

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

**IN THE MATTER OF THE APPLICATION OF THE NEW MEXICO OIL AND
GAS ASSOCIATION FOR AMENDMENT OF CERTAIN PROVISIONS OF
TITLE 19, CHAPTER 15 OF THE NEW MEXICO ADMINISTRATIVE CODE
CONCERNING PITS, BELOW GRADE TANKS, CLOSED LOOP SYSTEMS
AND OTHER ALTERNATIVE METHODS TO THE FOREGOING, AND
AMENDING OTHER RULES TO CONFORMING CHANGES STATEWIDE.**

CASE NO. 14784

CASE NO. 14785

**RESPONSE TO PETITIONERS' MOTION TO EXCLUDE WITNESSES
IDENTIFIED IN OGAP'S NOTICE OF INTENT TO PRESENT TECHNICAL
TESTIMONY**

Earthworks' Oil and Gas Accountability Project ("OGAP") hereby submits its Response to Petitioners' Motion to Exclude Witnesses in OGAP's Notice of Intent to Present Technical Testimony, filed on January 4, 2012 ("Motion"). Petitioners' Motion is meritless for two reasons and should be denied. First, OGAP's proposed testimony is clearly within the scope of the above-captioned rulemaking based on the Commission's November 15, 2012 order. Second, as a matter of fairness, OGAP should be allowed to present relevant testimony in the supplemental hearing that is necessary solely because Petitioners based their respective petitions for rulemaking on a superseded regulation.

I. OGAP'S PROPOSED TESTIMONY IS WITHIN THE SCOPE OF THE SUPPLEMENTAL HEARING.

The thrust of Petitioners' Motion is that they anticipate that OGAP's proposed expert witnesses' testimony will be beyond the scope of the supplemental hearing. The Petitioners' argument should be rejected for two reasons. First, the Petitioners' interpret the scope of the supplemental hearing too narrowly. Second, Petitioners' Motion

impermissibly attempts to apply quasi-adjudicatory evidentiary procedures to a rulemaking.

A. OGAP's Proposed Testimony is Within the Scope of the Supplemental Hearing.

Petitioners argue that OGAP's proposed testimony promises to be outside the scope of the supplemental hearing. Motion at ¶¶ 3-6. Petitioners assert that the supplemental hearing is limited to the testing methods by which pit waste concentrations are determined. *Id.* at ¶ 3. Petitioners' assertion, however, is unsupported by the record and should be rejected.

When the Commission announced that it would hold a supplemental hearing to address the problem of Petitioners' petitions being based on a superseded rule, it stated:

There was a concern about the contaminant levels on the tables.

...
The issue with the [contaminant level] tables is more serious ... There is not sufficient testimony in the record about the measurement levels to allow us to correct the problems without getting more input from the parties.

...
The Commission should have concerns about the numerical limits in the tables that are part of Section 19.15.17.13.

...
[S]ince these tables are integral to the closure and reclamation requirements in 19.15.17.13, and since that section is an essential part of the rulemaking proposal before the Commission, the Commission must require that an amended set of tables be submitted and that testimony must be taken on the amended tables before the Commission can complete deliberation on the rulemaking proposal.

November 15, 2012 Transcript ("11/15 Tr.") at 3-5. Further, the public notice of the supplemental proceeding provided that:

[T]he Oil Conservation Commission entered an oral order requiring the applicants in the above cases to submit a revised set of tables related to applicants' proposed closure and reclamation requirements. The Oil

Conservation Commission also orally ordered that testimony taken on the revised tables ...

December 3 Public Notice at 1-2. Both the November 15 transcript and the public notice clearly indicate that the Commission was concerned not only about how the contaminants in pits were measured, but also about the contaminant levels themselves. The Commission also specifically ordered the Petitioners to provide a "consistent method of reporting measurements for each value provided in the tables." 11/15 Tr. at 8:1-2.

Petitioners failed to respond to the Commission's order, and now seek to limit OGAP's participation based on their non-responsive submissions. OGAP should be allowed to present testimony not only on what appears in Petitioners' allegedly corrected petitions and tables, but also what Petitioners failed to provide and about which the Commission expressed concerns. Further, OGAP should be allowed to explain what Petitioners submissions and omissions mean with respect to protecting public health and the environment. OGAP should be allowed to present testimony what the Petitioners present and omit within the scope identified by the Commission. Petitioners' Motion should be denied.

B. This Proceeding is a Rulemaking and Adjudicatory Procedures Do Not Apply.

Petitioners' Motion is replete with language that assumes an adjudicatory process will be violated if OGAP's proposed witnesses are allowed to testify. Motion at ¶¶ 4-5. However, as has been repeatedly established, this proceeding is a rulemaking. Neither the rules of evidence nor the rules of civil procedure apply. 19.15.3.12.A.1. In a rulemaking, the Commission is required to admit relevant evidence unless it finds that the evidence is incompetent or unduly repetitious. 19.15.3.12.B.2.

In effect, Petitioners have filed a motion in limine seeking exclusion of evidence. Such an evidentiary motion has no place in a rulemaking hearing. Thus, OGAP should be allowed to present its witnesses, and the Commission may determine whether specific testimony is relevant, competent or repetitious as it deems necessary.

Moreover, Petitioners do not allege that OGAP's proposed evidence is either irrelevant or incompetent as it relates to the waste tables. Petitioners' Motion is based primarily on the assumption that OGAP's proposed testimony will be unduly repetitious. Motion at ¶ 6. The Commission should allow OGAP's witnesses to testify and make determinations as to the relevance, competency and repetitiveness based on the merits of the testimony offered.

II. PETITIONERS' PETITIONS ARE BASED ON A SUPERSEDED RULE.

It is important to recognize that the sole reason for the Commission's supplemental hearing is that Petitioners based their petitions to amend the Pit Rule on a version of the Pit Rule that has been superseded. Transcript of Commission Deliberations ("Tr.") at 3754:12-14; 3756:5-8. In other words, Petitioners seek to change a rule that effectively does not exist.

This mistake not only confuses the record in this proceeding, but parsing out which provisions have been affected by Petitioners' mistake is also exceedingly difficult and confusing. *See, generally*, Tr. Vol. 18. Because of this dramatic procedural problem, the Commission should have required the Petitioners to re-submit their petitions to amend the Pit Rule and conducted hearings on the re-submitted petitions. Nevertheless, the Commission ordered a limited supplemental hearing to address the contents of the waste tables in Petitioners' petitions. 11/15 Tr. at 6:13-15.

Petitioners complain that allowing the expert witnesses listed in OGAP's Notice of Intent to testify would be unfair. Motion at ¶ 6. However, the interests of fairness in this case dictate that all parties to this proceeding and the public be permitted broad latitude to present testimony on the proposed waste tables. The Petitioners' Motion should be denied.

Dated: January 7, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2013, I have delivered a copy of the foregoing pleading in the above-captioned case via electronic mail and/or US Mail, First Class to the following:

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