

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

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**IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION DIVISION FOR
THE PURPOSE OF CONSIDERING**

**OWL SWD OPERATING, LLC APPLICATION FOR
AUTHORIZATION TO INJECT**

Case No. 15723

RESPONSE BRIEF OF THE CITY OF JAL, NEW MEXICO

This response brief is submitted by the City of Jal, New Mexico (“City” or “Jal”) as directed by the Oil Conservation Division (“OCD”) following the hearing on August 1, 2 and 4, 2017 (“the hearing”) on the Application of OWL SWD Operating, LLC (“OWL”) for authorization to inject.

I. INTRODUCTION TO RESPONSE

OWL has purposefully and intentionally failed to lay out its position in their post trial brief and thereby subject it to review and response by the parties who appear in opposition to the application. The obvious intent of the briefing schedule was to have two (2) rounds of briefing, with the first devoted to laying out a party’s position. The second round was to offer the parties the opportunity to respond to the legal and factual positions taken by the other parties. There never has been a significant dispute as to the law to be applied. This application turns on how the facts of this case, which were presented over three (3) full days of hearing time, apply to that law.

The Applicant’s so called opening legal brief does nothing more than identify the relevant law. It fails to discuss the facts at all and offers no insight to how OWL contends it met its burden of proof when considering how those facts apply to the law in this case. As OWL itself notes in the second paragraph of its brief:

“... this legal brief discusses the statutory and rule requirements, but does not address the specific facts of this case based upon the application and the testimony and does not present argument based on the application of the evidence to the law. OWL reserves those arguments for its filings due on September 22.”

In other words, OWL just gamed the briefing schedule to deprive the other parties the opportunity to present any argument responsive to the legal or factual contentions which OWL will make. This gives OWL not only the unilateral ability to respond to the arguments of the intervenors, it also gives the Applicant the ability to make whatever factual contentions it chooses without the other parties having the opportunity to present contrary facts. Furthermore, if OWL takes facts out of context or presents inaccurate facts, the Intervenors are deprived of the capability of placing into proper context facts or testimony or correct the records.

Every other party in its post hearing brief discussed the interplay of the facts which were presented at the hearing to the law in this case. There is nothing in the record which directs the parties to limit their initial briefs to just the applicable law, and the record is clear the second round of briefing was designed to offer opportunities to report. For example, the OCD's Post Hearing Brief went into significant detail in its discussion of the factual issues and how those facts apply to the law. That is the same with the State Land Office's brief. The only party who did not present its position was OWL. This was a blatant effort by OWL to approach the briefing in a way that created an advantage by avoiding having its positions subjected to responsive briefing. That bodes well for how OWL will treat its regulatory obligations. Here, the NMOCD has a voluntary compliance regulatory structure for the oil and gas industry, including the regulation of injection wells such as at issue in this application. As noted, the purpose of two (2) rounds of briefing was to allow the parties the opportunity to refute positions taken by the other parties. OWL was able to circumvent that purpose because it cleverly structured its brief so that none of its arguments

were revealed. If OWL will be clever in an effort to undermine the purpose of the briefing, should it not be logical to assume it will likewise apply that same level of creativity in frustrating the purpose of industry regulation when it is to OWL's advantage to do so. When so much of regulatory compliance is based on the integrity of the operator involved, it is clear the willingness of the operator to behave in a fair and reasonable manner is critical.

At the very least, the factual arguments presented by OWL in the September 22 or second round of briefing should be viewed skeptically. Because of the manner in which OWL is presenting its argument, its claims as to the facts will not be subject to the same review as those positions taken by all of the other parties. Any dispute as between the factual positions should be weighed against the Applicant instead of in its favor. Perhaps this gambit should be seen for what it is; an attempt by an OWL to meet its burden for its application when the facts presented do not make the case because all have either been refuted or discounted once they are considered in proper context. As noted previously, OWL has failed to satisfy its factual requirements to have its application granted and irrespective of its gamesmanship, OWL's Application should be denied.

II. DISCUSSION

As noted, OWL does nothing other than identify the relevant legal framework for consideration of its application. Consequently, there is nothing substantive to which intervenors can respond. There is not much dispute as to the relevant statutory and regulatory law. All the parties agree the statutes and regulations are designed to prevent waste and the drowning by water of any strata capsule of producing oil and gas. This includes Applicant and the authority cited in its brief. See § 70-2-3(A) and 70-2-12(B)(9) NMSA 1978. Additionally, the parties agree the statutes and regulations are designed to prevent contamination of usable water supplies. The

evidence is clear this application seeks authority for a disposal well that fails on both counts as it harms production in the Yates formation and it endangers water resources.

The Application by its own terms seeks to inject produced in excess of twenty thousand (20,000) barrels each day into the Yates formation. The testimony by OWL is that it anticipates doing this over the next twenty (20) years. There is no dispute that the Yates is a producing formation as same is recognized by the OCD. There is even production from that zone within a mile of this proposed well. The evidence presented by the Division at the hearing demonstrates this injection harms the formation as it shows a correlation between injections of produced water into the Maralo Sholes B # 2 well¹ and increased water production in producing wells nearby. (Division Exhibit 5) Obviously, there exist issues which are created by allowing this much water into an existing producing formation. OWL claims it does not matter and that it modelled it out. Unfortunately, it only modeled it out for ten (10) years, not the entire twenty (20) and its modeling fails to capture the verifiable fact this injection well pushes more water into the formation at the expense of existing production. This injection of produced water is not part of the waterflood project and there is no evidence which indicates the injection of the water will not harm the ability to produce these minerals. The burden is on applicant and OWL as the application fails to meet that threshold.

Similarly, the Application must be denied because OWL has failed to prove its proposed injection well will not be harmful to aquifers. The various studies and other evidence presented shows the Capitan Reef Aquifer underlies the Yates formation. The evidence presented shows the Capitan Reef Aquifer is used as a source of drinking water for Carlsbad and communities in Texas. The evidence also shows its quality of Capitan Reef water is highly variable. Studies by Hiss and

¹ The Applicant has acknowledged this application is for an injection well to replace the Maralo Sholes B #2 well which is subject to a compliance action pending before the division.

others revealed not only this variability in water quality they also noted there exists communication between the Yates formation and the Capitan Reef Aquifer. OWL contends otherwise though it fails to demonstrate why this communication should be ignored. In fact, the NMOCD has noted this communication in other prior applications to inject.

If the policy is to protect groundwater from being contaminated by produced water, then this Applicant must be denied. It is not as if there are no other viable options concerning disposal. None of the intervenors would object if OWL wanted to inject it into a formation below the Capitan Reef Aquifer. That is the solution here. OWL can simply drill deeper and inject into a formation which (1) is not a producing formation and (2) does not overlie and communicate with a viable aquifer.

III. CONCLUSION

OWL played fast and loose with the briefing. Even so it has failed to meet its burden of proof. Its application should be denied because it negatively impacts correlative rights and will be harmful to sources of water.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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