

**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 MOTION TO EXCLUDE THE
TECHNICAL TESTIMONY AND EXHIBITS OF DUSTY HORWITT**

The New Mexico Oil and Gas Association (“NMOGA”) hereby moves to exclude the direct technical testimony and exhibits of Dusty Horwitt submitted on behalf of WildEarth Guardians in the above-captioned matter before the Oil Conservation Commission (“Commission”). In support of this motion, movant states as follows:

I. INTRODUCTION

Mr. Horwitt lacks the scientific, engineering, economic, or other technical expertise to testify as a technical expert in this hearing. Mr. Horwitt has a background in history, law, journalism, and public policy. He does not and never has worked as an oil and gas technical professional or as a technical expert in PFAS (Per- and polyfluoroalkyl substances) in oil and gas operations. And he has no technical expertise in PFAS or oil and gas operations through training or experience. His background and experience reflects an advocate seeking to influence public policy outcomes. As follows, his testimony should be excluded for failing to meet the technical requirements necessary to be admissible under Commission Rule 19.15.3.7(B). In the alternative,

Mr. Horwitt's testimony should be accepted as non-technical, sworn testimony under 19.15.3.11(A) NMAC.

II. LEGAL STANDARD

The admissibility of technical testimony in Commission rulemaking proceedings is governed by Rule 19.15.3.7(B) NMAC that defines technical testimony as: “[s]cientific, engineering, economic, or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.”

To qualify as technical testimony, the testimony must be provided by an individual with specialized knowledge, skill, experience, training, or education in a relevant technical field, offering expert insights beyond general observations or publicly accessible information. *See* 19.15.3.7(B) NMAC; *accord* 11-702 NMRA (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”); *see also State v. Smith*, 2024-NMCA-068, ¶13 (“‘Expert testimony’ is neither the kind of personal observation that a lay person is capable of making nor common knowledge within the general public”); *State v. Duran*, 2015-NMCA-015, ¶ 16, 343 P.3d 207 (“Information not known by the general public includes [k]nowledge contained in treatises and understood by practitioners in their particular field, as well as knowledge that is beyond personal observation and a product of . . . specialized training and experience not possessed by ‘the average person’”) (internal citations omitted).

III. ARGUMENT

Mr. Hortwitt does not possess the necessary technical expertise that is required under the Commission standard to testify as a technical witness. His testimony should be excluded from the record or, in the alternative, it should be accepted as non-technical testimony.

Mr. Horwitt is a lawyer with an undergraduate degree in history, a background in writing and journalism, and recent work experience advocating on public policy involving environmental and natural resource issues. *See* WG Ex. 9. Lawyers often possess extensive legal expertise, but they commonly lack the technical knowledge required to provide a technical expert's opinion about PFAS in oil and gas operations. Simply put, lawyers generally do not meet the necessary criteria to provide technical testimony when it comes to issues involving PFAS. Mr. Horwitt is no different.

In recent years, Mr. Horwitt has worked extensively influencing public policy and legislation addressing environmental and natural resource issues, with a recent focus on banning PFAS in oil and gas operations. As a consultant for Physicians for Social Responsibility (“PSR”), Mr. Horwitt wrote the group’s reports summarizing their review of publicly available information on the use of PFAS in oil and gas operations, including the report addressing such operations in New Mexico. *See* WG Ex. 19. Such summaries do not qualify as technical testimony. *See State v. Smith*, 2024-NMCA-068, ¶13; *Duran*, 2015-NMCA-015, ¶ 16. In those reports, he summarizes the conclusions of other technical experts who are not being offered to testify in this proceeding. *See, e.g.*, (“ . . . but scientific experts told PSR that chemicals injected into two dozen wells in the Permian Basin were PSAS . . .” (emphasis added)). But Mr. Horwitt himself has no specialized technical training, knowledge, or expertise in these fields. His testimony instead reflects an effort to summarize publicly available information, which requires no specialized skill, training, or knowledge, and to advocate for the adoption of a public policy outcome. *See, e.g.*, WG Ex. 19 at p. 27 (“Chapter 7: Policy Can Help Protect New Mexicans from PFAS in Oil & Gas Operations”). His testimony does not opine on technical issues; instead, it provides general comments advocating for adoption of a public policy. Under Rule 19.15.3.7(B) NMAC, that is non-technical testimony.

Simply stated, while his testimony touches on and relates to technical information—PFAS and oil and gas operations—it is nothing more than a summary of publicly available information. More concerning, his testimony and the report he prepared for PSR, relies on the conclusions and determinations of non-testifying “experts,” who are not available for cross-examination, regarding their determinations of what chemicals may be PFAS or precursors to PFAS. Under the Commission’s rules, this sort of testimony does not meet the threshold to be accepted as “technical” testimony, even under the Commission’s relaxed standard for rulemakings.

IV. CONCLUSION

Mr. Horwitt lacks the scientific, engineering, economic, or other technical expertise to provide technical testimony in this hearing and his technical testimony and exhibits should be excluded from the record. In the alternative, it should be accepted as non-technical testimony.

WHEREFORE, NMOGA moves the Commission for the exclusion of the direct technical testimony and exhibits of Mr. Horwitt on behalf of WildEarth Guardians from the record of this proceeding.

By:

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion in Limine was e-mailed to the following on October 21, 2024:

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