

**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 IN LIMINE TO EXCLUDE
THE TECHNICAL TESTIMONY AND EXHIBITS OF DAVID BROWN**

The New Mexico Oil and Gas Association (“NMOGA”) hereby moves to exclude the direct technical testimony and exhibits of David Brown 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

David Brown’s technical testimony is focused on his conclusions and opinions regarding “the lessons we learned about oil and gas chemical exposures and the need for chemical disclosure from fracking sites” based on his experiences in Pennsylvania;¹ however, he makes no effort to establish how his experiences in Pennsylvania are applicable to the underlying factual circumstances in New Mexico. *See generally*, WG Ex. 57. Without establishing a factual nexus to New Mexico, his technical testimony is irrelevant to the proposed rule, and thereby inadmissible.

¹ Brown Testimony, WG Ex. 57 at 2:12-14.

In addition, his testimony provides general opinions about the “toxicity and health effects of exposure” to PFAS without establishing that the PFAS substances he addresses in his testimony have ever been in used in New Mexico oil and gas operations. *See* WG Ex. 57 at 15-19. The PFAS he does refer to in his testimony are not among the PFAS identified by WEG’s own witnesses as being used in New Mexico oil and gas operations. *Compare* WG Ex. 57 at 15-19 (discussing health effects of various PFAS) *to* WG Ex. 10 at 7:13-8:18 (reviewing PFAS identified in New Mexico oil and gas operations).

For these reasons, Mr. Brown’s technical testimony and exhibits should be excluded from the record as irrelevant.

II. LEGAL STANDARD

The admissibility of technical testimony in Commission rulemaking proceedings is governed by Rule 19.15.3.7(B) NMAC. It 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.” 19.15.3.7(B) NMAC. In addition to the requirements of 19.15.3.7(B) NMAC, expert testimony should also be relevant under Rule 11-402 NMRA. *See* Rule 11-402 (Evidence must be relevant to be admitted). Evidence is relevant if it is probative and “material to the particular case.” *State v. Alberico*, 1993-NMSC-047, ¶¶ 43-45, 116 N.M. 156.

Under the Commission’s regulations, the Commission “shall admit relevant evidence,” but it is not required to admit irrelevant evidence. 19.15.3.12(B)(2) NMAC. To support adoption of a regulation, the Commission must enter a final decision that is supported by “substantial evidence.” Rule 1-075 NMRA; *see also Earthworks’ Oil & Gas Accountability Project v. N.M. Oil Conservation Comm’n*, 2016-NMCA-055, ¶ 3, 374 P.3d 710 (noting that Rule 1-075 NMRA applies where the Oil and Gas Act and NMSA 1978, § 39-3-.1.1 do not provide for an appeal of

Commission rulemaking). “Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion.” *Wilcox v. N.M. Bd. of Acupuncture & Oriental Med.*, 2012-NMCA-106, ¶ 7, 288 P.3d 902 (emphasis added) (internal quotation marks omitted). Thus, only relevant evidence should be admitted to the record for consideration.

The purpose of the limine process is to prevent irrelevant and unduly prejudicial statements being made to the jury, or in this case, to the Commission. *Proper v. Mowry*, 1977-NMCA-080, ¶ 19, 568 P.2d 236 (Citing New Mexico Rules of Evidence).

III. ARGUMENT

As noticed by WildEarth Guardians, the proposed rule “is intended to prohibit the use of PFAS in order to prevent the generation of PFAS-contaminated produced water and nondomestic waste” in New Mexico. *See* WG Ex. 2 (emphasis added). In addition, the proposed rule seeks to require operators of oil and gas wells in New Mexico to provide a certification that no PFAS-containing fracturing fluids have been used in the fracturing of wells in New Mexico, and certain uses of FracFocus. *See id.*

The Commission does not have authority or jurisdiction over Pennsylvania oil and gas operations, nor does it operate under the same set of oil and gas rules or regulations as Pennsylvania administrative agencies. *See* NMSA 1978, §70-2-12 (Enumerating the Commission’s powers, which are limited to New Mexico). Mr. Brown does not provide any testimony establishing that the geology, hydrology, oil and gas operations, or other factual circumstances associated with his experiences in Pennsylvania are the same or similar to New Mexico. *See* WG Ex. 57 (Making no express or extrapolated connection to New Mexico). Accordingly, Mr. Brown’s experience with the Southwest Pennsylvania/Environmental Health Project (“Pennsylvania Health Project”) addressed in his testimony is absolutely irrelevant and prejudicial to the matters addressed in this rulemaking.

Although Mr. Brown’s testimony about his experiences and the Pennsylvania Health Project does focus on health impacts of oil and gas operations, its scope is within the context of the *Northeast and Pennsylvania*. The associated geology, regulations, and environmental characteristics of that region differ from that of New Mexico. As such, there are several reasons why the experiences and opinions related by Mr. Brown are not applicable to oil and gas operations in New Mexico.

First, the geology of oil and gas deposits vary greatly from the Pennsylvania to New Mexico, affecting things like drilling techniques, potential for spills or leaks, and associated health risks. The Marcellus Shale in Pennsylvania, for instance, has very different geological and hydrogeological traits compared to the Permian Basin in New Mexico.

Second, the regulations governing oil and gas operations often differ across states. Pennsylvania’s laws, regulatory bodies, and enforcement practices differ from those of New Mexico. These variations have a significant impact on the operation practices of oil and gas companies, and subsequently, on the extent of potential health impacts.

Third, local climate, air quality, and water sources differ between Southwest Pennsylvania and New Mexico. These varying factors influence the dispersion of pollutants, exposure patterns, and health impacts in different ways. Thus Mr. Brown’s testimony addressing his experience with Pennsylvania Health Project is irrelevant to the matters addressed in this rulemaking.

In addition, Mr. Brown testifies about the “toxicity and health effects of exposure” to PFAS without establishing that the PFAS substances he addresses have ever been in used in New Mexico oil and gas operations. *See* WG Ex. 57 at 15-19. However, because Mr. Brown has no experience with oil and gas operations in New Mexico—nor does he cite to any studies or evidence regarding the types of PFAS used or identified in oil and gas operations in New Mexico—he is unable to testify that the PFAS he testifies about have any relevance to New Mexico oil and gas operations

or this rulemaking. *See generally*, WG Ex. 57. In fact, the PFAS he does refer to in his testimony are not among the PFAS identified by WEG's own witnesses as being used in New Mexico oil and gas operations. *Compare* WG Ex. 57 at 15-19 (discussing health effects of various PFAS) *to* WG Ex. 10 at 7:13-8:18 (reviewing PFAS identified in New Mexico oil and gas operations); *see also* WG Ex. 66 at 6 (noting that an EPA report "found that chemicals used in [hydraulic fracturing] fluid varied greatly across regions, which limits external validity") (internal citation omitted). His testimony on the "toxicity and health effects of exposure" to PFAS are simply not relevant to this rulemaking.

Moreover, by admitting Mr. Brown's evidence, the Commission is at risk of being unfairly prejudiced by his experiences in Pennsylvania, which are in no way relevant nor persuasive to a New Mexico rulemaking addressing PFAS in oil and gas operations in New Mexico. It should be excluded.

IV. CONCLUSION

Mr. Brown's testimony does not address PFAS use in New Mexico oil and gas operations. Actually, his testimony fails to mention New Mexico a single time until its conclusion. His testimony centers on information generated in Pennsylvania, without any specific reference to New Mexico PFAS-related incidents or to the specific PFAS identified by WEG's own witnesses as being used in New Mexico oil and gas operations. Therefore, his testimony is not relevant to the specific issues the Commission is considering in this rulemaking proceeding and should be excluded.

WHEREFORE, NMOGA moves the Commission to exclude the direct technical testimony and exhibits of Mr. Brown from the record of this proceeding; and for other such relief as it deems just and proper.

Respectfully submitted,

HOLLAND & HART LLP

By: 

Michael H. Feldewert
Adam G. Rankin
Cristina A. Mulcahy
Paula M. Vance
Julia Broggi
Post Office Box 2208
Santa Fe, NM 87504
505-998-4421
505-983-6043 Facsimile
mfeldewert@hollandhart.com
agrarkin@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 Motion in Limine was e-mailed to the following on October 28, 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

33419377_v1