

**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**

**IN THE MATTER OF PROPOSED AMENDMENTS
TO COMMISSION RULES ON RELEASES,
SECTIONS 19.15.29.6, 19.15.29.8, and 19.15.29.15 NMAC**

**CASE NO. 21834
ORDER NO. R-21674-B**

ORDER ON PREHEARING MOTIONS

The New Mexico Oil Conservation Commission (Commission) agreed to hold a public hearing on rule changes proposed by the Oil Conservation Division ('OCD' or 'Division') and WildEarth Guardians (Guardians) to amend Sections 19.15.29.6, 19.15.29.8, and 19.15.29.15 NMAC in order to prohibit the unauthorized release of oil, gas, produced water, and other contaminants; and to clarify the Division's authority to enforce the prohibition on major and minor releases.

Notice of the hearing was timely published, and on April 22, 2021, the Commission Chair entered a procedural order, supplementing the Commission's rulemaking rules, setting out deadlines for prehearing statements and for the filing of prehearing motions.

Prehearing statements were timely filed by Petitioners Division and Guardians; the New Mexico Oil and Gas Association (NMOGA); the Independent Petroleum Association of New Mexico (IPANM); and by the Rio Grande Chapter of the Sierra Club, Amigos Bravos, Citizens Caring for the Future, the Native American Voters Alliance Education Project, and the Pueblo Action Alliance (collectively, 'Intervenors').

Intervenors' prehearing statement drew several objections and motions to exclude all or part of their proposed testimony: OCD's Motion to Strike and Exclude Testimony and Evidence on Proposed Modifications; NMOGA's Motion to Exclude Evidence and Testimony; and IPANM's

Motion to Exclude All Proposed Evidence and Testimony of Intervenors. These motions opposed testimony and evidence related to three additional regulatory requirements proposed by Intervenors in their prehearing statement, on the grounds that the new proposals were outside the scope and published notice of the rulemaking. IPANM also filed a Motion to Exclude Certain Proposed Testimony of Intervenors' witness Kayley Shoup, on the grounds that she does not appear to have the necessary professional education or experience to assert a link between cancer in any person and a specific cause. Other objections included in the motions included lack of an appropriate summary for Intervenors' witness Mr. Zupan's testimony, a lack of timely access to Intervenors' witness Mr. Gaume's data workbook, and undue length of planned Intervenors' testimony overall.

Intervenors filed a Consolidated Response in Opposition to the motions to strike or exclude their planned testimony in support of additional proposed regulatory requirements, and filed a separate response in opposition to the motion to limit Ms. Shoup's testimony. Guardians filed a Consolidated Response to the motions to exclude testimony and evidence related to proposed new requirements, primarily to address differences between state and federal rulemaking processes.

A motion hearing was held on a virtual platform on June 4, 2021, with all Commissioners and counsel for all parties present, in addition to Commission counsel, Commission and Division staff, and others. Having considered relevant law, the motions, responses, and replies, both in writing and as offered during the motion hearing, the Hearing Officer rules as follows:

1. Intervenors may present testimony and evidence in support of the petition filed by Division and Guardians.

2. The additional regulatory requirements proposed by intervenors in their prehearing statement are not properly part of this rulemaking, and no testimony or evidence in support of those proposals may be offered, either technical or non-technical.

a. The proposed new requirements are not ‘minor,’ as characterized by intervenors; they impose substantial burdens related to sampling, reporting, and notification on operators and on the Division immediately following a release, at a time when the focus of the Commission’s rules is on containment and quick notification to the Division.

b. An interested person reviewing the Commission’s public notice of this rulemaking could not have reasonably foreseen that the rulemaking hearing would include consideration of such new requirements, particularly when the existing regulatory sections on reporting and notification are not among the sections addressed by the original petition (see 19.15.29.9 and -10 NMAC), and sampling/characterization are addressed in still different sections of the existing rule (see 19.15.29.11 and -12 NMAC), neither of them contemplated by the public notice for this hearing, either.

c. Intervenors’ argument that any proposed modifications to the original petition that would “protect public health and the environment” should be considered within the scope of the rulemaking is not well taken; as OCD notes, that reference in the public notice of this hearing refers to the Commission’s legal authority, not to the scope of the rulemaking. Moreover, the case law on this topic consistently draws the lines much more narrowly.

3. This ruling is not intended to discourage intervenors from bringing their own petition to the Commission with their proposals, under 19.15.3.8 NMAC.

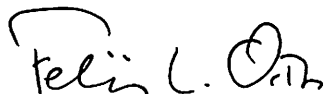
4. Intervenor's prehearing statement may not fully comply with the Commission's rules or the procedural order as to Mr. Zupan's planned testimony, depending upon what he offers at hearing, although it appears compliance was attempted. There is significant detail as to Mr. Zupan's background, and just two general sentences regarding his support for the original petition. Mr. Zupan may testify in support of the original petition as he wishes; in the event he offers surprising testimony not contemplated by the prehearing statement, any other party may lodge an objection, and the Hearing Officer will resolve the dispute at that time.

5. Intervenor's prehearing statement reflects a relatively common issue with the planned testimony of Kayley Shoup, who does not appear to have the professional expertise necessary to draw a connection between cancer in a person and any specific cause, be it oil and gas production contaminants or otherwise. She may hold this connection as a firm and sincere belief, but Intervenor's counsel should advise her on the limits of non-technical testimony, and that, to the extent any testimony is offered by a non-technical witness that would require technical qualifications, the Hearing Officer will have to interrupt with an instruction, and that testimony will have to be disregarded.

6. Intervenor's prehearing statement included the testimony of Norm Gaume, and noted that he would be relying upon data in an Excel workbook. Technical difficulties and a broken Dropbox link meant that that workbook was not available to the other parties until several days after the prehearing statements were due. Surprising technical evidence is unwelcome in a rulemaking hearing, and after discussion Intervenor's counsel agreed that Mr. Gaume could offer compelling testimony in support of the original petition even without

referring to the workbook, and that he what he is invited to do. The workbook will not be admitted into evidence.

7. Finally, Intervenor's counsel noted that with the ruling that their proposed new requirements will not be heard as part of this rulemaking, the Intervenor's presentation will not be as long as anticipated in their prehearing statement. Regardless, the Hearing Officer welcomes testimony from the Intervenor of any length, so long as it is relevant to the petition at hand, and otherwise complies with the rulings set out above.



Felicia L. Orth, Hearing Officer