

STATE OF NEW MEXICO
BEFORE THE OIL CONSERVATION COMMISSION

In the matter of the proposed amendments
to NMAC §§19.15.29.6, 19.15.29.8 and
19.15.29.15 of the New Mexico Oil
Conservation Commission Rules

No. 21834

RESPONSE IN OPPOSITION TO
MOTION TO EXCLUDE TESTIMONY OF KAYLEY SHOUP
FILED BY
THE INDEPENDENT PETROLEUM ASSOCIATION
OF NEW MEXICO

Introduction

This Response in Opposition to the Motion to Exclude Testimony of Kayley Shoup submitted by the Independent Petroleum Association of New Mexico (“the IPANM”) is filed by the Rio Grande Chapter of the Sierra Club, the Pueblo Action Alliance, Citizens Caring for the Future, the Native American Voters Alliance Education Project, and Amigos Bravos (collectively “the Intervenors”).

The IPANM’s motion to exclude portions of the testimony of Kayley Shoup (the Motion”) should be denied for three reasons. First, the Oil Conservation Commission’s (“the Commission’s”) procedural Rules provide for opportunities for members of the public to express their views about proposed Rule amendments. Second, the Motion is based on an effort to read into Ms. Shoup’s testimony allegations that simply are not there. Third, the IPANM has neither alleged nor demonstrated that it will be prejudiced by admission of Ms. Shoup’s testimony or that there is not sufficient competent evidence to support the Commission’s ultimate decision.

Argument

I. The documents that govern this proceeding provide for opportunities for members of the public to express their views about proposed rule amendments.

The three principal documents that govern the procedures in this proceeding are section 19.15.3.11 of the Commission’s Rules, section 19.15.3.12 of the Commission’s Rules, and the Procedural Order dated April 22, 2021 entered by Adrienne Sandoval, the Chair of the Commission (“the Procedural Order”). Each of these documents provides for members of the public participating in proceedings conducted to address amendments to Commission Rules.

Section 19.15.3.11.A NMAC of the Commission’s Rules provides:

- A. Non-technical testimony**
 - (1) A person may testify or make an un-sworn statement at the rulemaking hearing. A person does not need to file prior notification with the commission clerk to present non-technical testimony at the hearing.
 - (2) A person may also offer exhibits with the testimony, so long as the exhibits are relevant to the proposed rule change and do not unduly repeat the testimony. A person offering exhibits shall file exhibits prior to the scheduled hearing date or submit them at the hearing.
 - (3) Members of the public who wish to present non-technical testimony should indicate their intent on a sign-in sheet at the hearing.

Similarly, the Procedural Order indicates that any person may submit relevant testimony.

It states in part:

- 4. Non-Technical Testimony**
 - a) Any person who has not submitted a Pre-Hearing Statement may present non-technical testimony at the hearing, and offer exhibits at the hearing, so long as the exhibits are relevant to the proposed rule and do not unduly repeat the testimony.

Finally, section 19.15.3.12.B NMAC, which is relied upon by the IPANM Motion, also indicates that the Commission shall admit relevant evidence. It provides:

B. Testimony and cross-examination.

(1) The commission shall take all testimony under oath or affirmation, which may be accomplished en masse or individually. However, a person may make an un-sworn position statement.

(2) The commission shall admit relevant evidence, unless the commission determines that the evidence is incompetent or unduly repetitious.

(3) A person who testifies at the hearing is subject to cross-examination by the commissioners, commission counsel or a party on the subject matter of the person's direct testimony. A person who presents technical testimony may also be cross-examined on matters related to the person's background and qualifications. The commission may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or undue repetition.

Thus the documents that govern the Commission's rule making proceedings indicate that the Commission shall provide opportunities for people to participate in rule making proceedings that the Commission conducts, and the IPANM's Motion should be evaluated in light of that policy.

II. There is no merit to the IPANM Motion's assertion that Ms. Shoup's testimony is "incompetent" evidence.

The IPANM's Motion to strike portions of Ms. Shoup's testimony is based on an effort to read into her testimony words that simply are not there. The Motion asserts that:

This proposed testimony about cancer appears to be based on Ms. Shoup's belief that produced water may be causing or contributing to incidents of cancer.

Motion, page 1, paragraph 3.

In fact, however, Ms. Shoup's proposed testimony never indicated that she believed that "produced water may be causing or contributing to incidents of cancer." The paragraph in Ms. Shoup's testimony to which the Motion refers is one of two paragraphs that explain how she became involved in her current work for Citizens Caring for the Future. The complete language of the two paragraphs is:

Ms. Shoup will provide testimony about her background and how she became involved in issues relating to the oil and gas industry. She was born & raised in Carlsbad, and is now serving as an organizer because of the destruction

in her community that she has witnessed for the past three years. The issues of produced water and oil field waste are ones that are near and dear to her heart because they have been her entry point to her current work.

Specifically, in late 2019 she began to learn about the industry that was surrounding and inundating her home. Her mother, at age 50, had just been diagnosed with Stage III ovarian cancer and before that diagnosis she had been watching a very close friend deal with a Stage IV testicular cancer diagnosis at only twenty four years old. These were the people closest to her, but since moving back to Carlsbad in 2018 she had heard of many relatively young people dealing with rare and aggressive cancers. *It got to the point where she began to suspect that their environment was harming them, and so she began the process of educating herself.*

Notice of Intent to Present Non-Technical and Technical Testimony filed by the Intervenors, pages 7-8, emphasis added.

Thus the Notice of Intent filed by the Intervenors did not assert that Ms. Shoup determined that there was a causal link or any other link between produced water and cancer in people she knew. On the contrary, the Notice of Intent indicates only that Ms. Shoup “suspected that their environment was harming them” and that lead her to begin educating herself. Nothing in the Notice of Intent implies that Ms. Shoup made a medical or scientific determination about the cause or causes of the cancers in the people she knew. There is therefore no merit to the IPANM Motion assertion that Ms. Shoup’s testimony constitutes “incompetent evidence”.

III. The IPANM Motion has neither alleged nor demonstrated that Ms. Shoup’s testimony will cause IPANM prejudice.

Finally, the New Mexico Supreme Court has indicated that the admission of incompetent evidence is not grounds for reversal of a judgment if no prejudice is shown and there is sufficient competent evidence to support the tribunal’s ruling. *Martin v Village of Hot Springs*, 1929-NMSC-090, ¶8, 34 N.M. 411, 412. Here, the IPANM Motion neither alleges nor demonstrates that IPANM will be prejudiced by the admission of Ms. Shoup’s testimony or that there is not

sufficient competent evidence to support the conclusion that the Commission reaches. For those reasons as well, the IPANM Motion should be denied.

Conclusion

The Commission's regulations governing rule making proceedings indicate that people are to be allowed to participate in those proceedings. In addition, the IPANM Motion is based on an effort to read words that are not there into the summary of Ms. Shoup's testimony provided in the Notice of Intent filed by the Intervenors. Finally, the IPANM has neither alleged nor demonstrated that it will be prejudiced by admission of Ms. Shoup's testimony or that there is not sufficient competent evidence to support the Commission's ultimate ruling.

For these reasons, the IPANM Motion should be denied.

Dated: June 1, 2021.

NEW MEXICO
ENVIRONMENTAL LAW CENTER

/s/Douglas Meiklejohn
Douglas Meiklejohn
1405 Luisa Street, Suite #5
Santa Fe, N.M. 87505
(505) 989-9022
dmeiklejohn@nmelc.org

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I certify that on June 1, 2021, copies of this Response were sent by electronic mail to:

Daniel Timmons
Attorney for WildEarth Guardians
dtimmons@wildearthguardians.org

Michael H. Feldewert
Adam G. Rankin
Kaitlyn A. Luck
Attorneys for the New Mexico Oil and
Gas Association
mfeldewert@hollandhart.com
agrankin@hollandhart.com
kaluck@hollandhart.com

Eric Ames
Jesse Tremaine
Attorneys for the Oil Conservation Division
eric.ames@state.nm.us
jessek.tremaine@state.nm.us

Andrew J. Cloutier
Attorney for the Independent Petroleum
Association of New Mexico
acloutier@hinklelawfirm.com

/s/Douglas Meiklejohn