both OTM 50 and OTM 51 are only air methods, they are not soil, water, or wastewater methods, and neither is a standardized analytical method. *See* US EPA, Air Emission Measurement Center: EMC Other Test Methods, available at https://www.epa.gov/emc/emc-other-test-methods (last visited Feb. 15, 2025). Because these are air only methods and the OCC has no regulatory purview over air, OTM 50 and OTM 51 have been removed from the Commission's proposed definition and NMOGA has also not included them herein.

Exhibit 1-0003]; *see also* **[Nov. 13, 2024, Tr: 142-143:22-25, Tr: 163: 3-16 Sandau Testimony]**.

29. The NMOGA Definition by its plain language appropriately excludes single -CF_3 and -CF_2- compounds. *See* **[NMOGA Exhibit D7]**; *see also* **[NMOGA Exhibit D, at pg. 11]**.

30. In practice, the NMOCD Definition of "PFAS" also properly excludes single -CF_3 and -CF_2- compounds because the NMOCD Definition requires the application of certain analytical methods for a substance to be within the definition of "PFAS." **[OCD Exhibit 1-0003]**; *see also* [**Nov. 13, 2024, Tr: 142: 16-25, Tr: 143: 1-6 Sandau Testimony]**.

31. The specified analytical methods in the NMOCD "PFAS" Definition can only analyze for PFAS that contain *at least two* or more fully carbon atoms. **[OCD Exhibit 1-0003]**

32. Also, there is no standardized, analytical method in existence that can analyze for single -CF_3 and -CF_2- compounds. **[Nov. 13, 2024, Tr: 61: 23-25, Tr: 62: 1-2 Anderson Testimony].**

33. Without the ability to analyze for these single -CF_3 and -CF_2- compounds, including these compounds within the definition of "PFAS" under the Proposed Amendments would create a prohibition that would be unenforceable, as the NMOCD would have no way of sampling and analyzing to determine whether such prohibited compounds were being used in oil and gas operations. *See* **[Nov. 13, 2024, Tr: 108: 17-22 Anderson Testimony]**; *see* [**Nov. 13, 2024, Tr: 142: 16-25, Tr: 143: 1-6 Sandau Testimony]**.

34. Consequently, while NMOGA and OCD's respective definitions of "PFAS," in the paragraphs above contain different wording, *when applied* these two definitions are nearly identical because NMOCD's specified analytical methods in its definition only include

PFAS with at least two fully fluorinated carbons. *See* **[NMOGA Exhibit D7]**; *see* **[NMOGA Exhibit E30**]; *see also* **[NMOGA Exhibit E, at pg. 10**]; *accord* [**Nov. 13, 2024, Tr: 142: 10- 25 Sandau Testimony]**; *accord* **[Nov. 15, 2024, Tr: 61: 15-22 Anderson Testimony]** (discussing importance of standardized analytical methods matter and need for same for regulatory purposes).

35. Additionally, NMOGA and NMOCD's Definitions of "PFAS" are an *actually enforceable* regulatory definition because, although these definitions include a broad category of compounds, all such compounds can be sampled and analyzed for using promulgated analytical methods. *See* **[Nov. 15, 2024, Tr: 61: 15-22, Tr: 62: 1-2 Anderson Testimony]**; [**Nov. 13, 2024, Tr: 142: 10- 25 Sandau Testimony].**

36. Defining "PFAS" utilizing the NMOGA Definition provides a science-based, enforceable regulatory framework. In the alternative, the NMOCD Definition would also meet some of these same requirements and is the appropriate definition to adopt as part of this rulemaking. *see also* **[Nov. 15, 2024, Tr: 178: 1-4 Anderson Testimony]; [Nov. 15, 2024, Tr: 208: 2-11 Richardson Testimony]]**.

B. "Chemical" Definition:

37. The term "chemical" need not be included in the defined terms of the Proposed Amendments. *See* **[WG Exhibit 1, at pg. 1].**

38. The Proposed Amendments address PFAS, specifically, in hydraulic fracturing operations and a definition for PFAS has been provided for in the Proposed Amendments. *See* **[WG Exhibit 2, at pg. 1].**

39. The term, "chemical" is, therefore, not necessary in the Proposed Amendments that specifically address PFAS. *See* **[WG Exhibit 2, at pg. 1]**; *see also* **[NMOGA Exhibit D, at pg. 9]**.

40. Further, the term, "chemical" as proposed in WG Ex. 1 is not the generally accepted scientific term for chemical. *See* **[WG Ex. 1]**; *see also* **[NMOGA Exhibit D10]**.

41. For these reasons, the term "chemical" has not been adopted into the Proposed Amendments. *See supra* ¶¶ B.37-40.

C. "Chemical Disclosure List" Definition:

42. The term "chemical disclosure list" need not be included in the defined terms of the Proposed Amendments. *See* **[WG Exhibit 1, at pg. 1].**

43. Operators must already disclose the constituents in their fracking and completions fluids in FracFocus under 19.15.16.19(B) NMAC. *See* **[NMOGA Exhibit A.2];** *see also* **[OCD Exhibit 2-0016]**; *see also* **[Nov. 14, 2024, Tr: 58: 4-18 Powell Testimony]**.

44. An additional "chemical disclosure list" is unnecessary due to the availability of and detail included in the already-mandated FracFocus disclosures required by 19.15.16.19(B). *See* **[OCD Exhibit 2-0016]**; *see also* **[Nov. 14, 2024, Tr: 58: 4-18 Powell Testimony]**

45. For these reasons, the term, "chemical disclosure list" has not been adopted into the Proposed Amendments. *See supra* ¶¶ C.43-45.

D. "Downhole operations" Definition:

46. "Downhole operations" need not be included in the defined terms of the Proposed Amendments. *See* **[WG Exhibit 1, at pg. 1]**; *see also* **[OCD Exhibit 4-0028]**.

47. "Downhole operations" is a common industry term. Defining it may cause unintended limitations to the scope of the Proposed Amendments and impact other regulations that have already been enacted. *See* **[OCD Exhibit 4-0028]**.

48. The term, "downhole operations," moreover, adds nothing substantive to the Proposed Amendments or their regulatory application(s). *See* **[OCD Exhibit 4-0028]**.

49. For these reasons, the term, "downhole operations" has not been adopted into the Proposed Amendments. *See supra* ¶¶ D.46-48.

E. "Intentionally added PFAS" Definition:

50. "Intentionally added PFAS" means PFAS that are "deliberately added during the manufacture of a chemical product to serve an intended function in the final product." *See* **[NMOGA Exhibit A.3]**; *see also* **[NMOGA Exhibit D, at pg. 12]**.

51. PFAS, however that term is defined, are ubiquitous in the environment. *See* **[NMOGA Exhibit A.3].**

52. For example, PFAS have been found in municipal water, surface water, and private well water. *See* **[NMOGA Exhibit D11]**; *see also* **[NMOGA Exhibit D13]**; *see also* **[NMOGA Exhibit D14]**; *accord* **[NMOGA Exhibit D, at pg. 14]**. Such sources of water—municipal, surface, and private well—are also used as the carrier fluids for additives, proppants, etc., during hydraulic fracturing operations. *See* **[NMOGA Exhibit D, at pg. 14]**.

53. It is both conceivable and possible that PFAS—because of its ubiquitousness in the environment—could be present in hydraulic fracturing fluids used in oil and gas operations, even though PFAS was <u>not</u> added to the fluids by the manufacturer or by the operator because, as discussed above, the PFAS is in the source water. *See* **[NMOGA Exhibit D, at pg. 14]**.

54. In recognition of this ubiquitousness, *every* State identified in WG Ex. 8—the examples of other States that have enacted prohibitions on the use of PFAS in various different industries, such as in food packaging, consumer products, firefighting foams, and cosmetics—have included within their respective statutes a definition of "intentionally added PFAS." *See* **[WG Exhibit 8, at pgs. 5, 9, 23, 30, 41]**; *see also* **[Nov. 15, 2024, Tr: 203: 24-25, Tr: 204: 1-23 Richardson Testimony]**.

55. More specifically, Colorado House Bill 22-1345 ("CO Bill 22-1345), which was enacted in June 2022, and similarly prohibits the use of PFAS in oil and gas operations includes within its the defined terms, "intentionally added PFAS." **[NMOGA Exhibit B.4(12)(a), B.9]**.

56. The prohibition on PFAS in CO Bill 22-1345 that outlaws the use, sale, or distribution of oil and gas hydraulic fracturing fluids qualifies the PFAS prohibition to "intentionally added PFAS chemicals." **[NMOGA Exhibit B.9]**.

57. Under CO Bill 22-1345, "intentionally added PFAS" is defined as follows: "PFAS chemicals that a manufacturer has intentionally added to a product and that have a functional or technical effect on the product." **[NMOGA Exhibit B.4(12)(a)]**.

58. The Colorado definition of "intentionally added PFAS" and the definition identified above in paragraph E.40 mirror one-another. *See* **[NMOGA Exhibit B.4(12)(a)]**; *see also* **[NMOGA Exhibit D, at pg. 14]**.

59. The focus of the PFAS prohibition in the Proposed Amendments is the *addition* of PFAS chemicals *to the hydraulic fracturing fluids* used in oil and gas operations. *See* **[OCD Exhibit 1-0007]**.

60. It is not PFAS that *may*—because of the ubiquitousness of PFAS—unintentionally end up or otherwise be present in hydraulic fracturing fluids. *See* **[OCD Exhibit 1-0007]**; *see also* **[Nov. 14, 2024, Tr: 119: 10-22 Powell Testimony]**.

61. Qualifying the Proposed Amendments to include a definition for and of "intentionally added PFAS" appropriately targets the hydraulic fracturing fluids used in oil and gas operations and correctly excludes PFAS whose source, such as the incidental water used in the fluid, is something *other than* PFAS-containing hydraulic fracturing fluids. *See* **[OCD**

Exhibit 1-0007]; *see also* **[NMOGA Exhibit D, at pg. 14]**; *see also* **[Nov. 15, 2024, Tr: 203: 21-25, Tr: 204: 1-2 Richardson Testimony]**; *see also* **[Nov. 14, 2024, Tr: 114: 3-12 Powell Testimony]**.

62. For these reasons, the term "intentionally added PFAS" has been adopted into the Proposed Amendments. *See supra* ¶¶ E.51-61.

F. "Trade secret" Definition:

63. The term "trade secret" need not be included in the defined terms of the Proposed Amendments. *See* **[WG Exhibit 1, at pg. 13]**.

64. "Trade secret" is defined under the New Mexico Uniform Trade Secrets Act at NMSA 1978, §57-3A-2(D)(1)-(2)(1989). *See* **[OCD Exhibit 4-0031]**.

65. WEG, the Applicant, proposed a definition of "trade secret" in conjunction with its proposed ban on the use of "undisclosed chemicals." *See* **[WG Exhibit 1, at pg. 13-14]**.

66. However, as discussed herein below, a ban on undisclosed proprietary chemicals will and has <u>not</u> been adopted into the Proposed Amendments for among other reasons, there is an insufficient technical basis to justify a ban on *all* proprietary compounds. *See* **[OCD Exhibit 2-0015]**; *see* **[NMOGA Exhibit D, at pg. 13]**; *see also* **[Nov. 14, 2024, Tr: 94: 9-13 Powell Testimony]**; *see also infra* Conclusions of Law, at I.d.

67. The term "trade secret" has been used in various OCC regulations for some time, without a definition and without issue. *See* **[OCD Exhibit 2-0015]**.

68. The term "trade secret" must be consistent with the definition under the New Mexico Uniform Trade Secrets Act at NMSA 1978, §57-3A-2(D)(1)-(2) because the Commission lacks any regulatory authority to alter this definition adopted by the legislature. *See* **[OCD Exhibit 2-0015]**; *see also* **[OCD Exhibit 4-0031]**; *see also infra* Conclusions of Law, at I.d.

69. Adopting a definition of "trade secret" in the Proposed Amendments is not needed because the NMOCD has regularly applied the to be consistent with the term, "trade secret" under the New Mexico Uniform Trade Secret Act and adding a separate defined term under the Proposed Amendments risks creating discord between the OCC regulations and the Uniform Trade Secret Act, unless the Proposed Amendments are updated upon any change in statutory definition under the Uniform Trade Secret Act. *See* **[OCD Exhibit 4-0031]**.

70. But such regulatory update to the definition of "trade secret" would, in turn, require a rulemaking for each and every update. *See* **[OCD Exhibit 4-0031]**.

71. Because the term "trade secret" is already clearly defined in and has been applied consistent with the definition under the Trade Secret Act, the Commission need not adopt a separate and additional definition into the Proposed Amendments. *See* **[OCD Exhibit 4-0031]**.

72. For these reasons, the term "trade secret" has not been adopted in the Proposed Amendments. *See supra* ¶¶ F.63-71.

G. ""Well Site" Definition:

73. The term "well site" need not be included in the defined terms of the Proposed Amendments. *See* **[WG Exhibit 1, at pg. 14]**.

74. "Well site" is a common industry term. *See* **[OCD Exhibit 4-0033]**.

75. Defining "well site" as part of the terms in the Proposed Amendments may cause unintended limitations to the scope of the term and may potentially and unintentionally, affect other rules not noticed nor addressed in this rulemaking, *See* **[OCD Exhibit 4-0033]**.

76. For these reasons, the term "well site" has not been adopted in the Proposed Amendments. *See supra* ¶¶ G.73-15.

II. Proposed Amendments to 19.15.7.16 Well Completion or Recompletion Report and Log (Form C-105)

77. The NMOCD's proposed amendments, identified by the underlined below, to 19.15.7.16 should be adopted. *See* **[OCD Exhibit 1-0007]**.

78. With the adoption of the NMOCD's amendments to 19.15.17.16, the rule now provides as follows:

> **A.** Within 45 days following the completion or recompletion of a well, the operator shall file form C-105 with the division accompanied by a summary of special tests conducted on the well, including drill stem tests. In addition, the operator shall file a certification that no PFAS were added to the fluid used in the completion or recompletion of the well, a copy of electrical and radio-activity logs run on the well with form C-105. If the division does not receive form C-105 with attached certification, logs and summaries within the specified 45-day period, the division shall withhold the allowable authorizations for the well or suspend injection authority, as appropriate, until the operator has complied with 19.15.7.16 NMAC.
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> **B.** In the case of a dry hole, a complete record of the well on form C-105, or if applicable form C-103, with the attachments listed in Subsection A of 19.15.7.16 NMAC shall accompany the notice of intention to plug the well, unless previously filed. The division shall not approve the plugging report or release the bond the operator has complied with 19.15.7.16 NMAC.
>
> **C.** The division shall not keep form C-105, or if applicable form C-103, and accompanying attachments confidential unless the well's owner requests in writing that the division keep it confidential. Upon such request, the division shall keep these data confidential for 90 days from the date of the well's completion, provided, however, that the report, logs and other attached data may, when pertinent, be introduced in a public hearing before division examiners, the commission or in a court of law, regardless of the request that they be kept confidential.
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> **D.** If there is a change in the information provided under this part, the operator must submit the change to the division within 30 days after the date the operator first knew of the change. *See* **[OCD Exhibit 1-0007]**.

79. Adopting the NMOCD's proposed amendments to 19.15.17.16 provides revisions to the rule needed for enforcement, consistency with the other proposed changes to various OCC rules, and achieves the policy aims of this rulemaking, which is to prohibit the use

of PFAS-containing hydraulic fracturing fluids. *See* **[OCD Exhibit 1-0007]**; *see also* **[OCD Exhibit 4-0035]**.

80. In the alternative, NMOGA's proposed revisions, identified by the underlined portion below, to 19.15.7.16 should be adopted. *See* **[NMOGA Exhibit A.8]**.

81. NMOGA's proposed revisions to 19.15.7.16 closely track the NMOCD's proposed revisions and are as follows:

> **A.** Within 45 days following the completion or recompletion of a well, the operator shall file form C-105 with the division accompanied by a summary of special tests conducted on the well, including drill stem tests. In addition, the operator shall file a certification <u>that no PFAS was intentionally added to the hydraulic fracturing, completion, or recompletion fluids used in the well</u>, a copy of electrical and radio-activity logs run on the well with form C-105. If the division does not receive form C-105 with attached certification, logs and summaries within the specified 45-day period, the division shall withhold the allowable authorizations for the well or suspend injection authority, as appropriate, until the operator has complied with 19.15.7.16 NMAC.
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> **B.** In the case of a dry hole, a complete record of the well on form C-105, or if applicable form C-103, with the attachments listed in Subsection A of 19.15.7.16 NMAC shall accompany the notice of intention to plug the well, unless previously filed. The division shall not approve the plugging report or release the bond the operator has complied with 19.15.7.16 NMAC.
>
> **C.** The division shall not keep form C-105, or if applicable form C-103, and accompanying attachments confidential unless the well's owner requests in writing that the division keep it confidential. Upon such request, the division shall keep these data confidential for 90 days from the date of the well's completion, provided, however, that the report, logs and other attached data shall when pertinent, be introduced in a public hearing before division examiners, the commission or in a court of law, regardless of the request that they be kept confidential.
>
> **D.** If there is a change in the information provided under this part, the operator must submit the change to the division within 30 days after the date the operator first knew of the change. *See* **[NMOGA Exhibit A.8]**; *cf* **[OCD Exhibit 1-0007]**.

82. The differences in language are identified in the underlined portions above of NMOCD and NMOGA's, respective, proposed subparts A.

83. Although different in wording, as identified by the underline portions of the rules above, in practice NMOCD and NMOGA's proposed changes to 19.15.17.16 achieve the same regulatory and policy outcomes. *See* **[NMOGA Exhibit A.8]**; *cf* **[OCD Exhibit 1-0007]**.

84. Both proposals in subpart A ban PFAS-containing hydraulic fracturing fluids and require operators to certify that no PFAS were added to the completion fluid(s) used for hydraulic fracturing, which is the proper regulatory focus for a PFAS prohibition because any such prohibition must realistically account for the ubiquitousness of PFAS in the environment, as discussed above in relation to the Proposed Amendments to 19.15.2.7. *See* **[OCD Exhibit 1-0007]**; *see* **[OCD Exhibit 4-0035]**; *see also* **[NMOGA Exhibit D, at pg. 12]**; *see also* **[NMOGA Exhibit A.8]**; *cf* **[OCD Exhibit 1-0007]**.

85. The Commission declines to adopt WEG's proposed amendments to 19.15.7.16.A, identified in WG Ex. 1, including WEG's proposed amendments requiring additional chemical disclosures beyond those *already* required by law to be disclosed in the FracFocus chemical registry. *See* **[WG Exhibit 1, at pg. 15]**; *see also* **[NMOGA Exhibit D, at pg. 13]**.

86. The FracFocus disclosures are both detailed and publicly available to anyone interested in them and requiring additional disclosures beyond those already provided for in FracFocus creates unnecessary duplication. *See* **[OCD Exhibit 2-0016]**; *see also* **[Nov. 15, 2024, Tr: 227: 4-23 Richardson Testimony]**.

87. The 90-day timeline at 19.15.7.16.C is the timeline that appears in the current version of this rule. *See* 19.15.7.16.C.

88. OCD requested that the 90-day timeline in 19.15.7.16.C be retained—rather than adopting the 60-day timeline WEG proposed—because in certain circumstances, the 90-day timeline is necessary for Operators to obtain the requisite information from third parties. *See* **[OCD Exhibit 4-0037]**.

89. Furthermore, WEG provided no evidence in the record regarding a reasoned basis for changing the timeline from the current 90-days to WEG's proposed 60-days. *See* **[WG Exhibit 1, at pg. 15]**.

90. All rules adopted by the Commission must be based on "substantial evidence in the record." *See* NMSA 1978, §70-2-12.2.

91. Accordingly, the Commission declines to adopt the proposed, revised 60-day timeline in 19.15.16.

92. Likewise, the Commission declines to adopt WEG's proposed, entirely new part at 19.15.7.16.D that would require the indefinite retention of forms C-103 and C-105. *See* **[WG Exhibit 1, at pg. 15]**.

93. State record retention and archive requirements dictate the schedule for records retention, not OCC regulations. *See* **[OCD Exhibit 4-0039]**. Mandating indefinite retention by OCC rulemaking could create a conflict with the State's record retention rules. *See* **[OCD Exhibit 4-0039]**. Because of this potential conflict, the Commission declines to adopt this modification.

III. Proposed Amendments to 19.15.14.9 Applications

94. The only proposed changes to 19.15.14.19 appear in what is in **new** subpart B. *See* **[WEG Exhibit 1, at pg. 16]**.

95. NMOCD and NMOGA's proposed changes to 19.15.14.9.B largely track one another. *See* **[OCD Exhibit 1-0008]**; *cf* **[NMOGA Exhibit A.9]**.

96. Both NMOCD and NMOGA's proposed language for 19.15.14.9.B are congruent with their respective proposed amendments to the provisions in 19.15.7.16, which also discuss the content of the certifications from operators regarding PFAS containing completions fluids. *See supra* II.

97. NMOCD's amended 19.15.14.19.B, indicated by the underlined portion below, is as follows:

> **19.15.14.9 APPLICATIONS:** An operator shall file a complete form C-101 and complete form C-102 with the division and meet the following requirements, if applicable:
>
> **A.** an applicant for a permit to drill a well within the corporate limits of a city, town or village shall give notice to the duly constituted governing body of the city, town or village or its duly authorized agent and certify on form C-101 that it gave such notice;
>
> **B.** an applicant for a permit to drill in a quarter-quarter section containing an existing well or wells operated by another operator shall concurrently file a plat or other acceptable document locating and identifying the well or wells, furnish a copy of the application to the other operator or operators in the quarter-quarter section and certify on form C-101 that it furnished the copies;
>
> **C.** an applicant for a permit to drill, deepen, or plug back shall certify that they will not introduce any additives that contain PFAS chemicals in the completion or recompletion operations of the well; and
>
> **D.** an applicant for a permit to operate a well in a spacing or proration unit containing an existing well or wells operated by another operator shall also comply with Subsection B of 19.15.15.12 NMAC. *See* **[OCD Exhibit 1-0008]**.

98. NMOGA's amended 19.15.14.19.B, indicated by the underlined portion below, is as follows:

> **19.15.14.9 APPLICATIONS:** An operator shall file a complete form C-101 and complete form C-102 with the division and meet the following requirements, if applicable: an applicant for a permit to drill a well within the corporate limits of a city, town or village shall give notice to the duly constituted governing body of the city, town or village or its duly authorized agent and certify on form C-101 that it gave such notice;
>
> **A.** an applicant for a permit to drill in a quarter-quarter section containing an existing well or wells operated by another operator shall concurrently file a plat or other acceptable document locating and identifying the well or wells, furnish a copy of the application to the other

operator or operators in the quarter-quarter section and certify on form C-101 that it furnished the copies;

B. an applicant for a permit to drill, deepen, or plug back shall certify that they will not intentionally introduce any PFAS containing hydraulic fracturing fluids in hydraulic fracturing operations of the well.

C. an applicant for a permit to operate a well in a spacing or proration unit containing an existing well or wells operated by another operator shall also comply with Subsection B of 19.15.15.12 NMAC. *See* **[NMOGA Exhibit A.9]**.

99. There are small differences between NMOCD and NMOGA's proposed 19.15.14.9.B amendment. *See* **[OCD Exhibit 1-0008]**; *cf* **[NMOGA Exhibit A.9]**.

100. However, the differences between the two are *only* linguistic. There is no difference between the regulatory implication or policy outcomes between the NMOCD and NMOGA's proposed changes to 19.15.14.9.B. *See* **[OCD Exhibit 1-0008]**; *cf* **[NMOGA Exhibit A.9]**.

101. Congruent with the proposed revisions to 19.15.7.16.A, the NMOCD and NMOGA's proposed provisions at 19.15.14.9.B both expressly require that Operators certify that no PFAS have been added to completion or recompletions fluids that are used in oil and gas hydraulic fracturing fluids. *See* **[OCD Exhibit 1-0008]**; *cf* **[NMOGA Exhibit A.9]**.

102. Both NMOCD and NMOGA's proposed language at 19.15.14.9 new proposed subpart B prohibit the addition of PFAS to hydraulic fracturing fluids and, therefore, achieve the policy goals of this rulemaking. *See* **[OCD Exhibit 1-0008]**; *cf* **[NMOGA Exhibit A.9]**.

103. The OCC declines to include WEG's proposed language regarding "undisclosed chemicals" in 19.15.14.9.B for the same reasons the Commission declined to include the language "undisclosed chemicals" in the proposed revisions to 19.15.7.16.A. *See supra* II.

IV. Proposed Amendments to 19.15.14.10 Approval or Denial of a Permit to Drill, Deepen, or Plug Back

104. WEG proposed entirely new language—denoted in underlining below—for subsection 19.15.14.10.A as follows:

> **A.** The director or the director's designee may deny a permit to drill, deepen or plug back if the applicant is not in compliance with Subsection A of 19.15.5.9 NMAC and shall deny a permit to drill, deepen, or plug back, or any permit authorizing the transport of nondomestic waste, including produced water, if the applicant does not provide the certification required by Subsection C of 19.15.14.9 or provides a false certification . . . . *See* **[WG Exhibit 1, at pg. 16]**

105. WEG, as the Applicant bears the burden to provide a reasoned basis for its proposed regulatory changes. *See* 19.15.3.7.A-D.

106. But WEG provided no evidence in the record regarding a reasoned basis for the proposed changes in 19.15.14.10.A. *See* **[WG Exhibit 1, at pg. 16]**.

107. All rules adopted by the Commission must be based on "substantial evidence in the record." *See* NMSA 1978, §70-2-12.2.

108. Accordingly, the OCC properly declines to adopt WEG's proposed changes at 19.15.14.10.A. *See* **[WG Exhibit 1, at pg. 16]**.

V. Proposed Amendments to 19.15.16.17 Completion Operations, Shooting, and Chemical Treatment of Wells

109. NMOGA, NMOCD, and WEG all proposed different amendments to 19.15.16.17 NMAC. *See* **[NMOGA Exhibit A, at pg. 11]**; *see* **[OCD Exhibit 4-0044 to 4-0049]**; *see also* **[WG Ex. 1, at pgs. 17-18]**.

110. On November 14, 2024, Brandon Powell ("Mr. Powell") testified on behalf of the NMOCD to explain its Proposed Amendments to 19.15.16.17 NMAC. *See* **[Nov. 14, 2024, Tr: 53: 11 to Tr: 58: 1-3 Powell Testimony]**; *see also* **[OCD Exhibit 4-0044 to 4-0049]**.

111. Mr. Powell's testimony clarified the NMOCD's intended regulatory approach, scope, and application for its Proposed Amendments to 19.15.16.17.

112. However, Mr. Powell's testimony and the language that the NMOCD provided in OCD Exhibit 1-0009, before the hearing, for the Proposed Amendments at 19.15.16.17 are not necessarily consistent with one another and the written amendments to 19.15.16.17 require further amendment to be consistent with Mr. Powell's hearing testimony. *See* **[Nov. 14, 2024, Tr: 53: 11 – Tr: 58: 1-3 Powell Testimony]**; *see also* **[OCD Exhibit 4-0044 to 4-0049]**; *but see* **[OCD Exhibit 1-0009]**.

113. The OCC should adopt NMOCD's Proposed Amendments to 19.15.16.17, *provided* that further amendments are made to 19.15.16.17 NMAC to more accurately track Mr. Powell's November 14, 2024, hearing testimony and the written justifications that the OCD provided in its Exhibits 4-0044 to 4-0049. *See* **[Nov. 14, 2024, Tr: 53: 11 to Tr: 58: 1-3 Powell Testimony]**; *see also* **[OCD Exhibit 4-0044 to 4-0049]**; *but see* **[OCD Exhibit 1-0009]**.

114. The further amendments to 19.15.16.17 must clarify that:

(1) 19.15.16.17 applies upon the occurrence of a well integrity event, "a loss of containment of the well," *i.e.*, fluid has escaped the well casing and threatens either ground or surface water, or both. *See* **[Nov. 14, 2024, Tr: 54: 23 to Tr: 55: 1-22 Powell Testimony]**;

(2) the provisions in 19.15.16.17 provide a pathway for the OCD to conduct an *initial* investigation to determine if there is any potential threat to ground and/or surface water from the well's loss of containment but any further investigation and required remediation would be conducted subject to and in accordance with existing OCC Rules 19.15.29 and 19.15.30, as may be applicable. *See* **[Nov. 14, 2024, Tr: 55: 13-22 Powell Testimony]**; *see also* **[OCD Exhibit 4-0044]** (explaining that "OCD's changes to [19.15.16.17] intend to address the *detection* of potential water impacts, *not* their remediation. The remediation will still be regulated under other OCD rules [29 and 30] regarding water impacts")(emphasis added);

> **(3)** the focus of any OCD investigation, pursuant to the Proposed Amendments in 19.15.16.17, would be the chemical additives used in the oil and gas operation that caused the loss of containment, and that neither sand nor water are considered a "chemical additive" within the meaning of the Proposed Amendments to 19.15.16.17. *See* **[Nov. 14, 2024, Tr: 56: 2-12 Powell Testimony]**; and
>
> **(4)** that any necessary additional disclosures of trade-secreted information would be made *only* to the OCD and not publicly. *See* **[Nov. 14, 2024, Tr: 53: 1-25 to Tr: 55: 1-16]**.

115. With the above-enumerated further amendments—and any others necessary for clarification and consistency with Mr. Powell's testimony—NMOGA supports the adoption of the NMOCD's Proposed Amendments to 19.15.16.17. *See supra* ¶¶109(1)-(4).

116. On the other hand, WEG's amendments to 19.15.16.17, which lack both clarity and any evidentiary support for the proposed changes to 19.15.16.17 Section should be rejected. *See* **[WG Ex. 1, at pg. 17-18]** (providing no explanation nor reasoning for Proposed Amendments to 19.15.16.17); *see also generally* **[WG Exs.]** (including no evidentiary support for its proposed changes to 19.15.16.17).

VI. Proposed Amendments to 19.15.16.19 Log, Completion and Workover Reports

117. WEG proposed modifications to 19.15.16.17.B(1) and a wholly new addition the regulations at 19.15.16.17.D. *See* **[WG Exhibit 1, at pgs. 17-18]**; *see* **[OCD Exhibit 2-0018]**; *see also* **[OCD Exhibit 4-0050 thru 4-0055]**.

118. WEG proposed eliminating the present-day provisions at 19.15.16.17.B(1) that ties the information that must be disclosed in the FracFocus chemical registry database with the information in a corresponding material safety data sheet. *See* **[WG Exhibit 1, at pgs. 17-18]**.

119. Both the NMOCD and NMOGA opposed WEG's modifications to 19.15.16.17.B(1) and WEG's wholly new addition to the regulations at 19.15.16.17.D. *See*

[OCD Exhibit 2-0018]; *see also* **[OCD Exhibit 4-0050 thru 4-0055]**; *accord* **[NMOGA Exhibit A.14 thru A.15]**.

120. A revised version of 19.15.16.19, as follows, should be adopted:

> **A. Completion report.** Within 45 days after the completion of a well drilled for oil or gas, or the recompletion of a well into a different common source or supply, the operator shall file a completion report with the division on form C-105. For the purpose of 19.15.16.19, a hole drilled or cored below fresh water that penetrates oil- or gas-bearing formations or that an owner drills is presumed to be a well drilled for oil or gas. The operator shall signify on form C-105, or alternatively on form C-103, whether the well has been hydraulically fractured.
>
> **B. Hydraulic fracture disclosure.** For a hydraulically fractured well, the operator shall also complete and file with the FracFocus chemical disclosure registry a completed hydraulic fracturing disclosure within 45 days after completion, recompletion, or other hydraulic fracturing treatment of the well. The hydraulic fracturing disclosure shall be completed on a then current edition of the hydraulic fluid product component information form published by FracFocus and shall include complete and correct responses disclosing all information called for by the FracFocus form, provided that:
>
> **(1)** the division does not require the reporting of information beyond the material safety data sheet data as described in 29 C.F.R. 1910.1200;
>
> **(2)** the division does not require the reporting or disclosure of proprietary, trade secret or confidential business information; and
>
> **(3)** the division shall download and archive New Mexico FracFocus submissions on a quarterly basis.
>
> **C.** If the FracFocus chemical disclosure registry is temporarily inoperable, the operator of a well on which hydraulic fracturing treatment(s) were performed shall file the information required by the then most recent FracFocus form with the division along with Well Completion Report (form C-105) or Sundry Notice (form C-103) reporting the hydraulic fracture treatment and file the information on the FracFocus internet website when the website is again operable. If the FracFocus chemical disclosure registry is discontinued or becomes permanently inoperable, the operator shall continue filing the information with the division until otherwise provided by rule or order.

121. NMOCD and NMOGA both proposed leaving 19.15.16.17.B(1) as it currently appears in the rule, which is how it appears above. *See* **[OCD Exhibit 2-0018]**; *see also* **[OCD Exhibit 4-0050 thru 4-0055]**; *accord* **[NMOGA Exhibit A.14 thru A.15]**.

122. Regarding WEG's proposed revisions to 19.15.16.17.B(1), the Commission rejects WEG's proposed revisions to subpart B(1) because eliminating subpart B(1) in 19.15.16.17, as it currently appears in the rule, would cause confusion and ambiguity regarding *what* information must be reported in the FracFocus chemical registry. *See* **[OCD Exhibit 4-0051]**.

123. Tying the FracFocus chemical disclosures with the information in the corresponding material safety data sheet provides regulatory clarity on *what* information must be included in an Operator's FracFocus disclosures. *See* 19.15.16.17.B(1); *see also* **[OCD Exhibit 4-0051]**.

124. Additionally, tying this information to one-another ensures consistent and complete information is provided to the NMOCD, first responders, and others who may need to obtain it. *See* **[OCD Exhibit 4-0050 thru 4-0055]**; *accord* **[NMOGA Exhibit A.14 thru A.15]**.

125. Eliminating subpart B(1) as it is currently written from 19.15.16.17.B(1) introduces unnecessary ambiguity into the regulations. *See* 19.15.16.17.B(1); *see also* **[OCD Exhibit 4-0051]**.

126. Thus, the Commission rejects WEG's proposed amendment to 19.15.16.17.B(1) that eliminates the current-day language that links the information that an Operator must disclose in FracFocus to the corresponding material safety datasheet. *See* 19.15.16.17.B(1); *see also* **[WG Exhibit 1, at pg. 17]**.

127. In an entirely new subpart at 19.15.16.17.D, WEG proposed requiring a full disclosure of all chemicals to a variety of individuals, entities, public bodies, and facilities, including, but not limited to, police departments; fire departments; various schools; various local governments; surface owners; tribes, and many others. *See* **[WG Exhibit 1, at pg. 18]**.

128. The disclosures in entirely new subpart D would be *in addition* to those disclosures *already* mandated by OCC regulation and made in the FracFocus chemical registry database. *See* **[WG Exhibit 1, at pg. 18]**; *see also* 19.15.16.19(B) NMAC.

129. WEG, however, provided no evidence in the record that requiring disclosures to all the various individuals, entities, public bodies, entities, etc., in the new subpart D provides for better public health outcomes, allows first responders to provide better assistance, or is otherwise in the best interest of the public. *See* **[WG Exhibit 94, at pgs. 10-11]**.

130. To the extent that WEG put any information into the record on its proposed mandate at subpart D, such information was only provided in the rebuttal testimony at pages 10-11 of Exhibit 94, from WEG's witness Dusty Horowitt ("Mr. Horowitt"). *See* **[WG Exhibit 94, at pgs. 10-11]**.

131. Mr. Horowitt is <u>not</u> an expert in the fields of toxicology, chemistry, risk communications or assessment, and is, therefore, not qualified to opine on either health outcomes, methods of proper risk communication or risk assessment, or the need for first responders to know the exact chemical make-up of hydraulic fracturing fluids used in oil and gas hydraulic fracturing operations. *See* **[WG Exhibit 94, at pgs. 10-11]**; *but see* **[WG Exhibit 9, at pgs. 1-.3]** (Curriculum vitae of Mr. Horowitt indicating no expertise in toxicology, chemistry, risk communications or assessment, or psychology).

132. The record also indicates that disclosing chemical information as WEG would like to mandate in new 19.15.16.19.D is not only inconsistent with, but contrary to standard risk communication best practices in a number of ways. *See* **[NMOGA Exhibit E, at pg. 14]**; *see* **[NMOGA Exhibit E24]**; *see* **[NMOGA Exhibit E25]**; *see also* **[Nov. 15, 2024, Tr: 118: 24-25, Tr: 119: 1-12 Anderson Testimony]**.

133. Risk assessment is the standard of practice to determine potential public health risk; the mere presence of a chemical does not equate to an unacceptable risk to human health or the environment. *See* **[NMOGA Exhibit E, at pg. 15]**; *see* **[NMOGA Exhibit E25]**; *accord* **[Nov. 15, 2024, Tr: 103: 11-25 Anderson Testimony]**.

134. The National Academies of Science recognizes that psychological stress is an important consideration when studying environmental health risks, **[NMOGA Exhibit E27]**, and stress itself has been shown to contribute to adverse human health conditions including cardiovascular issues and immune responses. *See* **[NMOGA Exhibit E26]**.

135. To best manage and to minimize unnecessary public misconceptions, confusion, and fear, public disclosure regarding the potential presence of environmental chemicals needs to follow well-established risk communication strategies. *See* **[NMOGA Exhibit E, at pg. 16]**; *see also* **[Nov. 15, 2024, Tr: 119: 13–25; Tr: 120: 1–25; Tr: 121: 1–11 Anderson Testimony].**

136. The USEPA defines “risk communication: as the process of informing people about potential hazards to their person, property, or community.” *See* **[NMOGA Exhibit E, at pg. 16]**; *see also* **[NMOGA Exhibit E29]**.

137. Following standard best practices for risk communication has a "clear impact on whether an audience can hear, understand, accept, and act on a specific message." *See* **[NMOGA Exhibit E25]**; *see also* **[Nov. 15, 2024, Tr: 130: 3-15 Anderson Testimony]**.

138. As explained in the Interstate Technical and Regulatory Council (ITRC) risk communication guidance, presenting information regarding chemicals in the environment is challenging and complicated; stakeholders will want to know if the presence of a chemical will cause or has caused health impacts, and explaining this requires explaining scientific concepts such as complicated chemistry, fate and transport, health effects, exposure information, and knowledge gaps. *See* **[NMOGA Exhibit E29]**; *see also* **[NMOGA Exhibit E, at pg. 17]**.

139. The entities that WEG included in its proposed new 19.15.16.19.D do not have the training or experience to distinguish between "safe" and "unsafe" substances present in the environment. *See* **[NMOGA Exhibit E, at pg. 15]**.

140. As such, disclosing a list of various chemicals in the environment, as WEG proposed in 19.15.16.19.D, does not serve to support improved public health because these disclosures provide no context of technical information, such as the concentration(s) of each chemical, fate and transport of each chemical, potential for human exposure to each listed, and potential specific adverse health effects from each chemical. *See* **[NMOGA Exhibit E, at pg. 17]**; *see also* **[Nov. 15, 2024, Tr: 129: 7-25, Tr: 130: 1-15 Anderson Testimony]**.

141. Without this additional technical detail, no member of the public, nor will the various entities, public bodies, and facilities, etc., WEG includes in 19.15.16.19.D be equipped to understand possible risks or make appropriate risk management decisions based on or as a result of the chemical disclosures that WEG proposes in 19.15.16.19.D. **[NMOGA Exhibit E, at pg. 17]**; *see also* **[Nov. 15, 2024, Tr: 176: 16-23 Anderson Testimony]**.

142. Furthermore, such entities are largely not familiar with oil and gas operations and in the event of a contamination issue from oil and gas operations, other rules already in place, such as 19.15.29 and 19.15.30, require notice and provide for an appropriate notice. *See* **[OCD Exhibit 4-0053]**; *see also* 19.15.29 NMAC; *see also* 19.15.30 NMAC.

143. WEG has provided no evidence in the record that the existing rules at 19.15.29 and 19.15.30, which require notice would provide an inadequate notice to the public and those entities identified in its proposed 19.15.16.19.D. *See* **[OCD Exhibit 4-0053]**; *see also* **[WG Exhibit 94, at pgs. 10-11]**.

144. And all amendments or enactments of rules must be based on sufficient evidence, and may not be arbitrary and capricious. *See* §70-2-12.2(C)(1)-(2).

145. For these reasons, discussed above, the Commission rejects WEG's proposed additions to 19.15.16.19.D that mandate a chemical disclosure list be provided to a host of various entities, public bodies, and facilities, etc.

146. NMOCD proposed limiting any disclosures in proposed 19.15.16.19.D to *only* the State Land Office ("SLO"), if the state owns the minerals being developed at the well site; or the federal Bureau of Land Management ("BLM"), if the United States state owns the minerals being developed at the well site. *See* **[OCD Exhibit 4-0054]**.

147. However, the NMOCD did not express a strong preference for such disclosures nor the rationale for including them. *See* **[OCD Exhibit 4-0054]**.

148. Instead, the NMOCD believes that such disclosures are unnecessary as the SLO and BLM can and do already access the chemical disclosures in FracFocus, when needed. *See* **[OCD Exhibit 4-0054]**.

149. The Commission, therefore, declines to adopt regulations at 19.15.16.19.D requiring additional and separate chemical disclosures to SLO and the BLM.

VII. Proposed Amendments to 19.15.25.14 Demonstrating Mechanical Integrity

150. WEG proposed adding the term, "casing investigation" to the existing regulations at 19.15.25.14.A. *See* **[WG Ex. 1, at pg.19]**.

151. WEG, however, did not define the term, "casing investigation" in its proposed revisions to 19.15.25.14.A. *See* **[WG Ex. 1, at pg.19]**.

152. Additionally, WEG did not use the term, "casing investigation" in context anywhere in 19.15.25.14 or elsewhere in its Proposed Amendments. *See* **[WG Ex. 1]**.

153. Consequently, it is unclear how a "casing investigation" differs from or is in addition to those actions already authorized or mandated under 19.15.25.14 and other OCC regulations governing casing integrity. *See* 19.15.25.14.A-.F.

154. Furthermore, WEG provide no evidence in the record regarding the need for this addition to 19.15.25.14.A or a reasoned basis therefor. *See* **[WG Ex. 1]**; *see generally* **[AR]** (lacking any evidence of or basis for proposed addition to 19.15.25.14).

155. All amendments or enactments of rules must be based on sufficient evidence, and may not be arbitrary and capricious. See §70-2-12.2(C)(1)-(2)

156. For these reasons, identified above, the Commission declines to adopt WEG's proposed additional language of "casing investigation" to 19.15.25.14.A.

Conclusions of Law

I. Legal Authorities for the Proposed Amendments

a. The Commission's Enumerated Powers and the Proper Scope of Regulations Implementing the Oil and Gas Act

1. Section 70-2-12 catalogs the twenty-two (22) statutorily delineated powers of the Commission. *See* NMSA 1978, §70-2-12(B)(1)-(22)(1953) ("Enumeration of Powers").

2. The Commission's specifically enumerated powers in Sections 70-12-2(B)(15), 70-12-2(B)(21), and 70-12-2(B)(22) serve as the bases for WEG's requested amendments to the various provisions in the regulations to implement the Oil and Gas Act. *See id.*; *see also* NMSA 1978, 70-1-1 *et seq.* (1927)(Oil and Gas Act); *see also* Application, at pg. 3 (justifying request to Commission to adopt Proposed Amendments pursuant to OCC's enumerated powers in 70-12-2(B)(15), 70-12-2(B)(21), and 70-12-2(B)(22)).

3. It is well-settled New Mexico law that the implementing regulations—such as those in WEG's Proposed Amendments—cannot be created more broadly than the governing statute. *See Gonzales v. New Mexico Educ. Ret. 3d*., 1990-NMSC-024, ¶ 11, 109N.M. 592, 788 P.2d 348 ("An agency may not create a regulation that exceeds its statutory authority."); *see also Marbob Energy Corp. v. N.M. Oil Conservation Comm.,* 2009-NMSC-013, ¶ 5, 206 P.3d 135 ("[a]n agency may not create a regulation that exceeds its statutory authority"); *accord In re Camino Real Env't Ctr., Inc.,* 2010-NMCA-057, ¶ 11, 148 N.M. 776, 242 P.3d 343 (implementing regulations of the Solid Waste Act void because regulations exceeded Secretary's statutorily enumerated authority).

4. Oil and Gas Act Section 70-2-12(B)(15) provides as follows:

> The [Commission] may make rules . . . for the purposes and with respect to the subject matter stated in this subsection: . . . (15) to regulate the *disposition*, *handling*, *transport*, *storage*, *recycling*, *treatment* and *disposal* of produced water during, or for reuse in, the

> exploration, drilling, production, treatment or refinement of oil or gas, including disposal by injection pursuant to authority delegated under the federal Safe Drinking Water Act, in a manner that protects public health, the environment and fresh water resources. *Id.* (emphasis added).

5. Likewise, Section 70-2-12(B)(21) states that the "[Commission] may make rules":

> (21) to regulate the *disposition* of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment. *Id.* (emphasis added).

6. And, similarly, section 70-2-12(B)(22) proscribes that the "[Commission] may make rules":

> (22) to regulate the *disposition* of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment, including administering the Water Quality Act. *Id.* (emphasis added).

7. Taken together, Sections 70-2-12(B)(15), 70-2-12(B)(21), and 70-2-12(B)(22) provide the contours of both the Commission's powers and any regulations that the Commission may adopt to implement its enumerated Oil and Gas Act powers. *See* §70-2-12(B)(15); *see* §70-2-12(B)(21); *see* §70-2-12(B)(22); *see also Marbob Energy Corp.*, 2009-NMSC-013, ¶ 5.

8. Accordingly, any of the Proposed Amendments to the OCC regulations that the Commission considers for adoption through this rulemaking cannot exceed the powers provided for in Sections 70-2-12(B)(15), 70-2-12(B)(21), and 70-2-12(B)(22).

b. The OCC/OCD has no statutory authority over the "generation" of "nondomestic waste," only the *"disposition"* of nondomestic waste," as clearly enumerated in Section 70-12-2, and the OCC may not adopt regulations that provide it the broader authority over the "generation" of "nondomestic waste."

9. WEG's Application provides that " . . . the Commission [should] adopt a rule prohibiting the use of PFAS in oil and gas drilling, development, and production in order to prevent the *generation* of PFAS-contaminated produced water and nondomestic waste." Application at pg. 1 (emphasis added).

10. But such assertion mistakenly conflates and equates "generation" and "disposition" as being one-in-the same, which they are not. *See* §§70-2-12(B)(15), (21), (22). The OCC/OCD have no regulatory authority over the "generation" of produced water or nondomestic waste. *See* §§70-2-12(B)(15), (21), (22).

11. As identified above, Section 70-2-12(B)(15) provides the Commission with authority "to regulate the disposition, handling, transport, storage, recycling, treatment, and disposal of produced water . . ." §70-2-12(B)(15) (emphasis added).

12. Likewise, Section 70-2-12(B)(21) empowers the Commission "to regulate the *disposition* of nondomestic wastes resulting from the exploration, development, or storage of crude oil or natural gas to protect public health and the environment." *Id.*(emphasis added)*; see also* §70-2-12(B)(22) (authorizing the OCD "to regulate disposition of nondomestic waste" under similar circumstances).

13. Although not defined in Sections 70-2-12(B)(15), (21), or (22), the common understanding of "disposition" is "the disposal or discarding of something, the power to make decisions about . . . disposal." *See* Random House Unabridged Dictionary (2d Ed.)[2]; *see*

[2] Random House Unabridged Dictionary (2d Ed.), available at https://www.dictionary.com/ (last visited Feb. 6, 2025).

also Levario v. Ysidro Villareal Labor Agency, 1995-NMCA-133, ¶ 11, 906 P.2d 266 (when a word in statute is left undefined, it must be read according to its common meaning); *accord Best v. Marino*, 2017-NMCA-073, ¶ 38, 404 P.3d 450 ("Appellate courts often refer to dictionary definitions to ascertain the ordinary meaning of statutory language").

14. On the other hand, the common understanding of "generation" is "the act or process of generating or bringing into being; production, manufacture, or procreation." *See* Random House Unabridged Dictionary (2d Ed.).

15. Accordingly, the terms "disposition" and "generation" are neither interchangeable, nor are they synonymous. *See id*. Furthermore, the Commission's regulatory authority in the context of produced water is limited to the "disposition, handling, transport, storage, recycling, treatment, and disposal of produced water," as expressly enumerated in the statute. *See id*.; *see also Leger v. Gerety*, 2019-NMCA-033, ¶ 17, 444 P.3d 1036 (where a statute is unambiguous, plain language governs).

16. Similarly, the plain language of Sections 70-2-12(B)(21), (22) limits the Commission's regulatory oversight to the "disposition of nondomestic waste." *See e.g.,* §§70-2-12(B)(21), (22) (providing authority to OCC to regulate "disposition of nondomestic wastes" in statutorily enumerated contexts) (emphasis added); *see also Leger,* 2019-NMCA-033, ¶ 17.

17. Sections 70-2-12(B)(15), (21), and (22) provide no statutory authority for the Commission to regulate the "*generation*" of "nondomestic waste" and any attempt by the Commission to do so is ultra vires. *See* §§70-2-12(B)(21), (22); *see also City of Santa Fe ex rel. Santa Fe Police Dep't v. One Black 2006 Jeep*, 2012-NMCA-027, ¶ 13, 286 P.3d 1223 (Cannot read language into a statute that does not appear in the statute).

18. Moreover, and in a similar vein, the OCC may not adopt regulations that attempt to regulate the "generation," as opposed to the "disposal" or "disposition of nondomestic waste," because any such implementing regulations governing "generation" would be created more broadly than the governing statutes limited the OCC regulatory powers to "disposal." *See Gonzales,* 1990-NMSC-024, ¶ 11.

19. It follows, to the extent that WEG's Application and proposed rule, or portions thereof, rely upon Commission authority to regulate the "generation" of produced water or nondomestic waste, such proposed regulation is outside the Commission's statutory authority and may not be adopted. *See* §§70-2-12(B)(15), (21), (22); *see also Marbob Energy Corp.,* 2009-NMSC-013, ¶ 5.

20. The Commission, instead, may enact or amend its rules only in a manner consistent with its authority over the "disposition, handling, transport, storage, recycling, treatment, and disposal of produced water," and "disposition of nondomestic waste," as expressly and unambiguously provided for in Sections 70-2-12(B)(15), (21), (22), respectively. *See* §§70-2-12(B)(15), (21), (22); *see Marbob Energy Corp.,* 2009-NMSC-013, ¶ 5.

c. The OCC/OCD has no statutory authority to regulate the *additives* in hydraulic fracturing fluids and any such regulation of the additives is beyond the statutory authority provided for in Section 70-2-12(B)(15).

21. WEG's Proposed Amendments to 19.15.7.16(A), 19.15.14.9, and 19.15.16.19 prohibit the use of hydraulic fracturing fluids in well completions, recompletions, or treatments that contain "undisclosed chemicals." *See e.g.* **[WG Ex. 1, at Proposed 19.15.7.16(A)]** (". . . the operator shall file a certification that no undisclosed chemicals or PFAS were used in the completion or recompletion of the well").

22. In support of its proposed amendment, WEG cites to Section 70-2-12(B)(15), which empowers the Commission "to regulate the disposition, handling, transport,

storage, recycling, treatment, and disposal of produced water . . . .” *Id*. (emphasis added); *see also* Application at pg. 4 (“. . . undisclosed chemicals [in hydraulic fracturing fluid] simply could not be used in New Mexico”).

23. In support of its proposed amendments banning “undisclosed chemicals,” WEG cites to Section 70-2-12(B)(15), which empowers the Commission “to regulate the *disposition, handling, transport, storage, recycling, treatment, and disposal* of produced water . . . .” *Id.* (emphasis added); *see also* Application at pg. 4 (“. . . undisclosed chemicals [in hydraulic fracturing fluid] simply could not be used in New Mexico”).

24. However, Section 70-2-12(B)(15) empowers the Commission to regulate certain activities—“disposition, handling, transport, storage, recycling, treatment, and disposal, . . . during or for reuse in, the exploration, drilling, production, treatment or refinement of oil and gas”—related to “produced water.” §70-2-12(B)(15).

25. Section 70-2-12(B)(15), however, makes no mention *whatsoever* of having authority to regulate additives, *aka* the chemicals, in hydraulic fracturing fluid. *See id.* (discussing only *produced water*, not additives, as being within OCC purview)(emphasis added).

26. A plain language reading of Section 70-2-12(B)(15) provides no such authority for the Commission to regulate additives, *i.e.*, chemicals—disclosed or undisclosed—in hydraulic fracturing fluid. *See id*.; *see Leger*, 2019-NMCA-033, ¶ 17 (plain language governs).

27. Furthermore, any such language cannot be read into Section 70-2-12(B)(15) to provide for the regulation of additives in hydraulic fracturing fluids. *See* One Black 2006 Jeep, 2012-NMCA-027, ¶ 13 (cannot read nonexistent language into statute).

28. Instead, by its plain language, Section 70-2-12(B)(15) expressly limits the Commission’s authority to “produced water.” *See* §70-2-12(B)(15).

29. WEG's Proposed Amendments to 19.15.7.16(A), 19.15.14.9, and 19.15.16.19 that seek to prohibit the use of "undisclosed chemicals" in hydraulic fracturing fluids regulates the additives in fracturing fluids, not produced water. *See e.g.* **[WG Ex. 1, at Proposed 19.15.7.16(A)]**; *cf* §70-2-12(B)(15).

30. Moreover, and in a similar vein, WEG's Proposed Amendments to 19.15.14.10, 19.15.7.16, 19.15.14.9, and 19.15.16.19, none of which are regulations that govern the "disposition of waste," address operations relating to the *production* of oil and gas, such as hydraulic fracturing, completions, and recompletions. *See e.g.* **[WG Ex. 1, at Proposed 19.15.16.19]** (entitled "Oil and Gas, Drilling and Production" and governing production activities not disposal)(emphasis added).

31. Sections 70-2-12(B)(21) and(22), both of which address disposal activities, provide no statutory authority to the Commission to regulate constituents in hydraulic fracturing fluids, especially with respect to *production*-related activities. *See* §§70-2-12(B)(21)-(22) (emphasis added).

32. Such regulation is wholly unsupported by the plain language in Section 70-2-12(B)(15). *See* §70-2-12(B)(15); *see Leger v. Gerety*, 2019-NMCA-033, ¶ 17 (plain language governs).

33. Because WEG's Proposed Amendments prohibiting the use of "undisclosed chemicals" is unsupported by the clear-cut language circumscribing the OCC/OCD's powers, the Commission must reject WEG's invitation to amend 19.15.7.16(A), 19.15.14.9, and 19.15.16.19 to prohibit the use of "undisclosed chemicals" in hydraulic fracturing fluid. *See* §70-2-12(B)(15); *accord Marbob Energy Corp.*, 2009-NMSC-013, ¶ 5.

d. It is beyond the Commission's enumerated powers to require—either directly or indirectly—the disclosure of trade-secreted information.

34. NMAC 19.15.16.19.B presently requires that "for a hydraulically fractured well, the operator shall . . . complete and file with the FracFocus chemical disclosure registry a completed hydraulic fracturing disclosure within 45 days after completion, recompletion, or other hydraulic fracturing treatment on the well." *See* 19.15.16.19.B.

35. In other words, the existing regulations mandate the disclosure of hydraulic fracturing fluids—from completion, recompletion, or other hydraulic fracturing treatments—in the FracFocus chemical disclosure registry. *See id.*

36. The existing regulations at 19.15.16.19(B) further require that:

> the hydraulic fracturing disclosure shall be completed on a then current edition of the hydraulic fluid product component information form published by FracFocus and shall include complete and correct responses disclosing all information called for by the FracFocus form, provided that: (1) the division does not require the reporting of information beyond the material safety data sheet data as described in 29 C.F.R. 1910.1200; [and] (2) the division does not require the reporting or disclosure of proprietary, trade secret or confidential business information . . . *Id.* (emphasis added).

37. Accordingly, the FracFocus chemical disclosure mandate in 19.15.16.19.B recognizes two narrow limitations on the scope of the disclosure: (1) any information beyond the safety data sheet at 29 C.F.R. 1910.1200, which is an extensive set of safety and occupational health disclosures, and (2) trade-secreted constituents in the hydraulic fracturing fluid. *See id.*

38. At the same time, New Mexico law protects certain types of information as "trade secreted." *See* NMSA 1978, §§57-3A-1 to 57-3A-7 (1989) (New Mexico Uniform Trade Secrets Act, hereafter "Trade Secrets Act").

39. The New Mexico legislature has recognized the economic importance of trade secrets and under the Trade Secrets Act, a "trade secret" is protected from disclosure. *See*

§57-3A-2(B)(1)-(2); *see also Pincheira v. Allstate Ins. Co.*, 2007-NMCA-094, ¶ 34, 142 N.M. 283, 164 P.3d 982 (Noting there is a "strong public policy in New Mexico supporting the confidentiality of trade secrets").

40. A "trade secret" can include all the following:

> information, including a formula, pattern, compilation, program, device, method, technique or process, that: derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. §57-3A-2(D)(1)-(2).

41. Consequently, hydraulic fracturing fluids, composed of various additives, include a "formula, pattern, method, technique, [and/or] process," are maintained as secret, and are, therefore, trade secrets protected from disclosure under New Mexico law. *See id.*

42. In practice, operators disclose nearly all constituents in a hydraulic fracturing treatment, in accordance with existing regulations at 19.15.16.19.B, in the FracFocus chemical disclosure registry. *See id.*

43. To the extent that operators withhold any information in their FracFocus disclosures, only the name and/or concentration of a given constituent or additive in the hydraulic fracturing fluid used in each fracturing job is withheld *if* the constituent or concentration of it is trade-secreted and, therefore, protected from disclosure. *See* §57-3A-2(A)-(D). Thus, only the trade-secreted constituent or additive is redacted in FracFocus, while all other information about the hydraulic fracturing fluids are in fact disclosed. *See id.*

44. WEG's May 2023, Application ("May Application") proposed that the OCC mandate disclosure of *all* constituents—including trade-secreted constituents—in FracFocus, without exception:

> [i]n response to feedback from the [OCD], [WEG] has dropped the provision in its first application that required disclosure of all chemicals used downhole, including trade secret chemicals, in recognition that the [OCD] lacks authority to regulate [those] that hold trade secrets. Application, at pg. 4 (emphasis added).

45. WEG acknowledged that the Commission has *no authority* to waive claims or mandate disclosure of trade-secreted constituents and was, therefore, forced to amend its Application. *See id.*; *See also* §70-2-12 (B) (delineating authority of OCC and making no mention of trade secrets).

46. Despite WEG's concession that the Commission has no authority to require an operator to disclose trade-secreted constituents, WEG, nonetheless, seeks to have the OCC indirectly mandate that which it could not directly mandate by prohibiting the use of *any* undisclosed constituents in oil and gas operations in New Mexico:

> [WEG] includes [ ] provision[s] that prohibit[ ] the use of undisclosed chemicals in downhole operations. This provision does pose a jurisdictional problem for the [OCD] . . . Manufacturers and operators would not have to disclose any trade secrets . . . those undisclosed chemicals simply could not be used in New Mexico. Application, at pg. 4.

47. Thus, to comply with WEG's proposed amendments to 19.15.7.16, 19.15.14.9, and 19.15.16.19, operators would need to disclose in FracFocus *every* confidential and proprietary constituent in their fracturing fluid without regard to legally applicable trade secret protections. *See id.* (emphasis added).

48. In addition, failing to disclose every constituent would prevent an operator from being able to obtain a permit to drill ("APD") in the future, even at unrelated well sites. *See* **[WG Ex. 1, at Proposed 19.15.14.10]**.

49. Consequently, as applied, WEG's proposed revisions provide a "no choice" option for operators, whereby operators must either (1) disclose trade secreted

information in FracFocus because "undisclosed chemicals simply [cannot] be used in New Mexico," under its proposed amendments, as WEG concedes, or (2) be prevented from obtaining future permits to drill, deepen, or plug back wells. *See id.*; *see also* Application at pg. 4.

50. Regardless of WEG's framing of the mandate, the Commission lacks the authority to either directly *or* indirectly require disclosure of trade-secreted information. *See* §§70-2-12(B)(1)-(22)(OCC enumerated powers providing no authority to regulate trade-secrets, much less to *require* disclosure of trade-secreted information)(emphasis added); *see also Marbob Energy Corp.,* 2009-NMSC-013, ¶ 5 ("[a]n agency may not create a regulation that exceeds its statutory authority");

51. Hydraulic fracturing fluids contain trade secreted information because the development of cutting-edge, next generation "formulas" takes both great time and expense. *See* §57-3A-2(D) (Trade Secret Act protects "formulas . . . method, technique, or process," *i.e.*, constituents in hydraulic fracturing formulas, as "trade secrets").

52. The legislature—by enacting the Trade Secrets Act—expressly recognized not only this time and effort, but also the "economic benefit" from the particularities of these fracturing "formulas" "not being generally known." §57-3A-2(D); *see also Pincheira*, 2007-NMCA-094, ¶ 34, ("strong public policy in New Mexico supporting the confidentiality of trade secrets").

53. The Commission will not go outside of its statutory authority and must decline to mandate the disclosure of trade-secreted components of hydraulic fracturing fluids. *See Marbob Energy Corp.,* 2009-NMSC-013, ¶ 5.

e. Section 74-6-15 of the Water Quality Act is both inapplicable to this rulemaking and, likewise, provides no authority for the Commission to mandate disclosure of trade-secreted components of hydraulic fracturing fluids.

54. Section 74-6-15 *only* applies when the Water Quality Control Commission ("WQCC") or a "constituent agency" is acting pursuant to the Water Quality Act and its implementing regulations. *See* NMSA 1978, §74-6-15(A)(1993)("Records, reports or information obtained by the commission or a constituent agency *pursuant to the Water Quality Act*)(emphasis added).

55. This rulemaking, Case No. 23580, does not invoke either the WQCC or the Commission's constituent agency's authority under the Water Quality Act. *See* Application, at pg. 3 (invoking Oil and Gas Act Sections 70-2-12(B)(15), 70-2-12(B)(21), and 70-2-12(B)(22) for rulemaking Application in Case No. 23580).

56. Equally important, Section 74-6-15(A) by its plain language only applies to "ambient water quality data and all effluent data;" it does <u>not</u> apply to hydraulic fracturing chemical disclosures. *See id.* (emphasis added); *see* One Black 2006 Jeep, 2012-NMCA-027, ¶ 13 (cannot read nonexistent language into statute).

57. Even assuming that Section 74-6-15 did apply to this rulemaking—which it does not—it contains no such requirement that either trade-secreted or confidential business information be divulged. *See* 74-6-15(A) ("Records, reports or information or particular parts of the records, reports or information *shall be held confidential*, if a person can demonstrate to the commission or constituent agency that the records, reports or information or particular parts of the records, reports or information, if made public, would divulge confidential business records or methods or processes entitled to protection as trade secrets").

58. To the contrary, Section 74-6-15 expressly exempts from disclosure, "confidential business records or methods or processes entitled to protection as trade secrets." *Id.*

59. The Statute, further, provides for both civil and criminal penalties in the event that an "officer, employee or authorized representative of the commission or a constituent agency" divulges the trade-secreted or confidential business information. *See* 74-6-15(C)("An officer, employee or authorized representative of the commission or a constituent agency who knowingly or willfully publishes, divulges, discloses or makes known any information that is required to be considered confidential pursuant to this section shall be fined not more than one thousand dollars ($1,000) or imprisonment of not more than one year, or both").

60. Plainly, while the OCC is a "constituent agency" of the WQCC, Section 74-6-15, is inapplicable to this rulemaking and provides no authority for the OCC to mandate disclosure of trade-secreted components of hydraulic fracturing fluids. To the contrary, Section 74-6-15, expressly requires the protection of trade-secreted or confidential business information. *See* §74-6-15.

II. Statutory Criteria for Adoption of Proposed Amendments

61. Any rule adopted or amended by the Commission pursuant to the Oil and Gas Act must (1) not be "arbitrary, capricious, or an abuse of discretion"; (2) be "supported by substantial evidence in the record"; and (3) "otherwise [be] in accordance with law." *See* NMSA 1978, §70-2-12.2(C)(1)-(3)(2015).

62. If a rule adopted by the Commission does not meet the three standards in Section 70-2-12.2(C)(1)-(3), then the Commission's adoption of the rule is improper. *See id.*

63. In addition to ensuring that the Commission adopts or amends a rule only if the rule meets the three criteria identified in Section 70-2-12.2(C)(1)-(3), the Commission is required to enact rules that are not so broad they are unconstitutionally vague. *Bokum Resources*

Corp. v. New Mexico Water Quality Control Comm'n, 1979-NMSC-090, ¶ 5, 93 N.M. 546, 603 P.2d 285 ("Bokum's most serious complaint is that the definition of "toxic pollutants" in the regulations is unconstitutionally vague. We agree.").

64. Where a rule is so broad it is vague, it is also unconstitutional and may not be adopted. *See id.*

f. WEG's Proposed Amendments banning "undisclosed chemicals" and the purported need for such mandatory disclosures is also not supported by sufficient evidence.

65. Sufficient evidence is, "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Weststar Mortg. Corp. v. Jackson,* 2003-NMSC-002, ¶ 8, 133 N.M. 114, 61 P.3d 823.

66. Current regulation requires disclosure of chemicals used in oil and gas operations in the FracFocus chemical disclosure registry. *See* 19.15.16.17.B.

67. Under this current regulation, operators may redact the concentration of or name for certain chemicals in its FracFocus disclosures if the information is protected as trade-secreted under New Mexico law. *See* 19.15.16.17.B; *see also* §57-3A-2(A)-(D)(protecting information within the definition of "trade-secret" from disclosure).

68. As discussed above, WEG proposed to (1) indirectly mandate the disclosure of trade-secreted hydraulic fracturing fluids by prohibiting the use of any "undisclosed chemicals" in oil and gas hydraulic fracturing operations and to (2) require that such chemical disclosures then also be provided to an extensive list of individuals, entities, and facilities. *See supra* VI; *see also* **[WG Ex. 1**, **at proposed 19.15.16.19.D]**.

69. The mandated disclosures to the litany of individuals, entities, public bodies, tribes, etc. that WEG proposes at its revised 19.15.16.19.D does <u>not</u> include any option

for those individuals, entities, public bodies, etc. to opt out of receiving such information. *See supra* VI; *see also* **[WG Ex. 1**, **at proposed 19.15.16.19.D]**.

70. Rather than include any option for these individuals, entities, public bodies, etc., to opt-out of receiving these *extensive* disclosures, WEG postulates that the recipients can simply "choose not to view the [chemical disclosure] lists." *See* **[WG Ex. 94, at pg. 11]**.

71. WEG submitted the rebuttal testimony of Mr. Horowitt as its evidentiary basis for its Proposed Amendments banning the use of "undisclosed chemicals" in hydraulic fracturing operations. *See* **[WG Exhibit 94, at pgs. 10-11]**.

72. According to Mr. Horowitt's testimony, full disclosure is needed to (1) assist with public transparency, including better human health and safety outcomes, and (2) ensure compliance with any ban on the use of PFAs in oil and gas hydraulic fracturing operations. *See id.*

73. But Mr. Horowitt has no technical experience in public health, nor in risk communication best practices/protocols and is, therefore, wholly unqualified to opine on potential human health risks and outcomes related to the disclosure or non-disclosure of such information. *See* **[WG Ex. 9, at pgs. 1-3]** (Mr. Horowitt's curriculum vitae identifying him as obtaining a law degree and having experience in public policy).

74. On the other hand, Dr. Anderson, who is a qualified expert toxicologist with experience in risk communication protocols testified *extensively* regarding the potential harms to human health of disclosing chemical information without any context for such information. *See supra* Findings of Fact, at ¶¶ 118-143; *see also* **[NMOGA Exhibit E, at pgs. 14-17]**; *see also* **[Nov. 15, 2024, Tr: 129: 7-25, Tr: 130: 1-15 Anderson Testimony]**.

75. Dr. Anderson further testified that disclosing chemicals in the manner WEG requires in its Proposed Amendments is *contrary* to all best risk communication practices, including those recommend by USEPA and the ITRC risk communication guidance. *See supra* Findings of Fact, at ¶¶ 136, 138 (emphasis added); *see* **[NMOGA Exhibit E29]**; *see also* **[NMOGA Exhibit E, at pg. 17]**; *see also* **[Nov. 15, 2024, Tr: 118: 12-25, Tr: 119: 1-12 Anderson Testimony]**.

76. What's more, the 2023 PSR Report that identified historical use of two PFAS —PTFE and FPEG—in oil and gas operations in New Mexico, and which Mr. Horowitt co-authored, exists because operators *disclosed* the use of PTFE and FPEG, *i.e.*, were transparent about the chemicals used in oil and gas operations. *See* Findings of Fact, at ¶¶ 22-26.

77. Accordingly, WEG admitted no competent evidence into the record regarding its claims that full disclosure of all chemicals used in hydraulic fracturing operations, and then mandatory dissemination of such information is needed for transparency and to better public health outcomes. *See* **[WG Ex. 9, at pgs. 1-3]**; *see* **[WG Exhibit 94, at pgs. 10-11]**.

78. The evidence regarding operator transparency that *has* been placed into the record demonstrates that operators have been and continue to be transparent with the chemicals used in hydraulic fracturing operations, including the historical use of PFAs. *See* Findings of Fact, at ¶¶ 24-26; *see* **[NMOGA Exhibit E29]**. Likewise, WEG provided no evidence that the FracFocus disclosures currently mandated by 19.15.16.17.B are insufficient to ensure compliance with any PFAS ban. *See* **[WG Exhibit 94, at pgs. 10-11]**.

79. Further, as found above in Findings of Fact ¶¶ 31-35, WEG proposed definition of "PFAS," one single fully fluorinated carbon atom, is *so broad* there is no standard

analytical method *in existence* that can sample for as much. *See* Findings of Fact, at ¶¶ 31-35 (emphasis added).

80. Because there is no standardized method promulgated by which to sample for single fully fluorinated PFAs, there is also no way to monitor for compliance—much less enforce any such prohibition. *See* Findings of Fact, at ¶¶ 31-35.

81. Such inability is in no way tied to the disclosure or non-disclosure of all chemicals and is, instead, the result of WEG's proposed "PFAS" definition that lacks a sufficient technical basis for adoption in this rulemaking. *See* Findings of Fact, at ¶¶ 31-35.

82. Besides that, the record in this matter belies Mr. Horowitt's assertions regarding full chemical disclosure as being the only method by which to ensure compliance with any ban. *See* **[WG Exhibit 94, at pgs. 10-11]**.

83. Full chemical disclosure is *not* currently required by the 19.15.16.17.B FracFocus disclosures and yet operators *disclosed* their (historical) use of PFAS, *i.e.*, PTFE and FPEG, in their hydraulic fracturing operations. *See* Findings of Fact, at ¶¶ 24-26.

84. WEG provided no evidence *whatsoever* that operators would continue to do anything other than be transparent about their use or non-use of PFAs. *See* **[WG Exhibit 94, at pgs. 10-11]**.

85. Thus, WEG has put no competent evidence into the record to demonstrate that full disclosure of chemicals and mandatory dissemination of the same is needed to better transparently or ensure compliance with any prohibition. *See id.* Any amendment requiring as much is not supported by sufficient evidence, is arbitrary and capricious, and, therefore, cannot lawfully be adopted. *See* §70-2-12.2(C)(1)-(3).

g. WEG's proposed definition for "PFAS" is so broad it is arbitrary, capricious, and is not otherwise in accordance with the law.

86. WEG's proposed single-fully-fluorinated-carbon- atom definition for "PFAS" is both broad and vague because it encompasses an exorbitant, indefinite number of fluorinated and PFAS compounds. *See id.*

87. WEG's definition for "PFAS" includes some number, probably around 10,000+ compounds, that even three "PFAS" experts could not quantify with any certainty. *See* **[Nov. 14, 2024, Tr: 153: 16-23 Hansen Testimony]**; *see also* **[Nov. 13, 2024, Tr: 143: 19-25, Tr: 144: 1 Sandau Testimony]**; *accord* **[Nov. 15, 2024, Tr: 87: 12-23 Anderson Testimony]**.

88. WEG's single fully fluorinated carbon atom definition encompasses substances currently used as medications that have been deemed to be safe for human use, such as Paxlovid, Lipitor, Flonase, and Prozac. *See* **[NMOGA Exhibit E, at pg. 4]** (emphasis added); *see also* **[NMOGA Rebuttal Exhibit E30.4]**

89. In addition to this unquantifiable number of compounds that would be caught-up in WEG's definition of "PFAS," and which includes medications regularly prescribed for human use, WEG provided no evidence that single fully fluorinated carbon atom PFAS are currently or have ever been used in oil and gas operations. *See* **[New Energy Economy Exhibit B]**; *see* **[New Energy Economy Exhibit KH-1 to KH-3]**.

90. The evidence WEG *did* present, through its presentation about the 2023 PSR Report, about the historical use of two PFAS—PTFE and FPEG—in oil and gas drilling demonstrates that both compounds previously used were those that contained *two* fully fluorinated carbon atoms, not *one*. *See* **[Nov. 15, 2024, Tr: 207: 6-19 Richardson Testimony]**; *see also* **[NMOGA Exhibit D4]**.

91. WEG proposed its "PFAS" definition, not because of the use of single-fluorinated carbon atom PFAS in oil and gas operations but because (1) other States who have passed "PFAS" bans in food packaging, consumer products, and firefighting foams used such definition and because (2) "any scientific uncertainty [about PFAS] must be resolved by prevention," *i.e.,* all PFAS, without regard to industry use or available toxicity data must simply be banned. *See* **[New Energy Economy Exhibit B, at pg. 9]**.

92. Moreover, there is no standardized, analytical method *in existence* that can analyze for a single -CF_3 and -CF_2- compounds. *See* **[Nov. 13, 2024, Tr: 61: 23-25, Tr: 62: 1-2 Anderson Testimony**]; **[Nov. 13, 2024, Tr: 142: 16-25, Tr: 143: 1-6 Sandau Testimony]**.

93. Without the ability to analyze for these single -CF_3 and -CF_2- compounds, including these compounds to be within the definition of "PFAS" under the Proposed Amendments would create a prohibition that would be unenforceable because the NMOCD would have no way of sampling and analyzing for such prohibited compounds. **[Nov. 13, 2024, Tr: 61: 23-25, Tr: 62: 1-2 Anderson Testimony]**; [**Nov. 13, 2024, Tr: 142: 16-25, Tr: 143: 1-6 Sandau Testimony]**.

94. Consequently, the OCD/OCC would have no method to verify or dispel whether the prohibited PFAS compound had in fact been used in oil and gas operations, which, in turn, makes the prohibition virtually unenforceable. *See id.*

95. WEG's definition of "PFAS" encompasses (1) some *unquantifiable* number of PFAS —including compounds presently utilized in medications approved for regular human use—(2) for which no standardized analytical sampling methods exist, and (3) not known or reasonably believed to be used in oil and gas operations, thereby amounting to nothing more than arbitrary, capricious, and an unconstitutionally vague, unenforceable regulation. *See Bokum*

Resources Corp., 1979-NMSC-090, ¶ 11 (Holding "[t]he term 'information' in the definition of 'toxic pollutants' is [ ] limitless. There are no tests provided in the regulation for determining the reasonableness, reliability, or scientific accuracy of the 'available" information' and voiding definition of "toxic pollutants" as being so broad it is unconstitutionally vague).

96. It follows that an unconstitutional regulation cannot be "otherwise in accordance with law" and adopting or amending such regulation would also not meet the applicable, mandatory standards in Section 70-2-12.2(C) and, therefore, cannot be adopted. *See* §70-2-12.2(C).

97. Accordingly, the OCC cannot adopt WEG's definition of "PFAS" being "a perfluoroalkyl or polyfluoroalkyl substance with at least *one* fully fluorinated carbon atom." *See* [**WG Ex. 1, at pg. 12]**.

h. NMOGA's proposed amendments, as outlined herein, comply with both Section 70-2-12.2 and constitutional standards, and should be adopted.

98. The various proposed changes to existing OCC regulations, as NMOGA has enumerated in both its Findings of Fact and its Conclusions of Law, meet the standards for adoption in §70-2-12.2 because NMOGA's suggested revisions (1) are not "arbitrary, capricious, or an abuse of discretion"; (2) "supported by substantial evidence in the record"; and (3) are "otherwise in accordance with law." *See* NMSA 1978, §70-2-12.2(C)(2015).

99. NMOGA's amendments—which also adopt various parts of the NMOCD's proposed changes—are correctly tailored to the OCC's enumerated statutory powers in Section 70-2-12(B)(1)-(22), ensuring that any amendments to the regulations are not broader than provided for in the OCC"s enumerated powers and, adoption as NMOGA proposes is, therefore, not "arbitrary, capricious, or an abuse of discretion. *See* §70-2-12(B)(1)-(22); *see also*

§70-2-12.2; *see also Marbob Energy Corp.,* 2009-NMSC-013, ¶ 5 ("[a]n agency may not create a regulation that exceeds its statutory authority").

100. Moreover, NMOGA's proposed changes are consistent with the policy goals of this rulemaking, which is to adopt science-based, enforceable regulations prohibiting the use of PFAS-containing hydraulic fracturing fluids in oil and gas operations. *See* Application, at pgs. 1-3.

101. As demonstrated in its Findings of Fact, NMOGA's proposed amendments are supported by numerous citations to the record from the pleadings, exhibits, and testimony provided during the hearing in Case No. 23580, making them "supported by substantial evidence in the record." *See supra* Findings of Fact; *see also* §70-2-12.2(C)(2).

102. Finally, in addition to meeting the first two standards for regulatory amendments identified in 70-2-12.2(C)(1)-(2), NMOGA's proposed changes also meet the constitutional standards for rulemaking, *i.e.,* its changes are "otherwise [ ] in accordance with law." *See* §70-2-12.2)(C)(3)("otherwise in accordance with law" is third statutory criteria for enactment or adoption of rule); *Bokum Resources Corp.*, 1979-NMSC-090, ¶ 5. NMOGA's amendments are correctly tailored, *actually* enforceable, and meet the policy goals of prohibiting the use of PFAS-containing hydraulic fracturing fluids in oil and gas hydraulic fracturing operations. *See supra* Findings of Fact. As such, NMOGA's proposed changes avoid any issue of being overly broad and vague, and, therefore, unconstitutional.

WHEREFORE, NMOGA respectfully requests that the Commission adopts its proposed changes as identified herein and NMOGA Exhibit A.

Respectfully submitted,

HOLLAND & HART LLP

By: 

Adam G. Rankin
Cristina A. Mulcahy
Post Office Box 2208
Santa Fe, NM 87504
505-998-4421
505-983-6043 Facsimile
mfeldewert@hollandhart.com
agrankin@hollandhart.com
camulcahy@hollandhart.com
pmvance@hollandhart.com
jbroggi@hollandhart.com

ATTORNEYS FOR THE NEW MEXICO OIL & GAS ASSOCIATION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Findings of Fact and Conclusions of Law was e-mailed to the following on February 19, 2024:

NM Oil Conservation Commission Hearings:
occ.hearings@emnrd.nm.gov

Oil Conservation Commission Clerk Sheila Apodaca:
Sheila.Apodaca@emnrd.nm.gov

Jesse Tremaine
Chris Moander
Assistant General Counsel
New Mexico Energy Minerals and
Natural Resources Department
1220 S. St. Francis Drive
Santa Fe, NM 87505
jessek.tremaine@emnrd.nm.gov
chris.moander@emnrd.nm.gov

Attorneys for New Mexico Oil Conservation Division

Daniel Rubin
Assistant Attorney General
NM Dept. of Justice
408 Galisteo St.
Santa Fe, NM 87501
505-537-4477
drubin@nmag.gov

Attorney for New Mexico Oil Conservation Commission

Tim Davis
Tim Davis
WildEarth Guardians
301 N. Guadalupe St., Ste. 201
Santa Fe, NM 87501
(205) 913-6425
tdavis@wildearthguardians.org

Attorney for WildEarth Guardians

Deana M. Bennett
Modrall Sperling
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800
deana.bennett@modrall.com

Jordan L. Kessler
125 Lincoln Avenue, Suite 213 Santa Fe, New Mexico 87501
(432) 488-6108
jordan_kessler@eogresources.com

Attorneys for EOG Resources, Inc.

Mariel Nanasi, Esq.
Executive Director
New Energy Economy
300 East Marcy St.
Santa Fe, NM 87501
(505) 469-4060
mariel@seedsbeneaththesnow.com

Attorney for New Energy Economy

Mr. Nicholas R. Maxwell
P.O. Box 1064
Hobbs, New Mexico 88241
Telephone: (575) 441-3560
inspector@sunshineaudit.com

Individually

By: 

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