

**STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION**

**APPLICATIONS OF GOODNIGHT
MIDSTREAM PERMIAN, LLC FOR
APPROVAL OF SALTWATER DISPOSAL
WELLS LEA COUNTY, NEW MEXICO.**

CASE NOS. 23614-23617

**APPLICATION OF GOODNIGHT MIDSTREAM
PERMIAN LLC TO AMEND ORDER NO. R-
22026/SWD-2403 TO INCREASE THE
APPROVED INJECTION RATE IN ITS ANDRE
DAWSON SWD #1,
LEA COUNTY, NEW MEXICO.**

CASE NO. 23775

**APPLICATIONS OF EMPIRE NEW MEXICO
LLC TO REVOKE INJECTION AUTHORITY,
LEA COUNTY, NEW MEXICO.**

CASE NOS. 24018-24020, 24025

**APPLICATION OF GOODNIGHT MIDSTREAM
PERMIAN, LLC FOR APPROVAL OF A
SALTWATER DISPOSAL WELL, LEA
COUNTY, NEW MEXICO.**

**DIVISION CASE NO. 24123
ORDER NO. R-22869-A**

**GOODNIGHT MIDSTREAM PERMIAN, LLC'S CONSOLIDATED RESPONSE TO
REHEARING BRIEFS**

In accordance with the New Mexico Oil Conservation Commission's ("Commission") October 17, 2025 Order (the "Rehearing Order"), Goodnight Midstream Permian, LLC ("Goodnight") respectfully submits this Consolidated Response to the various briefs filed on October 31, 2025.

INTRODUCTION

In its Order addressing the parties' request for rehearing, the Commission directs the parties to answer two discrete, narrowly tailored legal questions, while denying the parties' requests to relitigate the Commission's factual findings. Rehearing Order at 2–3. Through its Rehearing Brief,

Empire ignores these directives, attempting instead to relitigate multiple factual findings, doing so with record citations that are misleading, speculative, and do not support Empire's assertions.

Most notably, Empire relitigates the Commission's finding that Empire provided "insufficient evidence . . . to prove whether the San Andres ROZ is recoverable." Order R-24004 at 12 ("Original Order"). Indeed, its first substantive argument posits that "Empire established the San Andres ROZ is recoverable." Empire Rehearing Brief at 3. Empire has chosen this path in the face of the Commission's first question: "Does the Commission have the legal authority to 'Suspend[] existing Goodnight[] injection wells . . . in order to provide Empire with the opportunity to establish the CO2 EOR pilot project' *given that 'there was insufficient evidence presented at hearing to prove whether the ROZ is recoverable?'*" Rehearing Order ¶ 9 (alterations in original; emphasis added). The reason Empire ignores the Commission's directive is clear: Empire knows that the finding of insufficient evidence of recoverability is fatal to its efforts to suspend Goodnight's valuable SWD operations.

And up until recently, Empire agreed that proof of recoverability was required and dispositive. For example, Empire adopted the recoverability standard in its applications to revoke Goodnight's injection authority, and it also asserted that the alleged ROZ must be economic in its briefing on the scope of the Commission's hearing in this case. Empire now sprints from this position without adequately explaining why its current litigation position is correct. Empire seems to view the Commission's powers as unlimited, even though the New Mexico Supreme Court has made clear that the Commission is a creature of statute. And while the Oil & Gas Act undoubtedly grants broad powers, all powers must be in service of the statutory mandate to prevent waste and protect correlative rights. Suspension of the Goodnight SWD disposal wells does not satisfy that mandate, as explained in Goodnight's Rehearing Brief.

Ultimately, on the questions of law proffered by the Commission, there is no legal basis to suspend Goodnight's existing injection operations within the EMSU because Empire failed to meet its burden to show (among other things) that the claimed ROZ in the EMSU is recoverable. Because the Commission found that Empire did not prove recoverability, suspension of Goodnight's SWD wells is not legally valid. As explained below and in Goodnight's Rehearing Brief, to do so would be patently arbitrary and capricious and inconsistent with applicable law. As such, the Original Order should be amended to allow Goodnight to continue its existing injection within the EMSU.

RESPONSE POINTS¹

I. Empire Improperly Seeks to Relitigate the Commission's Findings.

In setting forth the scope of the Rehearing and detailing the two discrete legal questions it directs the parties to answer, the Commission expressly denied the parties' Rehearing Applications "in so far as they seek to . . . relitigate the Commission's findings of fact." Rehearing Order ¶ 8. Empire chose to ignore the Commission's order. As explained below, Empire expressly seeks to relitigate adverse fact findings and implicitly asks the Commission to make new fact findings not contained in the Original Order, all while citing evidence that is speculative and unreliable, not relied upon in the Original Order, and/or unsupportive of the factual propositions in Empire's Rehearing Brief. The Commission should decline to entertain Empire's effort to relitigate these factual issues at this late stage.

A. Empire attempts to relitigate the Commission's finding that Empire presented insufficient evidence that the alleged ROZ is recoverable.

In the Original Order, the Commission found that "there was insufficient evidence presented at the hearing to prove whether the ROZ is recoverable." Original Order at 12. Empire

¹ Where possible, Goodnight will attempt to avoid restating arguments that are contained in its Rehearing Brief and focus on particular issues raised by the other parties' rehearing briefs.

requested that the Commission rehear this finding in its Motion for Rehearing. Empire Motion for Rehearing at 9. The Commission's Rehearing Order denied that motion outright. Rehearing Order at 1. The Rehearing Order's first legal question is premised on "the Commission's finding that there was 'insufficient evidence presented at hearing to prove whether the ROZ is recoverable.'" *Id.* at 3. Yet Empire seeks to relitigate that finding despite the Commission's clear directives.

That Empire seeks to relitigate this issue cannot be disputed. Its lead argument is that "Empire proved at hearing that hydrocarbons from the ROZ are economically recoverable." Empire Rehearing Brief at 3. And its brief is littered with statements to that effect:

- "Empire proved at hearing that hydrocarbons from the ROZ are economically recoverable." *Id.* at 5.
- "[The] ROZ in the EMSU is sufficiently oil saturated to be recoverable through CO2 flooding." *Id.*
- "[A] CO2 flooding project in the EMSU should conservatively yield 15% and may be closer to 30% recovery from the ROZ." *Id.*
- "[E]mpire's economic modeling shows that a tertiary recovery project in the EMSU would be profitable." *Id.*

Empire's Rehearing Brief demonstrates why it failed to meet its burden in the first place. The brief is full of bald, speculative assertions that rely on evidence the Commission already rejected. For example, Empire cites to witness testimony concerning the Seminole and Tall Cotton fields when asserting that the alleged ROZ in the EMSU is physically recoverable. Empire Rehearing Brief at 3–4. But the Commission already declined to rely on this speculative evidence, noting in the Original Order that recovery is a "site specific" determination, and thus, the evidence presented on the Seminole and Tall Cotton fields was not persuasive. Original Order at 10. The Commission ultimately concluded that Empire had *failed* to provide sufficient evidence of recoverability, in part, because the data from recovery projects within the San Andres formation that Empire had relied on were not appropriate comparisons, Empire failed to compare oil-in-place

calculations done to oil-in-place calculations at other ROZ sites, and the “dimensionless curve” it proffered “project[ed] 18% oil recovery” that was “two standard deviations above the mean for oil recovery for a CO2 flood in a conventional reservoir.” *Id.*

Empire boldly misrepresents to the Commission that Goodnight’s witnesses believe the ROZ is recoverable. In support, it cites a convoluted series of questions where Goodnight’s expert acknowledges that hypothetically—with unspecified “changes in technology, changes in cost profile, or changes . . . in commodity price”—it is “possible” something could be economically recovered:

Q: ... Even if you’re not impressed by my client, Empire, and the work that they’ve spent millions of dollars to bring here to this Commission, there are reserves that hypothetically could not be economically recoverable at this precise moment that the State of New Mexico owns, but that through advances in technology, the changes in cost profile, or the changes in commodity price environment become economically in the future?

A: You can’t call them reserves.

Q: Okay. What would you like me to call the State of New Mexico’s oil and gas hydrocarbon molecules that are literally inside the EMSU San Andres right now?

A: You can call it an alleged resource.

Q: Okay. So the alleged resource -- so as we talk about the State of New Mexico’s people’s alleged resource, as it sits in the San Andres and even in the Grayburg right now, we can agree that changes in technology, changes in cost profile, or changes ...in commodity price can all make the -- help me with your phrase again?

A: The alleged resource.

Q: -- the alleged resource now become economically recoverable?

A: I mean, that’s possible.

Empire Rehearing Brief at 3 (citing McBeath 4/11 Tr. 186:25-188:1).²

² Empire also cites Mr. McBeath (4/23 Tr. 137:13-22) wherein Mr. McBeath did not testify that the ROZ is recoverable but, with respect to whether the ROZ can be recovered, stated it “[d]epends on if you could efficiently and effectively contact it with CO2.” As Mr. McBeath later testified, Empire underestimated by “2 to 3 times” the volume of CO2 that would be lost in the formation. McBeath 4/23 Tr. 232:15-233:5. Because CO2 is the largest operating expense for a CO2 flood, doubling or tripling the volume of CO2 required would cripple the project’s economics before even

In addition to Goodnight's witness testimony, Empire also misconstrues its own witness testimony on physical recoverability. Empire points to Mr. West's testimony that the Seminole field is "as good an analogy as we can get" for a CO2 recovery project in the EMSU. *See* Empire Rehearing Brief at 4. But "as good as we can get" is not a statement that the analogy is objectively good or reliable; it simply indicates that, among imperfect alternatives, the Seminole field is the least inadequate option.

There must be some evidence supporting a finding of economic and physical recoverability for the Commission to act to prevent waste or protect correlative rights. The Commission's final order "cannot be justified without a basis in evidence having rational probative force." *City of Albuquerque v. State Labor & Indus. Comm'n*, 1970-NMSC-037, ¶ 6, 466 P.2d 565. In sum, the Commission cannot act based on speculation alone—that would be arbitrary and capricious³—and it rightly found that Empire failed to meet its burden to demonstrate recoverability.

B. Empire seeks to relitigate the Commission's findings related to alleged communication between the Grayburg and San Andres formations.

In the Original Order, "the Commission found Empire DID NOT adduce substantial evidence that their correlative rights in the Grayburg are CURRENTLY impaired by Goodnight's injection into the San Andres." Original Order at 9. Yet Empire seeks to relitigate the Commission's findings on proof of communication between the Grayburg and San Andres formations. Empire asserts in its brief that Goodnight's injection of water "is migrating out of the disposal zone" and as such, the Commission "appropriately suspended [Goodnight's] permits." Empire Rehearing Brief at 8. In support, Empire repeatedly claims that:

addressing whether the CO2 would efficiently or effectively contact the ROZ. *See* GNM FOF 164. What Mr. McBeath actually testified to was that he has not "seen any credible or direct measurement evidence of a viable economic ROZ project." McBeath 4/11 Tr. 159:15-20.

³ NMSA 1978, § 39-3-1.1(D).

- Goodnight's injection fluid is "not confined to its injection interval and is escaping into other strata in violation of the Commission's regulations and the Oil and Gas Act." *Id.* at 3.
- Empire "demonstrated by a preponderance of the evidence that Goodnight's injection into the San Andres is migrating to the Grayburg." *Id.* at 6.
- "The wastewater Goodnight is injecting into the San Andres is migrating up through the entire San Andres and into the Grayburg." *Id.* at 18.

None of these assertions are supported by the Original Order. As noted above, the Commission found no current impairment of correlative rights by Goodnight's injection. Original Order at 9. And the Commission does not utilize the term "migration" anywhere in its Original Order. As such, Empire's attempt to recharacterize the Commission's lack-of-a-continuous-barrier and potential future communication findings as a finding of current migration is not supported by the Commission's Order. At best for Empire, the Commission found the "possibility of future impairment." *Id.* at 7–8. But as explained by Goodnight, that future possibility—without a finding of present impairment or failure to confine injection fluids—is insufficient to establish waste or impairment of correlative rights, and thus is insufficient for the Commission to order suspension. Goodnight Rehearing Brief in Chief at 16.

Nonetheless, Empire asserts that "to hold otherwise would be incongruous with the Commission and Division's prior findings that a ROZ exists in the San Andres and Grayburg, that the injection of wastewater is migrating throughout (i.e., migrating outside of the injection zone), and that continued injection of wastewater will prevent recovery of oil within the ROZ." Empire Rehearing Brief at 14. This argument, however, conflates distinct determinations by the Commission with respect to Goodnight's existing and prospective additional disposal operations. It also misstates the scope of the Commission's findings in its Order. Findings related to applications for new well permits address prospective impacts associated with increased total injection volumes, not the lawfulness or effects of existing permits at current volumes. To the

extent the Commission considered the consequences of additional injection for new permits, those assessments can be explained by the incremental increase in total injected water, not by any finding that current operations are causing migration outside the authorized injection interval.

Empire's focus on alleged migration of Goodnight's injection fluids is a red herring, conflicts with the Commission's findings, and seeks to muddy the record with issues the Commission neither reopened nor relied upon. The Commission should reject that attempt and confine its analysis to the narrow grounds at issue on rehearing.

C. Empire otherwise makes broad factual assertions about its operational ability to develop the claimed ROZ, none of which are supported by the Original Order.

Empire advances a series of broad factual assertions not supported by the Commission's findings in the Original Order nor any evidentiary citation. For instance, Empire asserts that:

- (1) The viability of the ROZ "is dependent on the cessation of wastewater disposal into the EMSU." Empire Rehearing Brief, at 2.
- (2) If Goodnight's injection is not stopped, "there will be no San Andres ROZ development. *Id.* at 3.
- (3) Absent cessation, "any chance of recovering those hydrocarbons for the benefit of the State, United States, and interest owners will be irretrievably lost." *Id.* at 3.
- (4) "It is undisputed that no person will invest in Empire's proposed tertiary project while Goodnight's injection is ongoing." *Id.* at 5–6.

Nowhere in the Original Order does the Commission make any such finding or conclusion. And Empire fails to provide any evidentiary support for these bald assertions.

For instance, Empire suggests that it is "undisputed" that no person will invest in Empire's proposed EOR project while Goodnight's injection is ongoing. In support, Empire cites testimony from its own witness, Jack Wheeler, wherein Mr. Wheeler confirms instead that Empire is not actively seeking investment for its supposed EOR project—stating Empire has been "ordered not to invest any additional money into the operations for drilling of any additional wells until the

Goodnight matter is resolved” Wheeler 4/8 Tr. 187:15-21; *see also* Empire Rehearing Brief at 5–6 (citing same). Wheeler says *nothing* about whether *third parties* are unwilling to invest in Empire’s ROZ recovery efforts but rather speaks only to Empire’s unwillingness to do so itself. And Empire failed to call any witness to testify that they would have invested in Empire but for Goodnight’s ongoing SWD operations. The truth is that “no person will invest in Empire’s proposed tertiary project” because the purported ROZ is not viable, and because Empire is in dire financial straits, did no due diligence before purchasing the assets in the EMSU, and has no actual plan for pursuing tertiary recovery.

With respect to Empire’s assertion that to perform a successful CO2 EOR project the injection of water must be monitored closely, the appropriate course is to follow the procedure outlined by the Division in its Rehearing Application Response Brief—namely that once Empire is actually ready and approved to initiate a CO2 flood, it can request a targeted, temporary suspension tailored to the operational needs of its project. *See* OCD Rehearing Application Response Brief at Exhibit A. Suspension of Goodnight’s operations years in advance of that uncertain event is not necessary as a practical matter. It also is not necessary as a legal matter, as immediate suspension of SWD operations is not needed to prevent waste or protect correlative rights where there is no evidence the ROZ can be recovered or evidence that Empire actually intends to begin drilling operations in the EMSU.

II. The Commission Did Not Have Authority To Suspend Existing Goodnight Injection.

A. The Commission’s Authority Is Not Unlimited.

Empire appears to assert that the Commission has unlimited authority to “protect oil and gas resources.” Empire Rehearing Brief at 9; *see also* OCD Rehearing Brief at 4 (“the New Mexico Legislature empowered the OCC to address the entirety of the oil and gas industry in New Mexico”). While the Commission’s authority under the Oil and Gas Act is broad, that authority is

not unbounded. Rather, it is constrained by the statutory jurisdictional requirement that the Commission may act only to prevent waste and protect correlative rights and only through a decision supported by substantial evidence.

The Supreme Court of New Mexico has made clear that, as a creature of statute, the Commission's powers are limited to the conservation of oil and gas in New Mexico by the prevention of waste and protection of correlative rights, the prevention of waste being paramount:

The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, ***but the basis of its power is founded on the duty to prevent waste and to protect correlative rights***. Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights.

Cont'l Oil Co. v. Oil Conservation Comm'n, 1962-NMSC-062, ¶ 11, 373 P.2d 809 (internal citation omitted; emphasis added); *see Sims v. Mechem*, 1963-NMSC-103, ¶ 11, 382 P.2d 183 (same).

The Commission cannot revoke an entity's injection authority simply because an operator says it wants to develop an ROZ, as Empire suggests. That would be arbitrary and capricious. Rather, there must first be a finding of waste or impairment of correlative rights based on substantial (reliable) evidence. That determination—as explained below and in Goodnight's Rehearing Brief in Chief—is dependent on a preliminary finding that the oil or gas is both physically⁴ and economically recoverable.

B. Empire Previously Agreed that Recoverability Was a Necessary Finding.

To exercise its power to prevent waste and protect correlative rights, the Commission must first find that the oil or gas at issue is both physically and economically recoverable. *See, e.g.*, Goodnight Rehearing Brief in Chief at 10–16. Without these findings, there is neither waste to prevent nor correlative rights to protect. *See, e.g., id.*

⁴ Empire refers to the idea of physical recoverability in its Rehearing Brief as “technical recoverability.”

Not long ago, even Empire agreed that recoverability is a prerequisite for the Commission to act. Whether hydrocarbons are “recoverable” is the standard Gulf Oil referenced in its application to approve its EMSU waterflood project. *See* Case No. 8398, Application of Gulf Oil Corporation for Authority to Institute a Waterflood Project for the Eunice Monument South Unit at ¶ 8. Empire initially adopted that standard in its applications to revoke Goodnight’s injection authority. For instance, Empire noted:

Revocation of the disposal authority . . . will prevent the waste of **recoverable hydrocarbons** and will protect correlative rights.

See Case No. 24018, Application of Empire New Mexico LLC to Revoke the Injection Authority Granted Under Order No. R-22026 for the Andre Dawson SWD #001 Operated by Goodnight Midstream Permian, LLC, Lea County, New Mexico at ¶ 11 (emphasis added); *accord* Case No. 24019 at ¶ 11; Case No. 24020 at ¶ 10; Case. No. 24025 at ¶ 11.

Empire also adopted the standard that the alleged ROZ must be economic—which presumes recoverability—in its briefing to the Commission on the scope of this hearing, agreeing that it is a “foundational issue,” the determination of which will “substantially resolve the disputed issues[.]”

[I]f it turns out there is not a **viable ROZ** within the San Andres – notwithstanding the overwhelming evidence to the contrary – then resolving this question would impact all of the cases. On the other hand, the existence of an **economic ROZ** would have the same impact in all cases and uniformly frame the remaining issues moving forward.

See Empire Joint Resp. in Opposition to Motions to Limit Scope of Evidentiary Hearing, at 4, filed 6/6/2024 (emphasis added).

Now, after failing to meet its burden, Empire attempts to disclaim the importance of the Commission’s factual finding *See* Empire Rehearing Brief at 2 (“Empire disagrees with the Commission’s assessment of whether Goodnight’s wastewater disposal constitutes waste and

impairs correlative rights in the present sense (it does) or whether recoverability of the ROZ is a dispositive question (it is not)”); Empire Motion for Rehearing at 7 (“Rice and Goodnight’s attempts to impose artificial constraints on the Commission’s analysis of waste, i.e., that Empire prove actual recoverability rather than impairment to recoverability, misstates the statutory definition of waste and should not be adopted by the Commission”).

C. Contrary to Empire’s views, recoverability under Section 70-2-12(B)(4) is not determined in hindsight.

Empire contends in its brief that whether a well has produced in paying quantities—and is therefore economically recoverable—is something “determined in hindsight.” Empire Rehearing Brief at 4. But neither case cited by Empire supports that proposition. Instead, these decisions stand for the proposition that when a lease agreement requires a showing of “production in paying quantities,” to avoid termination due to cessation of production, that showing is assessed retrospectively. *See Maralex Res., Inc. v. Gilbreath*, 2003-NMSC-023, ¶ 9, 134 (“To satisfy the habendum clause production must be in ‘paying quantities,’ such that the income generated from oil and gas production exceeds the operating costs.”); *Clifton v. Koontz*, 325 S.W.2d 684, 690 (1959) (noting that the lease provided by its terms that it shall continue after commencement of production as long thereafter as oil and gas is produced in paying quantities).

Here, by contrast, NMSA 1978, Section 70-2-12(B)(4) requires a showing that the reservoir is “**capable** of producing oil or gas . . . in paying quantities.” § 70-2-12(B)(4) (emphasis added). This statutory language—unlike the contractual language in *Maralex* and *Clifton*—does not require an analysis in hindsight, but rather empowers the Commission to act to prevent waste, so long as the stratum at issue is capable of producing oil or gas in paying quantities in the future.⁵

⁵ Unlike the analysis in *Maralex* and *Clifton*, which assess whether a **well or wells** produce in paying quantities, Section 70-2-12(B)(4) requires an analysis of whether a **reservoir** is capable of producing in paying quantities, which necessarily requires a forward-looking analysis in a formation where production has not yet been obtained.

Empire further misconstrues Goodnight's position by claiming that Goodnight believes the Commission can only prevent wastewater injection into a reservoir that is actively producing in paying quantities. *See* Empire Rehearing Brief at 17. Empire asserts that the Oil and Gas Act does not contain this limitation and that Goodnight's own witness disagrees with that position. *Id.* As explained above, this misstates the requirements of Section 70-2-12(B)(4), which permits the Commission to take action if there is a showing that oil or gas is "**capable**" of production in paying quantities. Empire failed to meet its burden to show the ROZ is capable of being produced in paying quantities by relying on unreliable and speculative evidence, as discussed above.

Nor does the cited witness testimony support Empire's argument. Mr. McBeath's testimony says nothing about when wastewater injection can be prevented. *See* Empire Rehearing Brief at 17 (citing 04/11 Tr. 169:16-20, 188:13-15). Rather, Mr. McBeath states that the term of art "production in paying quantities" applies to producing wells and whether they hold leases, which is a different requirement—and inquiry—from the statutory standard at issue.

D. Empire's argument concerning precise proof of a specific volume of hydrocarbons is inapposite.

Empire further claims in its brief that "New Mexico law is clear that precise proof of a specific volume of hydrocarbons is not required to establish waste." Empire Rehearing Brief at 11. Empire cites NMSA 1978, Section 70-2-17(A) and *Grace v. Oil Conservation Comm'n*, 1975-NMSC-001, ¶ 27, 531 P.2d 939 to support this assertion. But neither authority is directly applicable here. Section 70-2-17(A) addresses allocation of allowable production for operators within a pool. It states that each owner of property within a pool will have the opportunity to produce his just and equitable share of oil or gas within the pool—so far as it can be practically determined without waste—substantially "in the proportion that the quantity of the **recoverable** oil or gas . . . under such property bears to the total **recoverable** oil or gas . . . in the pool." § 70-2-12(A) (emphasis

added). It says nothing about the required finding for economic recoverability applicable here but confirms hydrocarbons *must be recoverable* for there to be waste.

Grace similarly addresses a pooling proration order, wherein one party asserted that the Commission did not have the authority to enter the order without first determining the amount of recoverable gas under each producer's tract within the pool. 1975-NMSC-001, ¶ 26. Notably, the court's holding applies to correlative rights, not waste. *Id.* It ultimately determined that the Commission was "not required as a prerequisite to the entry of a valid proration order, to first determine the amount of gas underlying each producer's tract and in the pool, in a case in which the Commission's findings demonstrate that such determinations are impracticable, and such findings are sustained by the record." *Id.* ¶ 30 (further noting that *Continental Oil* was distinguishable because the Commission had no reason for its failure to determine the amount of recoverable gas under each producer's tract or in the pool as the pool had been in production for a considerable time and it would've been practicable to determine the amounts of recoverable gas).⁶

E. Present-day failure to confine is a required showing under 19.15.26.10(E) NMAC.

Empire asserts that 19.15.26.10(E) NMAC "does not require a showing of actual, present-day 'failure to confine' before suspension. Rather, it is a permissive grant of authority to the Division and does not impose any sort of prerequisite to limit the Division's broad statutory duty under Sections 70-2-11 and 70-2-3(A) to prevent waste and protect correlative rights." Empire Rehearing Brief at 18–19. Empire is simply incorrect on this point. The rule is written in the past tense—providing authority to shut in wells that "*have exhibited* failure to confine." 19.15.26.10(E)

⁶ *Grace* does not provide a loophole for operators, like Empire, who elect not to collect data quantifying recoverable oil and gas in a pool. Instead, *Grace* allows the Commission to enter orders where the evidentiary record establishes that data "are not sufficiently reliable to practicably determine recoverable reserves." 1975-NMSC-001, ¶¶ 24, 30. The exception created in *Grace* is not applicable here, where Empire has elected not to obtain data quantifying any recoverable oil or gas. See GNM FOF 167-168.

NMAC (emphasis added). There is a “present-day” requirement, and the Commission made no finding that Goodnight wells exhibited a failure to confine. Indeed, as noted above, Empire failed to meet its burden to show that its “correlative rights in the Grayburg are CURRENTLY impaired by Goodnight’s injection into the San Andres.” Original Order at 9. If a present-day ‘failure to confine’ were not required, suspension of Goodnight’s injection would be without a factual basis, making it arbitrary and capricious under the law. *City of Albuquerque*, 1970-NMSC-037, ¶ 6; *see also* § 39-3-1.1(D).

CONCLUSION

Empire’s Rehearing Brief demonstrates the infirmity of its legal arguments. Rather than focus on the two legal questions at issue, it chose to relitigate adverse fact findings, put forth a factual narrative that is unsupported by the Original Order and the record, and repeatedly misconstrue testimony, without explaining why it flipped position on the dispositive nature of the existence of an “economic ROZ.” It does so because the finding of a lack of recoverability is fatal to its effort to suspend Goodnight’s injection. Without a finding of recoverability, there is no evidence of waste to prevent and no reliable evidence of correlative rights to protect, and thus no basis to suspend injection. For the foregoing reasons, Goodnight respectfully requests the Commission (a) amend its Original Order to remove any suspension requirement and allow Goodnight to continue its current SWD injection within the EMSU, and (b) clarify that the Division has the authority to implement the Original Order.⁷

⁷ Goodnight’s position on the second legal issue is sufficiently set forth in its Rehearing Brief in Chief.

Respectfully submitted,

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