

**STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
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
23580**

CASE NO.

**WILDEARTH GUARDIANS' RESPONSE TO MAXWELL'S AND NMOGA'S
MOTIONS TO EXCLUDE TROUTMAN TESTIMONY AND EXHIBITS**

This is a rulemaking proceeding before the New Mexico Oil Conservation Commission (“Commission” or “OCC”). The Commission has promulgated regulations applicable to rulemaking proceedings at 19.15.3 NMAC, and those provisions control the admission of evidence. *See Marker v. New Mexico Oil Conservation Commission* No. A-1-CA-37860, No. A-1-CA-38814 ¶21, (N.M. Ct. App. April 19, 2021) (nonprecedential) (“The Commission’s rulemaking procedures are governed by the New Mexico Rules Act, *as well as the Commission’s own procedural rules.*”) (emphasis added).

Rulemaking proceedings have a more relaxed evidentiary standard than trial courts and administrative adjudications because rulemakings do not adjudicate individual rights. *See Earthworks Oil and Gas Accountability Project v. New Mexico Oil Conservation Commission* (“administrative action” is “regulatory when it furthers the public interest under the state’s police powers and adjudicatory when it is based on adjudicating a private right rather than implementing public policy.”). 2016-NMCA-055, ¶ 5. Rulemaking hearings are “intended to be inclusive, encouraging broad public participation.” *New Energy Economy v. Vanzi* 2012-NMSC-

005, ¶ 15. *See also Miles v. Bd. of Cnty. Comm'rs*, 1998-NMCA-118, ¶ 8, 125 N.M. 608. (“[T]he distinction between individualized fact-based deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process underlies both the distinction between legislation and judicial trial and the distinction between rulemaking and adjudication.”)

In OCC rulemakings, “The commission *shall* admit relevant evidence, unless the commission determines that the evidence is incompetent or unduly repetitious.” 19.15.3.12(B)(2) (emphasis added). In New Mexico “shall” is a command. *See Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, ¶ 53. (“The word ‘shall’ is ordinarily the language of command. And when a law uses ‘shall’, the normal inference is that it is used in its usual sense—that being mandatory.”) (internal quotations and citations omitted); *see also* NMSA 1978, § 12-2A-4(A) (1997) (“‘Shall’ and ‘must’ express a duty, obligation, requirement or condition precedent.”). Therefore, if testimony is relevant to the proposed rule, it must be admitted. The only other provision in the OCC’s rulemaking regulations that provides for the exclusion of testimony is for technical testimony that is not properly noticed. 19.15.3.12(B) NMAC. Because Ms. Troutman’s testimony is relevant and properly noticed, it must be admitted. Any arguments made by NMOGA and Mr. Maxwell (“Movants”) under the New Mexico Rules of Evidence are not applicable to this motion, because the rules of evidence do not apply to OCC rulemaking hearings. 19.15.3.12(A).

Ms. Troutman’s testimony in WG Exhibit 91 is a compilation of state-maintained data. (WG Ex. 91 Troutman Direct Bates 2929-2931). It is relevant to the proposed rule which, among other things, seeks to protect the public health and the environment from PFAS and undisclosed chemicals. As state data, it is also reliable. Ms. Troutman’s testimony is offered for the purpose

of authenticating data from the Oil Conservation Divisions' ("OCD") database that acknowledges that fluid spills can and do happen, and at times these spills affect our freshwater resources. *Id.* Fluid spills can contain these contaminants and are a potential pathway to exposure. Because this data and Ms. Troutman's testimony compiling this data are relevant to this proceeding, it must be admitted. *See* 19.15.3.12(B)(2).

The purpose of Ms. Troutman's direct testimony is to authenticate exhibits 92 and 93, which are compilations of OCD data. Because OCD maintains but does not compile this data, Guardians compiled spill information to show that produced water can and does spill on the oilfield, and OCD data recognizes that these spills can and do impact surface and groundwater.

Ms. Troutman's testimony is admissible as either technical or nontechnical testimony, and Guardians' submission of her testimony and exhibits was timely under either classification. Regardless of how Ms. Troutman's testimony is classified, the Commission should be able to consider basic spills data, because fluid spills are a potential pathway to exposure to PFAS and other oilfield chemicals. State data shows these spills can and do affect freshwater.

Movants' motions apply incorrect standards for the admission of evidence in this proceeding and cite to irrelevant authorities. Accordingly, Movants' motions to exclude this relevant testimony should be denied.

1. Ms. Troutman's testimony is relevant to this proceeding.

The standard for admission in rulemaking hearings before the Oil Conservation Commission ("OCC" or Commission") is relevance. 19.15.3.12(B)(2). Evidence is relevant if it "tends to establish a material proposition." *State v. Romero*, 1974-NMCA-015, ¶ 18, 86 N.M. 99. Ms. Troutman's testimony and the data in WG Exhibits 92 and 93 are relevant to this rulemaking hearing. The proposed rule asks the Commission to adopt a rule banning a toxic substance,

PFAS, and undisclosed chemicals, in order to protect the public health and the environment from produced water and nondomestic waste that is contaminated by PFAS and undisclosed chemicals. Data showing the frequency and volume of produced water spills and the impacts these spills can have on freshwater resources is relevant to the Commission's consideration of the proposed rule.

Movants' assertion that because Ms. Troutman's testimony does not mention PFAS it not relevant to this proceeding is incorrect. Spills are a pathway to exposure to whatever constituents may be present in in the fluid that is spilled. This is relevant to a proposed rule that would ban PFAS and require disclosure of chemicals used in downhole operations. This testimony "tends to establish a material proposition." *Romero*, 1974-NMCA-015, ¶ 18. Ms. Troutman is not required to connect all the evidentiary dots and make Guardians' whole case in her testimony. Guardians' counsel can do that in a closing statement or brief to the Commission. Ms. Troutman's testimony is just that, testimony; it is not a legal brief.

2. Ms. Troutman's testimony is admissible as technical or nontechnical testimony.

Ms. Troutman's direct testimony meets the definition of technical testimony, but that classification is not determinative of the weight it deserves. Technical testimony is "[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. Ms. Troutman's testimony falls into the "other specialized testimony" category. Ms. Troutman's testimony explains the steps she performed in order to compile spills data that is relevant to this proceeding. Contrary to the Movants' contentions, Ms. Troutman's testimony does not include "legal argument, general comments, or statements of policy or position" and she does not have to be an "expert" to provide technical testimony. *See*

generally 19.15.3 NMAC (outlining rules for OCC rulemaking proceedings and explicitly declining to apply the rules of evidence to those proceedings which include Rule 11-702 NMRA pertaining to “expert” testimony).

It is conspicuous that Movants’ motions attack Ms. Troutman’s technical qualifications and not attack the reliability of the actual testimony. The fact is fluid spills happen, and they affect freshwater resources, including groundwater on occasion. While this is obvious, and evidenced by state-held data, it should also be part of the record for the Commission to consider. That is all Ms. Troutman’s testimony does; it seeks to make these basic facts part of the record in this proceeding.

If the Commission decides that Ms. Troutman’s testimony does not meet the standard for technical testimony, it can accept her testimony as nontechnical testimony under 19.15.3.11(A). The requirements for submitting nontechnical testimony are lower than for technical testimony. Nontechnical testimony does not require filing of testimony prior to the hearing and does not require a prehearing statement. 19.15.3.11(A). Exhibits may be offered for nontechnical testimony, and the standard for admission is relevancy to the proposed rule. 19.15.3.11(A)(2).

Here, Ms. Troutman’s testimony is relevant to the proposed rule as explained above. Her exhibits are relevant to the proposed rule as well. WG Exhibits 92 and 93 are the raw data Ms. Troutman pulled in order to compile spills data that is stated in her testimony. WG Exhibit 3 is a New Mexico Environment Department acknowledgment of the amount of New Mexicans that depend on groundwater for drinking water. In a rulemaking that seeks to protect groundwater from PFAS contamination, among other aims, these exhibits are relevant.

WildEarth Guardians disclosed these exhibits to the parties and the Commission by the October 21 deadline for nontechnical testimony as required in the paragraph 4(d) of the

Amended Procedural Order. *Id.* (“Any exhibits that will be offered in conjunction with non-technical testimony must be sent via electronic mail to the Commission Clerk, Sheila Apodaca at the above email address no later than 5:00 p.m. on October 21, 2024.”)

If Guardians did not submit Ms. Troutman’s testimony under the requirements and deadline for technical testimony, Ms. Troutman’s testimony could have been attacked as technical testimony that was noncompliant with the notice requirements for technical testimony. Again, Guardians only wishes to proffer Ms. Troutman’s testimony in order to authenticate relevant, state-held spills data.

3. Movant’s citations to case law are inapplicable to this proceeding.

Last, Guardians addresses Movants’ citations to case law. Mr. Maxwell asserts *In re Louisiana Energy*, No. 28,663, (N.M. Ct. App. Jan. 11, 2010) (nonprecedential), controls this issue. It does not and is distinguishable. *Louisiana Energy* offers no assistance to the determination of this motion, because it arose out of a New Mexico Environment Department (“NMED”) permit *adjudication*, not a rulemaking hearing. *Id.* at 4 (applying rules for NMED permit hearings). The rules for NMED permit hearings are different from the rules for OCC rulemaking hearings. NMED permit hearing rules provide that “[a]t the discretion of the Hearing Officer, the rules [of civil procedure and evidence] may be used for guidance[.]” 20.1.4.100(A) NMAC.

In *Louisiana Energy*, the New Mexico Court of Appeals held that the hearing officer’s decision to exclude evidence in reliance on the rules of evidence was not an abuse of discretion. *In re Louisiana Energy*, No. 28,663, at 5. In comparison, the rules for the present proceeding only provide that “[t]he rules of civil procedure and the rules of evidence shall not apply.” 19.15.3.12(A).

While OCC's *rulemaking* regulations do not provide that the rules of evidence are a guideline, in contrast, OCC's regulations governing *adjudications* do provide that the rules of evidence are a guideline. 19.15.4.17(A) NMAC ("The rules of evidence applicable in a trial before a court without a jury shall not control, but division examiners and the commission may use such rules as guidance in conducting adjudicatory hearings.") This is consistent with the NMED permit hearing rules and Water Quality Control Commission adjudication regulations, which both provide that the rules of evidence serve as a guideline. *See* 20.1.4.100(A) and 20.1.3.8 NMAC. Contrast that standard with the regulations for WQCC rulemakings which is consistent with OCC rulemakings and provides simply that "the rules of evidence do not apply." 20.1.6.300(A). All of these provisions evidence a conscious decision to make the evidentiary standard in administrative adjudications lower than that of trial courts, and the evidentiary standard in rulemakings even lower than that of an administrative adjudication. *See also Marker* No. A-1-CA-37860, No. A-1-CA-38814 ¶ 18. (Court of Appeals rejected argument that rules for OCC adjudicatory proceedings should apply to an OCC rulemaking proceeding.)

While Mr. Maxwell's case citation is inapplicable to this proceeding, NMOGA's case citations are even further afield. NMOGA cites *State v. Smith*, 2024-NMCA-068, and *State v. Duran*, 2015-NMCA-015, to support their argument. Both cases involved the application of Rule 11-702 to expert witness testimony in criminal jury trials. This rulemaking proceeding is not a jury trial where the Rules of Evidence are needed to protect the constitutional rights of the accused. *See Miles*, 1998-NMCA-118, ¶ 8. (Distinguishing trials and administrative adjudications which involve constitutional protections like due process from legislation and rulemaking to which individual constitutional rights do not apply). This is a rulemaking hearing, which is "intended to be inclusive, encouraging broad public participation." *New Energy*

Economy v. Vanzi 2012-NMSC-005, ¶ 15. The rules of evidence explicitly do not apply to this proceeding and NMOGA's case citations are not helpful to the determination of this Motion.

If the Oil Conservation Division compiled spills data, Guardians would have submitted that data compilation as an exhibit. As far as Guardians can tell, OCD does not compile its spills data, so Guardians proffers Ms. Troutman's testimony to authenticate a compilation of this state-held data. Ms. Troutman filtered data relevant to this proceeding and merely explains how she did so in her testimony. Cases that discuss the exclusion of expert testimony in forums with different, more restrictive, evidentiary standards do not apply to Ms. Troutman's testimony.

4. **Ms. Troutman's testimony contains no advocacy bias.**

Movants also asserts that Ms. Troutman's testimony reflects advocacy bias. As explained above, Ms. Troutman's testimony contains no argument or advocacy. It is only an explanation of how she compiled relevant state data. Movants attempt to get around this fact by claiming that Ms. Troutman's testimony is biased through her professional background. However, the motion never identifies any alleged bias in Ms. Troutman's actual testimony. It is hard to understand how Movants can claim Ms. Troutman's testimony is biased simultaneously with a claim that Ms. Troutman's testimony is a straightforward filtering of data. Ms. Troutman's testimony contains an explanation of how she filtered state data, the results of that filtering, and a citation to a state agency website. It contains no advocacy statements.

Maxwell in particular argues that permitting Ms. Troutman's testimony will somehow prejudice the Commission due to this alleged advocacy bias. Oil Conservation Commissioners have specialized knowledge in the area in which they regulate. *See* NMSA 1978 § 70-2-4 ("The designees of the commissioner of public lands and the secretary of energy, minerals and natural resources shall be persons who have expertise in the regulation of petroleum production by virtue

of education or training.”) (OCD director is a member of the OCC) and § 70-2-5 (OCD director “shall” [] “by virtue of education and experience have expertise in the field of petroleum engineering.”)¹ These experts will not be prejudiced by considering state data that is relevant to this proceeding.

5. Conclusion

To accept Movants’ argument and exclude Ms. Troutman’s testimony would foreclose Guardians’ ability to offer relevant Oil Conservation Division data for consideration by the Commission. This would be an absurd result. In a proceeding that is considering a proposed rule that would ban PFAS use in downhole operations, data on the number, frequency, and volume of spills is necessary to show that produced water spills are a possible pathway to exposure to PFAS contaminated produced water and to produced water contaminated by undisclosed chemicals. In fact, the data shows state acknowledgement that spills can and do impact our freshwater resources. Furthermore, NMED acknowledges that 78 percent of New Mexicans get their drinking water from groundwater. WG Ex. 3. Whether testimony is classified as technical or nontechnical has no bearing on the weight given to testimony in rulemakings before the OCC, because the rules governing this proceeding do not assign particular weight to one type of testimony over the other. The data is relevant, offered without opinion, and its reliability is high; it is state data. Accordingly, Movants’ motion should be denied, and Ms. Troutman’s testimony should not be excluded.

WHEREFORE, WildEarth Guardians respectfully requests that the motion be denied.

¹ In fact, on appeal “[s]pecial weight will be given to the experience, technical competence and specialized knowledge of the Commission.” *Viking Petroleum, Inc. v. Oil Conservation Comm’n*, 1983-NMSC-091, ¶ 8, 100 N.M. 451.

Respectfully submitted October 4, 2024 by:

/s/ Tim Davis

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response was e-mailed to the following on October 4, 2024:

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