

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

**APPLICATION OF ENDURING RESOURCES,
LLC FOR APPROVAL OF THE BOBBY B UNIT,
RIO ARriba COUNTY, NEW MEXICO.**

Case No. 26365

**EPIC ENERGY, LLC'S RESPONSE IN OPPOSITION TO
ENDURING RESOURCES, LLC'S MOTION TO EXCLUDE PREHEARING
STATEMENT AND TESTIMONY OF EPIC ENERGY, LLC**

INTRODUCTION

Epic Energy, LLC ("Epic") respectfully submits this Response in Opposition to Enduring Resources, LLC's ("Enduring") Motion to Exclude Prehearing Statement and Testimony of Epic Energy, LLC (the "Mot. to Exclude"). Enduring asks the Hearing Examiner to strike Epic's entire case – its Prehearing Statement, its only witness, and all of its exhibits – on the theory that an "established framework," supposedly reflected in two prior, unopposed unit orders, confines the Division's unit-approval inquiry to "structural and geological adequacy" and places everything else beyond the Division's reach. Mot. to Exclude at 6.

That premise does not withstand scrutiny. Neither Order No. R-22081 (Greater Lybrook Unit) nor Order No. R-24088 (Alamos Canyon Unit) uses the word "framework," articulates any factors, or purports to limit what evidence the Division may consider in a unit-approval proceeding. Both were entered on unopposed, affidavit-only records where no party ever offered, or was foreclosed from offering, the kind of evidence Epic proposes to present here. And tellingly, Enduring's own "Legal Standard" section cites no rule, order, or statute that actually adopts a materiality framework of the kind it now asks the Hearing Examiner to enforce. Compare that silence to the Division's recent order in a competing compulsory-pooling proceeding, where the Commission and the Division expressly "developed several factors" that they "may consider" in

evaluating competing applications. Order No. R-24349, ¶ 12, Case No. 25610 (May 1, 2026) (attached to Epic's Emergency Motion to Continue Contested Hearing as Ex. 1).

Absent any such framework, the standard for materiality is supplied by the same statutes that give the Division authority to approve the Bobby B Unit in the first place: NMSA 1978, §§ 70-2-11 and 70-2-12. Measured against that statutory standard – whether approval will prevent waste, protect correlative rights, and avoid injury to neighboring wells – each category of evidence Enduring seeks to exclude is plainly material, none of it is repetitious in any sense Rule 19.15.4.17(A) NMAC contemplates. The Motion to Exclude should be denied in its entirety.

ARGUMENT

I. RULE 19.15.4.17(A) NMAC PERMITS EXCLUSION ONLY OF EVIDENCE THAT IS IMMATERIAL, REPETITIOUS, OR UNRELIABLE, AND ENDURING BEARS THE BURDEN OF SHOWING ITS MOTION MEETS THAT STANDARD.

19.15.4.17(A) NMAC provides that the Division Examiner “may admit relevant evidence, unless it is immaterial, repetitious or otherwise unreliable.” Admission, not exclusion, is the default; exclusion is available only on one of three specific grounds, and Enduring, as the party seeking to strike Epic's entire evidentiary presentation, bears the burden of establishing one of them. Enduring does not contend that Epic's evidence is unreliable. Its motion rests entirely on the claims that Epic's evidence is “immaterial” and “repetitious.” Neither claim withstands examination.

II. THERE IS NO “ESTABLISHED FRAMEWORK” CONFINING THE DIVISION'S UNIT-APPROVAL INQUIRY TO STRUCTURAL AND GEOLOGICAL ADEQUACY.

A. The Two Orders Enduring Cites Establish No Framework, Because No Framework Was Ever Litigated.

Enduring's entire theory rests on the premise that Order No. R-22081 (Greater Lybrook Unit) and Order No. R-24088 (Alamos Canyon Unit) establish “the Division's established

framework for evaluating unit applications,” and that because those orders do not discuss notice compliance, anti-collision analysis, or historical drilling incidents, such evidence must be categorically outside the Division’s inquiry. Mot. to Exclude at 6. But neither order uses the word “framework.” Neither order articulates factors the Division considered or excluded. Instead, both simply recite findings on an unopposed record, as “[n]o other party appeared at the hearing or otherwise opposed” Enduring’s applications. Order No. R-22081, Finding ¶ (7); Order No. R-24088, Finding ¶ (6). Those findings were entered without any adversary presenting the kind of evidence Epic proposes to present here. They cannot be “precedent” for the proposition that such evidence is immaterial, because no one ever offered it, and no one ever argued that the Division should consider it, in either proceeding.

This is the same premise that underlies the “actually litigated” requirement running throughout New Mexico’s law of preclusion. Collateral estoppel bars relitigation of an issue only when, among other things, “the ultimate fact or issue was actually litigated” in the prior proceeding. *City of Sunland Park v. Macias*, 2003-NMCA-098, ¶ 10, 134 N.M. 216; *see Adams v. Un. Steelworkers of Am.*, 1982-NMSC-014, ¶ 16, 97 N.M. 369 (collateral estoppel prevents relitigation only of issues “actually and necessarily decided in a prior suit”). An issue that no party contested (because no party appeared to contest it) is not “actually litigated,” and a determination made without contest settles nothing beyond the parties who failed to appear. If an unopposed order does not even bind the same non-appearing party under the doctrine of collateral estoppel, it certainly cannot be wielded as generally applicable “precedent” to exclude a different, actively participating party’s evidence in a later contested proceeding. Greater Lybrook and Alamos Canyon say nothing about the categories of evidence Epic proposes to present because no one ever asked the Division to consider them, not because the Division considered and rejected them.

B. When the Division Means to Adopt an Evidentiary Framework, It Says So.

The Division expressly articulates a multi-factor framework when it intends one to govern a category of proceeding. In resolving competing compulsory-pooling applications, the Division expressly states that the “Oil Conservation Commission . . . and OCD have developed several factors they ‘may consider’ in evaluating competing compulsory pooling applications,” and then lists the seven specific factors. Order No. R-24349, ¶ 12 (May 1, 2026).

No comparable framework appears anywhere in Order No. R-22081, Order No. R-24088, or any other unit-approval order Enduring cites — and Enduring’s own Motion to Exclude, tellingly, cites none. Enduring’s “Legal Standard” section relies exclusively on the general evidentiary exclusion standard of 19.15.4.17(A) NMAC; it identifies no rule, order, or statute that actually narrows the scope of a unit-approval inquiry the way Powderhorn narrows (or at least structures) a competing-pooling inquiry. Mot. to Exclude at 5. If the Division had adopted, through rule or precedent, a framework confining unit-approval review to “structural and geological adequacy” and excluding evidence of an applicant’s operational track record, Enduring (which cites case law liberally elsewhere in its motion) would surely have cited it. It did not, because no such framework exists.

C. Absent a Framework, Materiality Is Governed by NMSA 1978, §§ 70-2-11(A) and 70-2-12(B)(7).

Where no Division rule or precedent narrows the inquiry, materiality must be measured against the source of the Division’s authority to act on the Application: the New Mexico Oil and Gas Act. Enduring’s own Bobby B Unit Agreement recites, in its penultimate WHEREAS clause, that the Division has authority “to approve this agreement and the conservation provisions hereof,” citing Chapters 70 and 71 NMSA 1978. Section 70-2-11(A) empowers and obligates the Division “to prevent waste prohibited by this act and to protect correlative rights,” and “to make and enforce

rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof.” And § 70-2-12(B)(7) specifically empowers the Division to make orders “to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties.” Neither statute cabins those powers to particular proceedings, to applications for force pooling or to revoke permits, or even to a stage after unit approval. *Contra* Mot. to Exclude at 7.

That statutory standard, not the framework Enduring has invented, governs materiality here. Evidence is material to the Bobby B Unit Application if it bears on whether approving the Unit, including unitizing operations under Enduring’s operatorship, will prevent waste, protect correlative rights, and avoid injury to neighboring wells within the meaning of §§ 70-2-11(A) and 70-2-12(B)(7). That standard is considerably broader than “structural and geological adequacy,” and it plainly reaches the evidence Enduring seeks to exclude.

III. MEASURED AGAINST THAT PROPER STATUTORY STANDARD, EACH CATEGORY OF EPIC’S EVIDENCE IS MATERIAL.

A. APD Notice-Compliance History.

Epic’s evidence that Enduring failed to comply with Rules 19.15.16.15(A)(9) and 19.15.15.12(B) NMAC for the Bobby B 047H and other Bobby B wells goes directly to whether Enduring will operate wells within the proposed Unit “in such manner as to prevent injury to neighboring leases or properties,” as § 70-2-12(B)(7) requires. The Division’s notice rules exist precisely so that, if an operator recklessly ignores risks posed by the offset operators’ well or wells, offset operators like Epic can identify and address collision and injury risks before drilling begins. Evidence that Enduring is currently disregarding those rules within the very Unit the Division is being asked to approve is not a collateral permitting footnote; it is direct evidence of whether unitized operations under Enduring’s control will, in fact, protect or endanger correlative rights.

B. The Ridge Unit Incident.

The Ridge Unit incident is not a speculative hypothetical; it is direct evidence of what has already happened when Enduring drilled near Epic's wells without notice. Enduring's drilling fluid breached Epic's South Blanco Federal 22 #5 wellbore, caused a surface release of crude oil, and destroyed the well as a producing asset; Enduring's operations in the same unit also damaged or destroyed two more of Epic's wells. That is precisely the kind of "injury to neighboring leases or properties" that § 70-2-12(B)(7) authorizes the Division to guard against, and it occurred under the same notice failures Enduring is repeating in the Bobby B Unit. Evidence of an applicant's demonstrated operational history is directly probative of whether granting that same applicant unitized authority over new wells will serve or defeat the Act's waste-prevention purpose. Forward-looking relief is properly informed by backward-looking conduct, particularly where, as here, the conduct is ongoing.

C. Anti-Collision Data and Separation-Factor Analysis.

Part and parcel to approval of a unit is the reality that the operator then has authority to name – and drill – wells within the unit. The Bobby B 047H well's Anticollision Report's own separation-factor warnings for Epic's existing wells are Enduring's own contemporaneous evidence of collision risk in the very Unit at issue. That evidence bears directly on whether approving the Unit – which will facilitate the very horizontal drilling program that produced those warnings – will prevent or cause waste and injury to Epic's correlative rights. Enduring's attempt to characterize this as purely an "individual well-level permitting" matter, Mot. to Exclude at 9, ignores that the well-level risk and the unit-level approval are not severable: the entire premise of Enduring's Application is that unitization will make its horizontal drilling program more efficient.

Evidence that the program, as practiced, endangers offset wells is squarely relevant to whether that premise holds.

D. Epic's Proposed Conditions Go to the Relief the Division May Order, Not to Admissibility.

Enduring separately asks the Hearing Examiner to exclude evidence supporting Epic's proposed conditions on any approval: advance notice (as the Division's Rules already explicitly require), disclosure of collision analysis, resolution of unsafe separation factors, and coordinated monitoring. Enduring seeks exclusion on the theory that the Division has "never, in any comparable proceeding," imposed such conditions. Mot. to Exclude at 9. But the absence of a prior order granting particular relief is not a basis to exclude evidence supporting that relief; it is, at most, an argument for the merits of what relief to grant, to be resolved after the evidence is heard. And § 70-2-11(A) squarely empowers the Division to "do whatever may be reasonably necessary to carry out the purpose of th[e] act, whether or not indicated or specified in any section hereof." That power necessarily includes the authority to condition approval on terms that prevent the very waste and injury Epic's evidence documents. Whether the Division ultimately imposes any such condition is a question for the merits, not a basis to exclude the evidence before it is even heard.

IV. EPIC'S EVIDENCE IS NOT "REPETITIOUS" OF CASE NOS. 26450-62.

Enduring separately argues that Epic's evidence is "repetitious" because Epic has filed applications to revoke certain Enduring drilling permits in Case Nos. 26450-62. Mot. to Exclude at 10-11. But the two proceedings resolve different questions and afford different relief. Case Nos. 26450-62 ask whether specific, already-issued permits (and not in the Bobby B Unit) should be revoked. This proceeding asks whether the Division should approve an entirely new unit agreement governing future wells. The Division's obligation to evaluate whether approving the Bobby B Unit will prevent waste and protect correlative rights does not evaporate merely because

some of the same underlying facts – Enduring’s notice failures and the Ridge Unit incident – are also relevant to a separate revocation proceeding. Rule 19.15.4.17(A) NMAC’s “repetitious” ground for exclusion targets needless duplication of the same issue within the same proceeding; it does not authorize excluding a party’s entire case merely because overlapping facts also happen to be at issue in a separate proceeding addressing a different form of relief. Docket-management convenience does not justify excluding evidence the Division needs to evaluate the Application actually before it.

V. ENDURING’S RESERVATION-OF-JURISDICTION ARGUMENT CONFIRMS, RATHER THAN FORECLOSES, THE DIVISION’S AUTHORITY TO CONSIDER THIS EVIDENCE NOW.

Enduring argues that because both precedent orders reserve the Division’s ongoing authority to “supervise and control operations for the unit,” well-level compliance issues are “an ongoing supervisory function that continues after unit approval” and “have no place here.” Mot. to Exclude at 7 (quoting Order No. R-22081, Ordering ¶ (12); Order No. R-24088, Ordering ¶ (7)). If anything, that reservation confirms the opposite of what Enduring argues: it confirms that the Division retains, at all times, the statutory authority to address exactly the kind of operational risk Epic’s evidence documents. Nothing in that reservation clause, or in §§ 70-2-11(A) and 70-2-12(B)(7) that underlie it, limits when the Division may exercise that authority to before, rather than only after, unit approval. Enduring’s position, reduced to its essence, is that the Division should approve the Unit first and address demonstrated, ongoing safety and notice violations only after the fact. That approach inverts the waste-prevention purpose of the Oil and Gas Act rather than serves it.

VI. EXCLUDING EPIC'S PREHEARING STATEMENT AND TESTIMONY IN THEIR ENTIRETY WOULD BE AN IMPROPER, CASE-TERMINATING SANCTION.

Enduring's primary request is not that particular exhibits be excluded, but that Epic's Prehearing Statement and the testimony and exhibits of Epic's only witness be excluded "in their entirety." Mot. to Exclude, Conclusion ¶(a). Granting that relief would leave Epic with no evidence and no argument whatsoever at the hearing on Enduring's own Application: the practical and functional equivalent of a default judgment in Enduring's favor.

New Mexico courts have long held that the most severe sanctions available to a tribunal – dismissal, default, and their functional equivalents – are extraordinary remedies reserved for extreme circumstances, not tools to resolve routine merits disputes. "[T]he severest of sanctions should be reserved for extreme circumstances," and such a sanction is appropriate only where a party "demonstrates flagrant bad faith and callous disregard for its responsibilities." *Medina v. Foundation Reserve Ins. Co.*, 1994-NMSC-016, ¶ 7, 117 N.M. 163 (citing *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 239, 629 P.2d 231 (1980)). Enduring's Motion to Exclude does not allege — because it cannot — that Epic has acted in bad faith, violated any order of the Division, or engaged in any misconduct in this proceeding at all. Epic timely filed its Prehearing Statement in full compliance with 19.15.4.13(B) NMAC and the Pre-Hearing Order. Enduring's entire argument is a merits disagreement about the scope of relevant evidence, dressed up as an evidentiary objection. Seeking the functional equivalent of a default judgment as the remedy for an ordinary merits disagreement is precisely the kind of severe, case-dispositive relief New Mexico law reserves for extreme circumstances that are simply not present here.

CONCLUSION

For the foregoing reasons, Epic respectfully requests that the Hearing Examiner deny Enduring's Motion to Exclude Prehearing Statement and Testimony of Epic Energy, LLC in its entirety.

Respectfully submitted,

PEIFER, HANSON, MULLINS & BAKER, P.A.

By: /s/ Matthew M. Beck
Matthew M. Beck
P.O. Box 25245
Albuquerque, NM 87125-5245
Tel: (505) 247-4800
Fax: (505) 243-6458
Email: mbeck@peiferlaw.com

-and-

Jost Energy Law, P.C.
Jamie L. Jost
3511 Ringsby Court, Unit 103
Denver, CO 80216
Tel: (707) 446-5620
Email: jjost@jostenergylaw.com

Attorneys for Epic Energy, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record and the below parties and on the Division's law clerk at Freya.Tschantz@emnrd.nm.gov by electronic mail this 15th day of September, 2026, and filed with the Division online.

Adam G. Rankin
Paula M. Vance
A. Raylee Starnes
Holland & Hart LLP
P.O. Box 2208
Santa Fe, NM 87504-2208
(505) 988-4421
agrarkin@hollandhart.com
pmvance@hollandhart.com
arstarnes@hollandhart.com
Attorneys for Enduring Resources, LLC

Jamie L. Jost
Jost Energy Law, P.C.
jjost@jostenergylaw.com

Brandon D. Whitley
bdwhitley@gmail.com

Jesse John Whitley
JesseWhitley04@gmail.com

Aaron Dale Kent
aaronkent@stiaenergy.com

PEIFER, HANSON, MULLINS & BAKER, P.A.

/s/ Matthew M. Beck
Matthew M. Beck