

Valentine, Velvet, EMNRD

From: Davidson, Florene, EMNRD
Sent: Friday, January 8, 2021 4:12 PM
To: Valentine, Velvet, EMNRD
Subject: FW: [EXT] New Mexico Attorney General's Office Comments in No. 21528
Attachments: NMAGO Comments in No. 21528.pdf

Case 21528

From: William Grantham <wgrantham@nmag.gov>
Sent: Friday, January 8, 2021 3:26 PM
To: Davidson, Florene, EMNRD <florene.davidson@state.nm.us>
Cc: Khoury, Cholla <ckhoury@nmag.gov>
Subject: [EXT] New Mexico Attorney General's Office Comments in No. 21528

Dear Ms. Davidson,

Please accept the attached comments of the New Mexico Attorney General's Office in the proceeding on proposed rules to regulate the venting and flaring of natural gas from oil and natural gas production and gathering facilities.

Thank you.



William Grantham

Assistant Attorney General – Consumer & Environmental Protection

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STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

January 8, 2021

New Mexico Oil Conservation Commission
c/o OCC Clerk, Florene Davidson,
2nd Floor, Wendell Chino Building
1220 South St. Francis Drive
Santa Fe, New Mexico, 87505
Submitted Via email to:
florene.davidson@state.nm.us

Re: Comments in OCC Rulemaking Case No. 21528

Dear Commissioners,

The New Mexico Office of the Attorney General appreciates the opportunity to provide these comments on the proposed rules to regulate the venting and flaring of natural gas from oil and natural gas production and gathering facilities.

As you well know, New Mexico is among the largest producers of oil and gas in the nation. The production of crude oil in the state has more than doubled since 2013, making New Mexico the third largest producer of oil among states. The state also ranks in the top ten for natural gas production. The industry is thus of great economic importance to the state – in recent years revenue from royalties and other payments related to oil and gas has approached 40% of New Mexico's general fund. And, despite the changed economic circumstances brought about by the Covid-19 pandemic, production in the Permian basin of New Mexico and West Texas is expected to continue growing.

Due to the economic importance and large environmental footprint of the oil and gas industry in the state, it is imperative that the Oil Conservation Commission fulfil its statutory duties to prevent waste, protect correlative rights, and protect public health and the environment. The Attorney General's Office commends the Oil Conservation Division for the thorough and deliberate process it has followed to develop the proposed rule, with meaningful opportunities for input from all stakeholders and affected entities.

Although this office is not a party to the proceedings and is not taking positions on specific provisions of the proposed rule, we write to provide comments related to recent litigation involving analogous federal regulations in which the Attorney General is a party. Specifically, we have pursued cases in federal district courts in Wyoming and California in defense of the U.S. Bureau of Land Management's 2016

Waste Prevention Rule, and in opposition to efforts to delay, suspend, and rescind that rule. We are aware that the District of Wyoming's recent vacatur of the 2016 rule (*Wyoming v. Dept. of Interior*, 2020 WL 7641067) has been cited in your proceeding as authority for a narrow definition of "waste," centered on the economic interests of the operator. See, e.g., New Mexico Oil and Gas Association pre-hearing statement at pp. 8-9. The Wyoming decision should not be relied on as persuasive authority for several reasons.

First, we believe the case was wrongly decided and have appealed it to the 10th Circuit Court of Appeals. A decision in that case will likely not be handed down until after your rulemaking process has concluded. Second, the U.S. District Court for the Northern District of California recently reached contrary conclusions on the same statutory provisions in its decision vacating BLM's 2018 attempt to rescind the Waste Prevention Rule. *California v. Bernhardt*, 472 F.Supp.3d 573 (N.D. Cal. 2020). (This case is also under appeal, in the 9th Circuit). Specifically, the court found that under the federal Mineral Leasing Act, "BLM has a duty to prevent undue waste and protect the interests of the United States and safeguard the public welfare." *Id.* at 596 (internal quotations omitted). The court also looked to the provisions of other applicable federal statutes, including requirements in the Federal Land Policy and Management Act to protect environmental, air, and atmospheric values, and requirements under the Federal Oil and Gas Royalty Management Act of 1982 to impose royalties on oil or gas lost as a result failure to comply with any rule or regulation issued under the mineral leasing laws. *Id.* In light of these provisions and in contrast to the Wyoming decision, the *California* court held that:

"The statutory language demonstrates on its face that any consideration of waste management limited to the economics of individual well-operators would ignore express statutory mandates concerning BLM's public welfare obligations." *Id.*

The *California* court also found that the legislative history of the Mineral Leasing Act "corroborates a broad statutory approach, contradicting BLM's attempt to limit the definition of waste to one related solely to the economics of operators," and rejected the argument that the Act incorporated the prudent operator standard into the definition of prevention of undue waste. *Id.* at 596-597.

Although neither of these cases is directly controlling as to interpretation of New Mexico statutes, we believe the decision in *California v. Bernhardt* is based on a more thorough and well-reasoned examination of both the federal Mineral Leasing Act and other federal statutes. At a minimum, the existence of conflicting decisions from different federal districts weighs against giving undue deference to the Wyoming court's decision.

Thank you for your consideration of these comments and your service to the State of New Mexico in conducting these needed rule-making proceedings.

Sincerely,

/s/ Cholla Khoury

Cholla Khoury
Assistant Attorney General
Director, Consumer and Environmental Protection