

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

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IN THE MATTER OF THE APPLICATION  
OF WILLIAMS PRODUCTION CO., LLC FOR  
APPROVAL OF A CLOSED LOOP SYSTEM FOR  
THE ROSA SWD WELL NO. 2 AND FOR IN-PLACE  
BURIAL OF DRILLING WASTES AT ANOTHER  
WELL LOCATION, RIO ARRIBA COUNTY, NEW MEXICO

CASE NO. 14521

PRE-HEARING BRIEF  
SUBMITTED BY THE OIL CONSERVATION DIVISION

The Oil Conservation Division (OCD) submits this pre-hearing brief to address the central legal issue in Case 14521: can Williams Production Co., LLC (Williams) obtain administrative approval under the on-site closure provisions of 19.15.17 NMAC (Part 17) to construct an off-site pit for the permanent disposal of drill cuttings and sludge generated by a closed-loop system?

The answer is no.

Part 17's on-site closure provisions do not provide for disposal of waste at a location away from the site where the waste was generated. Because Williams' application seeks approval for a closure method that is not provided for in Part 17, the application cannot be approved administratively. For Williams' application to be considered under Part 17, Williams must follow the procedure set out in 19.15.17.15 NMAC for obtaining approval of an "alternative closure method," or for seeking exceptions to specific Part 17 provisions.

Whether Williams' proposal for an off-site disposal pit could be approved as an "alternative closure method" or exception under Part 17 is not before the Oil Conservation Commission for decision because Williams did not follow the required procedure. However, as

discussed below, the OCD believes that Williams' proposal is so far outside the scope of Part 17 that it could not be approved under Part 17 as an exception or alternative closure method. Instead, off-site disposal pits should be addressed under Part 36, the Surface Waste Management Facilities Rule. 19.15.36 NMAC.

### **Background**

Williams' June 18, 2010 C-144 permit application<sup>1</sup> (Application) seeks administrative approval for a closed-loop system for the Rosa SWD Well #2 (the SWD well) and approval for a disposal pit to be constructed at a location miles away adjacent to another Williams well, the Rosa 634B (the 634B). According to the Application, the pit at the 634B will be used exclusively to dispose of drill cuttings and sludge generated by the SWD well's closed-loop system.<sup>2</sup> The Application characterizes this as a proposal for "on-site" closure.

Part 17's closure provisions set out three categories of closure methods: 1) waste removal and disposal at an OCD-approved facility; 2) "on-site closure;" and 3) "alternative closure methods." Any proposal that cannot be approved as a waste removal and disposal method or an on-site closure under Part 17 is an "alternative closure method." To obtain approval of an "alternative closure method" the operator must follow the procedure set out for obtaining an exception. That procedure includes filing an application with the OCD's environmental bureau (which may choose to impose conditions); demonstrating that the proposed alternative method

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<sup>1</sup> Williams has filed multiple applications for approval of an off-site disposal pit for the Rosa SWD Well #2. All references to the "Application" refer to the June 18, 2010 application that is the subject of Case 14521.

<sup>2</sup> The location given in the Application for the proposed disposal pit is already being used for a drilling pit permitted for the 634B, which Williams plans to close using in-place burial. When Williams' counsel was asked during a pre-hearing conference to clarify whether the pits for the SWD well and the 634B well would be separate or combined, she responded with an e-mail stating that the pits would be co-located or shared, and that Williams did not believe it had to modify its existing permit for the 634B to reflect this (or, apparently, indicate in its Application for the SWD disposal pit that the pit would also be used for drilling waste from the 634B). As stated above, however, the Application before the Commission for review seeks approval of a pit to be constructed solely for the purpose of disposing of waste generated at the SWD well.

protects fresh water, public health and the environment; and providing written and public notices, with the opportunity for public comment and hearing. See 19.15.17.15.B NMAC.

The OCD denied Williams' Application by letter dated June 24, 2010, giving multiple grounds for the denial.<sup>3</sup> This pre-hearing brief addresses the legal basis for one of those grounds: that Williams' proposal to construct a disposal pit miles away from the place where the waste is generated is not a form of "on-site closure" recognized by Part 17.

### ARGUMENT

This case requires the Oil Conservation Commission (Commission) to interpret Part 17's "on-site closure" provisions to determine if "on-site closure" includes construction of a disposal pit at a remote location. Agency rules are interpreted using the same principles that guide statutory interpretation. See N.M. Mining Assn. v. N.M. Water Quality Control Comm'n, 2007-NMCA-010, ¶ 12, 141 N.M. 41, 150 P.3d 991. The guiding principle is to determine and give effect to the intent of the body adopting the statute or rule. See Albuquerque Bernalillo County Water Utility Authority v. NMPRC, 2010-NMSC-013, ¶ 52. Applying those principles, it is clear that the Commission did not intend Part 17's "on-site closure" provisions to include

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<sup>3</sup> Additional reasons for denying the Application set out in the June 24, 2010 letter include: 1) the Application does not contain an alternative closure method to be used if Williams fails to meet on-site closure standards (see 19.15.17.9.C(1) NMAC); 2) Williams did not attach proof of notice to the surface owner to its Application (see 19.15.17.13.F(1)(b) NMAC); 3) Williams proposes to remove the "front" side of the fence surrounding the disposal pit, although the pit will not be used for drilling or completion activities (see 19.15.17.11.D(1)(NMAC)); 4) Williams fails to address the requirement that the operator file a deed notice with the county clerk identifying the location of the on-site burial (see 19.15.17.13.F(1)(f) NMAC); 5) Williams asserts that it meets the waste criteria for in-place burial, suggesting that it does not intend to test the waste (see 19.15.17.13.F(2)(c) NMAC); 6) Williams application does not address reclamation of areas associated with the closed-loop system (see 19.15.17.13.G(1) NMAC); 7) Williams failed to provide an appropriate design plan for its proposed pit (see 19.15.17.9.B (2) NMAC); 8) Williams' proposed pit will be located on the site of an existing permitted pit that Williams intends to close using in-place burial, yet Williams does not address the commingling of wastes or the excavation of the existing pit to construct the new pit. To the extent Williams seeks permit terms that deviate from Part 17 requirements, Williams must apply for and obtain approval for exceptions using the process set out in 19.15.17.15 NMAC. Deviations may not be approved administratively.

construction of disposal pits off the site where the waste is generated. Such pits are properly regulated under Part 36, the Surface Waste Management Facility Rule.

**I. The Plain Meaning of “On-Site” Closure is Closure at the Site Where the Waste is Generated.**

The first step in rule interpretation is to examine the language of the rule. See Reule Sun Corp. v. Valles, 2010-NMSC-004, ¶15, 147 N.M. 512, 226 P.3d 611. If the plain language is clear and unambiguous, then no further interpretation is required. See Reule Sun Corp., 2010-NMSC-004, ¶15.

Part 17 uses the phrase “on-site closure” to describe closure methods other than removal of waste to an OCD-approved facility. See, for example, 19.15.17.13 NMAC. “On-site” is not defined in the New Mexico Oil and Gas Act or OCC rules. When a term is not defined by statute or rule it should be given its ordinary meaning absent clear and express intent to the contrary. See State v. Johnson, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863. “On-site” is defined in The American Heritage Dictionary of the English Language, 1230 (4<sup>th</sup> ed. 2000), as, “Done or located at the site, as of a particular activity.” “On-site” is defined in the Random House Webster’s College Dictionary, 946 (1991), as “accomplished or located at the site of a particular activity or concern.” “On-site” contains a geographic component indicating close proximity. See, e.g., Bd. of Trade, Inc. v. State, Dep’t of Labor, Wage, & Hour Admin., 968 P.2d 86 (Alaska 1998) (“We conclude that for a large public construction project, such as the airport project in this case, a property will be considered ‘on-site’ only if it is in close geographic proximity to the project footprint.”); Reed v. State ex rel. Ortiz, 1997-NMSC-055, ¶ 89, 124 N.M. 129, 947 P.2d 86, *rev’d on other grounds*, 524 U.S. 151, 118 S.Ct. 1860, 141 L.Ed.2d 131 (1998) (“The preliminary hearing—or on-site hearing as it is sometimes called—should be ‘conducted at or

reasonably near the place of the alleged parole violation or arrest . . . .”) (quoted authority omitted).

The relevant activity in this case is the drilling or workover of a well, where the waste is generated. This is clear from an examination of the types of “on-site closure” Part 17 recognizes:

- “In-place burial” is a closure method that may be used for an existing temporary pit or a pit constructed for the disposal of the contents of a drying pad used in closed-loop systems. Existing temporary pits are pits used in drilling or workover operations – as a practical matter, these pits must be located at the drilling site if they are to perform their function. For pits constructed for the disposal of drying pads, Part 17 requires the pit to be constructed within 100 feet of the drying pad associated with the closed-loop system – allowing the district office to approve an alternative distance and location. And the operator must use a separate disposal pit for each drying pad. See 19.15.17.13.F(2)(f) NMAC
- “On-site trench burial” is a closure method that may be used for an existing temporary pit or for the disposal of the contents of a drying pad used in a closed loop system. Again, a temporary pit used in drilling or workover operations would of necessity be located at the drilling site. And, again, if the trench is constructed for disposal of the contents of a drying pad, Part 17 specifies that the trench must be located within 100 feet of the drying pad – allowing the district office to approve an alternative distance and location. The operator must use a separate trench for each drying pad. See 19.15.17.13.F(3)(d) NMAC.

From a review of the “on-site closure” provisions of Part 17, it is clear that the Commission contemplated that the closure would occur at the site where the waste is generated. Part 17 assumes that “on-site closure” of temporary pits used in drilling or workover operations

will take place at the well site. And the Commission specified that if a trench or disposal pit is constructed to dispose of the contents of a drying pad, that pit or trench should be constructed within 100' of the drying pad. This indicates that the Commission expected the trench or disposal pit to be located near the closed-loop system it serves. The Commission would not have written in a 100' expectation for on-site burial if it did not care where the waste was buried.

A contrary interpretation – that the relevant activity for “on-site closure” is the place where the waste disposal occurs – makes no sense. All waste disposal, no matter where it occurs, would be “on-site.” The term “on-site” would be superfluous. Administrative rules are not interpreted to render parts of the rule surplus or meaningless. See State v. Johnson, 1998-NMCA-019, ¶ 22, 124 N.M. 647, 954 P.2d 79. To give the term “on-site” meaning, it must refer to the site where the waste is generated.

**II. The Record of the Rule-Making Proceeding Shows that the Commission Intended “On-Site Closure” to Refer to Closure at the Site Where the Waste is Generated.**

Unlike the legislative process in New Mexico, which leaves little record of how or why a statute is adopted, the rule-making process before the Commission is transcribed and the Commission drafts an order setting out the basis for its decision to adopt a rule. That record is the clearest indication of the Commission’s intent that “on-site closure” refers to closure at the site where the waste is generated.

In the order adopting Part 17, the Commission wrote:

The following Statement of Reasons indicates the Commission’s analysis of certain key provisions and of the entire proposal. Additional reasons are included in the hearing transcript of the Commission deliberations.

Order No. R-12939, Finding No. 4. One such key provision is the provision governing on-site closure.

The Commission's order describes on-site closure methods as "where the waste that is generated from the drilling or workover of the well is buried on or near the well pad." See Order No. R-12939, Finding No. 68. The inquiry should end right here if there is any doubt as to what the Commission meant by on-site closure. See Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) (stating that an administrative agency's interpretation of its own rules is accorded a heightened degree of deference if it involves legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function).

The Commission's deliberations also demonstrate that the Commission intended "on-site" to refer to the location where the waste is generated. For example, consider the discussion of the notice requirements for on-site burial, found at pages 5014 to 5023 of the transcript. The Commissioners first considered the question of "whether that legal right to drill a well includes the legal right to leave the...material on site." Transcript p. 5021, lines 13-16. The "site" being discussed can only be the well site. The discussion of a legal right to leave material at a remote site would have presented a very different question. The Commissioners assumed, in their discussion, that the surface owner of the well site would also be the surface owner of the site where the waste was buried, and did not discuss the possibility that there might be two relevant "surface owners" to notice.

The testimony presented to the Commission during the rulemaking also supports the conclusion that "on-site" refers to the location where the waste is generated. OCD witness Brad Jones testified about the OCD's intent in proposing that trench burial occur within 100' of the drying pad or temporary pit being closed:

"The first [intent] is to locate a deep trench within an appropriate distance of a drying pad or temporary pit. This prevents the accumulation of multiple pits or

pads being buried together and allows the surface owner or future owners to determine the proximity of the buried waste after closure.”

Case No. 14015, Transcript, pp. 1100-1101. Mr. Jones also explained that the provision was intended “to prevent the development of unpermitted surface waste management facilities.” Id. at pp. 1091, lines 16-17. Mr. Jones testified that consolidating multiple closures would constitute a surface waste management facility under Part 36:

“[O]nce you start bringing in waste to one location and consolidating that waste, that falls up under part 36. And so we want to make sure that this does not occur and that we don’t have a lot of unpermitted surface waste management facilities out there.”

Id. at p. 1092, lines 3-8. Mr. Jones’ concerns are reflected in the Commission’s Order and Part 17 itself.

As Mr. Jones recommended, Part 17 requires that a trench used to dispose of the contents of a drying pad be located within 100’ of the drying pad, and a separate on-site trench must be used for each drying pad. See 19.15.17.13.F(3)(a) and (d) NMAC. The Commission went beyond the OCD’s recommendation to allow on-site trench burial, and added provisions in Part 17 that allow for in-place burial of existing temporary pits, such as drilling pits and workover pits. See 19.15.17.13.F(2). And the Commission expanded on-site closure to include the construction of a pit specifically for the purpose of disposing of the contents of drying pads used in closed-loop systems. See 19.15.17.F(2)(f) NMAC. The Commission applied the restrictions recommended by Mr. Jones for trench burials to pits constructed for the sole purpose of disposing of the contents of a drying pad: a disposal pit for drying pad waste must be constructed within 100’ of the drying pad and a separate disposal pit must be used for each drying pad. See 19.15.17.13.F(2)(a), (b), (e) and (f) NMAC. The Commission explained its modifications to the OCD’s proposal in Order R-12939, using the same reasoning Mr. Jones used in his testimony:

requiring a trench or a pit constructed for disposal of waste from a drying pad to be located within 100' of the drying pad "prevents the accumulation of multiple drying pads from other locations being buried on-site, in effect creating a mini-landfill." Order No. R-12939, Findings Nos. 217 and 221.

**III. Interpreting "On-Site" in Part 17 to Refer to the Site Where the Waste is Generated is Consistent with other Provisions in Part 17.**

The Commission's intent is also clear from what it did not say. If the Commission intended on-site closure to include off-site disposal pits, or the commingling of wastes from multiple locations, Part 17 would have had to address those issues. It does not. For example:

- If off-site disposal is allowed, is there any limit to the distance between the well site and the disposal pit for "on-site" disposal?
- May the disposal pit and the well it serves be located on different leases? May they be located on sites with different surface owners?
- Must the disposal pit be associated with a well or other oil and gas facility, or may the disposal pit be located in an area that is not associated with oil and gas development?
- May the disposal pit serve multiple wells? If so, are there any limitations on which wells may be included? Must the wells be on the same lease or unit? Must the wells have the same surface owner? Must the wells have the same operator?
- What notice, if any, must the operator give to the OCD and other interested persons if it intends to commingle waste at a single location?
- Which surface owner requires notice of a proposal for an on-site closure, the surface owner of the well site, or the surface owner of the disposal location? If the surface owner of the disposal location is not the surface owner of the well site, does the operator need to provide proof that it has the right to use that location for disposal of oil field wastes? What authority does the OCD have to determine rights to use the surface? (See 19.15.17.13.F(1)(b) NMAC, which simply requires notice to the "surface owner.")
- Which surface owner is entitled to closure notice under 19.15.17.13.J NMAC?
- The provision requiring a steel marker for burial sites requires the marker to give the location of the well. 19.15.17.13.F(1)(d) NMAC. If the burial is not located at the well, does the marker need to indicate the location of the burial? If waste from multiple wells is disposed of at the burial site, must all wells be identified?

There is a reason these questions were not addressed in Part 17. Part 17 was written with the assumption that the on-site closure provisions were limited to closures at or near where the waste was generated. The surface owner of the well would be the surface owner of the disposal

site. The operator of the well would be the operator of the disposal pit. And the disposal pit would serve a single well and contain only the contents of a single drying pad.

**IV. Interpreting “On-Site” in Part 17 to Refer to the Site Where the Waste is Generated is Consistent with the Commission’s Regulatory Scheme for the Disposal of Oil Field Waste.**

One guide to finding the intent of a rule is to read the rule in harmony with related rules to give effect to all their provisions. See Dewitt v. Rent-A-Center, Inc., 2009-NMSC-032, 212 P.3d 341, 146 N.M. 453. As discussed above, it is clear the Commission saw Part 17 as part of a larger regulatory structure governing disposal of oil field waste. In particular, the Commission saw Part 36, the Surface Waste Management Facilities Rule, as the primary rule governing disposal of drilling wastes, with Part 17 recognizing an exception to Part 36’s requirements for certain limited and defined on-site closure methods. And the Commission took care to prevent Part 17 from undermining the permitting process set out in Part 36.

The stated objective of Part 36 is “To regulate the disposal of oil field waste and the construction, operation and closure of surface waste management facilities.” 19.15.36.6 NMAC. A “surface waste management facility” is defined generally as “a facility that receives oil field waste for collection, disposal, evaporation, remediation, reclamation, treatment or storage.” 19.15.2.7(S)(11) NMAC. Part 36 landfills are used for permanent disposal of exempt or non-hazardous waste --- the sort of waste Williams seeks to dispose of in an off-site disposal pit. The permitting process for Part 36 landfills includes provisions for public comment and the opportunity for public hearing. Part 36 landfill permits include strict siting requirements, financial assurance requirements, waste tracking for commercial facilities, ground water monitoring programs if there is fresh water on site, and long-term closure plans.

The stated objective of Part 17 is “to regulate pits, closed-loop systems, below-grade tanks and sumps used in connection with oil and gas operations for the protection of public health, welfare and the environment.” 19.15.17.6 NMAC. The primary method of disposing of waste generated by the facilities regulated under Part 17 is removal of waste to an approved facility. For solid wastes, that generally means a Part 36 landfill or, for waste meeting certain requirements, a Part 36 landfarm. In allowing certain defined “on-site” closure methods for temporary pits and closed loop systems, Part 17 created limited exceptions to Part 36’s requirements. That is because the definition of “surface waste management facility” specifically excludes “temporary pits” as defined in Part 17, and pits permitted under Part 17 that receive oil field waste from a single well. See 19.15.2.7(S)(11)(c) and (d) NMAC.<sup>4</sup> When exempting Part 17 pits from Part 36 requirements, the Commission took care to make sure the exception was narrow. As discussed above, Part 17 recognizes only certain specified “on-site” disposal methods, and prohibits the commingling of waste at those sites (even the commingling of multiple drying pads from a single well). Any deviation from the approved on-site disposal methods recognized by Part 17 requires the operator to go through the exception process or alternative closure method process of 19.15.17.15 NMAC, which closely mirrors the notice and hearing provisions of Part 36.

Without these limitations, Part 17 would seriously undermine Part 36. An operator would have no incentive to take drilling waste to a permitted Part 36 landfill or landfarm if any pit permitted under Part 17 could be used as a landfill. And a facility operator would have no incentive to seek a Part 36 landfill or landfarm permit if he could avoid that permitting process by getting administrative approval for a disposal pit under Part 17.

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<sup>4</sup> 19.15.2.7(S)(11)(c) NMAC refers to pits permitted under 19.15.37 NMAC. That is a typographical error that does not appear in the provision as adopted by the Commission in Order R-12939, which referred to 19.15.17 NMAC. There is no Part 37.

Reading Part 17's "on-site closure" provisions broadly, as Williams does, to allow construction of off-site disposal pits and the commingling of waste from multiple sites, would lead to the "mini-landfills" the Commission hoped to avoid. See Findings Nos. 217 and 221 of Order No. R-12939. Administrative rules should not be construed to defeat the intended effect of the administrative body which promulgated the rule. See State v. Herrera, 86 N.M. 224, 226, 522 P.2d 76, 78 (1974).

### CONCLUSION

Williams' Application seeks approval under Part 17's on-site closure provisions for construction of an off-site disposal pit. Part 17's on-site closure provisions do not provide for off-site closure. If Williams' proposal can be approved at all under Part 17, it can only be approved through the exception process or the process for requesting an alternative closure method. Williams' application for administrative approval must be denied.

Part 17 provides limited exceptions from Part 36 for on-site disposal of drilling waste. Williams' request for approval for an off-site disposal pit goes far beyond those recognized exceptions, and should be addressed instead under Part 36 as a surface waste management facility.

Respectfully submitted,

  
Sonny Swazo, OCD Attorney  
Gail MacQuesten, OCD Attorney

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading was hand-delivered to the following on July 22, 2010 to Ocean Munds-Dry, Attorney for Applicant Williams Production Co., LLC, at Holland & Hart LLP, 110 N. Guadalupe Street, Santa Fe, NM 87501.

  
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Gail MacQuesten