

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

**CASE NO. 14948**

**APPLICATION OF LOS LOBOS RENEWABLE POWER, LLC (FORMS G-112) FOR APPROVAL TO INJECT INTO A GEOTHERMAL AQUIFER THROUGH TWO PROPOSED GEOTHERMAL INJECTION WELLS AT THE SITE OF THE PROPOSED LIGHTNING DOCK GEOTHERMAL POWER PLANT, HIDALGO COUNTY, NEW MEXICO.**

**INTERVENOR OIL CONSERVATION DIVISION'S  
PRE-HEARING BRIEF**

Intevenor files this brief to advise the Examiners of its position concerning certain issues that have been raised in correspondence filed by the parties, and may become issues at the hearing.

**First, is this hearing really necessary?**

Yes. A hearing is necessary in this case.

Applicant filed two applications on Form G-112 with the Oil Conservation Division to inject fluids into a geothermal reservoir. Those applications are governed by 19.14.93.8 NMAC. Subsection B of that section requires notice of the filing of an application "to all geothermal lease owners, if any there be, within one-half mile radius of the proposed injection/disposal well." Subsection C. of the same rule provides as follows:

If no objection is received within 20 days from the date of receipt of the application, and the division director is satisfied that all of the above requirements have been complied with, that the proposal is in the interest of conservation and will prevent waste and protect correlative rights, and that the well is cased, cemented, and equipped in such a manner that there will be no danger to any natural resource, including geothermal resources, useable underground water supplies, and surface resources, form G-112 will be approved. In the event the form is not approved because of objection from an affected geothermal lease

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owner or for other reason, the application will be set for public hearing, if the applicant so requests. [emphasis added]

It is clear from the above quoted language that the Division Director has discretion to approve a form G-112 pursuant to the first sentence of Subsection C only if no objection is received within 20 days. In this case objections were timely filed to each of the G-112s. Therefore the G-112s cannot be approved pursuant to the first sentence. The only other way the rule authorizes approval of G-112s is pursuant to the last sentence of the Subsection, which requires a hearing.

This reading of 19.14.93.12.C makes sense in the light of NMSA 1978 Section 71-5-17, a provision of the Geothermal Resources Conservation Act, which requires that except in an emergency, no order may be issued under the Act except after a hearing. Section 71-5-17 is virtually identical in terms to a provision of the Oil and Gas Act imposing the same requirement, NMSA 1978 Section 70-2-23. Neither provision has ever been construed by any court. However, the question whether granting of an injection permit requires an “order” has been expressly addressed by the Oil Conservation Commission in applying the Oil and Gas Act. 19.15.26.8.A NMAC, which governs applications for injection permits under that Act states: “[a]n operator shall not inject . . . except pursuant to a permit the division has granted after notice and hearing, or that the division has granted by administrative order. . . . [emphasis added]” 19.15.26.8.D states that “[i]f a written objection is filed . . . the division shall set the application for hearing.” [emphasis added].

Of course, 19.15.26.8 NMAC does not apply to geothermal applications. But it does demonstrate that the Commission has determined by rule that its authority to issue injection permits is an authority that requires an order. An order, under either the Oil and Gas Act or the Geothermal Resources Conservation Act, requires a hearing unless all affected parties have

waived that right by failing to protest after receiving and appropriate notice. Although the language is arguably less artful, 19.14.93.12 establishes exactly the same requirement for geothermal injection applications as 19.15.26.8 does for oil and gas injection applications, and for the same reason – to comply with express statutory directives.

**Second, do the notice provisions of the regulations adopted by the Water Quality Control Commission under the Water Quality Act apply in this case.**

No, they do not.

The Water Quality Act is quite explicit. NMSA 1978 Section 74-6-12.G states:

G. The Water Quality Act does not apply to any activity or condition subject to the authority of the oil conservation commission pursuant to provisions of the Oil and Gas Act [Chapter 70, Article 2 NMSA 1978], Section 70-2-12 NMSA 1978 and other laws conferring power on the oil conservation commission to prevent or abate water pollution.

NMSA 71-5-8, a provision of the Geothermal Resources Conservation Act, provides:

Included in the power given to the division is the authority . . . :

M. to regulate the disposition of geothermal resources or the residue thereof, and to direct the surface or subsurface disposal of such in a manner that will afford reasonable protection against contamination of all fresh waters and waters of present or probable future value for domestic, commercial, agricultural or stock purposes, and will afford reasonable protection to human life and health and to the environment . . . .

Clearly, the Geothermal Resources Conservation Act is an “other law conferring power on the oil conservation commission to prevent or abate water pollution,” and the licensing of a geothermal injection well under the Commission’s Rule 19.14.83.12 is an “activity or condition subject to the authority of the oil conservation commission pursuant to the provisions of the “other law.”

Thus, the Water Quality Act, and the rules made in pursuance thereof “do not apply.”

This very clear limitation on the applicability of the Water Quality Act procedures is undoubtedly somewhat confused by an implementing rule of the Water Quality Control Commission. Section 20.6.2.3105 of the WQCC Rules reads, in pertinent part, as follows:

**EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT**

Sections 20.6.2.3104 [the section requiring a discharge permit] and 20.6.2.3106 NMAC [the section describing the procedure for a discharge permit application] do not apply to the following:

M. Effluent or leachate discharges which are regulated by the Oil Conservation Commission and the regulation of which by the Water Quality Control Commission would interfere with the exclusive authority granted under Section 70-2-12 NMSA 1978 or under other laws to the Oil Conservation Commission.

This rule is confusing because it refers to the “exclusive authority” conferred on the Oil Conservation Commission notwithstanding that the statutes conferring authority on the OCC do not describe any authority granted as “exclusive,” and raises the question what exercise of what would “interfere” with that authority. These difficulties should not detain us, however, because they refer to concepts contained in an earlier version of the Water Quality Act – NMSA 74-6-12.G. The earlier version of NMSA 74-6-12.G read:

The Water Quality Act does not permit the adoption of regulations or other action by the commission or other constituent agency which would interfere with the exclusive authority of the oil conservation commission over all persons and things necessary to prevent water pollution as a result of oil and gas operations through the exercise of the powers granted to the oil conservation commission under Section 65-3-11 NMSA and other laws. [NMSA 1953 75-39-11.G, as adopted by Laws 1973, Ch. 326, Section 1]

That statute was amended in 1993 to substitute the present language which refers neither to “exclusive authority conferred” on OCC, nor to “interference”, but instead specifies simply that the Water Quality Act, which “does not apply.” Note also that the 1973 statute limits the exclusion from the Water Quality Act to “oil and gas operations,” whereas the present version excludes “any activity or condition subject to the authority of

the oil conservation commission,” clearly including geothermal. That difference is understandable since the Geothermal Resources Conservation Act was not enacted until 1975.

In the oil and gas arena the applicability of the Water Quality Act to OCD proceedings is confused by NMSA 70-2-12.B (22) which specifically authorizes the OCC to apply the Water Quality Act in certain contexts, presumably thereby trumping the more general provision of NMSA 74.6.12.G. However, there is no provision in the Geothermal Resources Conservation Act comparable to NMSA 70-2-12.B(22).

### **Conclusion**

This hearing is a necessary procedure under the Geothermal Resources conservation Act, and is not governed by the discharge permits rules adopted under the Water Quality Act.

Respectfully Submitted

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Division