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

APPLICATION OF GOODNIGHT MIDSTREAM PERMIAN LLC FOR APPROVAL OF A SALTWATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO	**CASE NO. 24123**
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**

EMPIRE NEW MEXICO LLC'S RESPONSE IN OPPOSITION TO GOODNIGHT'S MOTION TO PARTIALLY STAY ORDER NO. R-24004

INTRODUCTION

In New Mexico, a stay of an administrative order pending appeal is an extraordinary remedy – one typically reserved for "extreme cases of pressing necessity." Emergency stays must prevent imminent and irreparable harm and allow time to pursue a meritorious appeal. Nothing about Goodnight Midstream Permian's ("Goodnight") Emergency Motion to Partially Stay Commission Order No. R-24004 (the "Stay Request") fits this description. At bottom, Goodnight seeks to delay and unwind a fully litigated decision that Goodnight lost and would do so to the detriment of Empire New Mexico LLC ("Empire"), the State of New Mexico, and the United States.

The mismatch between the extraordinary nature of the remedy and the reality of Goodnight's request is clear from the record. On September 12, 2025, after a five-week evidentiary hearing, the Oil Conservation Commission (the "Commission") issued Order No. R-24004 (the "Suspension Order"), formalizing a decision it had announced a month earlier. The Commission found that Goodnight's high-volume wastewater disposal within the Eunice Monument South Unit ("EMSU") conflicted with Empire's rights as the unit operator and made a CO_2 tertiary recovery project infeasible. The Commission also found no evidence of a continuous barrier between the Grayburg and San Andres, undermining Goodnight's central defense. Accordingly, the Commission correctly directed Goodnight to suspend its injection operations.

Instead of simply complying with the Order, Goodnight now challenges the Commission's authority to enter it. According to Goodnight, the Commission must sit idle until Goodnight has already destroyed what is left of Empire's hydrocarbons in the San Andres. Only then would the Commission acquire "jurisdiction" to suspend Goodnight's injection authority. This argument lacks merit and contradicts the Commission's broad discretion to do "what is reasonably

necessary" to prevent waste. In short, Goodnight cannot satisfy any of the requirements for an administrative stay: (1) likelihood of success on the merits, (2) irreparable harm absent a stay, (3) evidence that no substantial harm will result to other interested persons, and (4) a showing that no harm to the public interest. Accordingly, the Stay Request should be denied.

First, Goodnight is unlikely to succeed on appeal. As noted above, the Commission's statutory mandate to prevent waste and protect correlative rights is broad and flexible. While Empire has established a recoverable residual oil zone ("ROZ") within the San Andres, even imminent or threatened harm to its operations triggers Commission jurisdiction. Preventing waste before it occurs is not beyond the Commission's authority. It is central to it. Goodnight asks the Commission to adopt an interpretation of the New Mexico Oil and Gas Act (the "Act") that would constrain the Commission's own authority to prevent waste – the Act's core purpose. Goodnight then proceeds to rehash the same unitization and scope arguments that the Commission has repeatedly considered and rejected, and that do not support its requested relief in any event. None of these tired, repetitive arguments are likely to succeed on appeal.

Second, Goodnight has failed to show irreparable harm. Goodnight's claimed "irreparable harms" are either economic, speculative, or self-induced and not compensable at all. Thus, they are insufficient to establish irreparable harm for purposes of a stay. Empire, by contrast, faces irreparable harm if the Suspension Order is stayed. This is because Goodnight's stay would only apply to Goodnight and would allow it to continue destroying the ROZ that all parties agree exists within the San Andres formation. Goodnight proposes suspending Order No. R-24004 (the "Suspension Order") as to itself but leaving Empire's three-year period to establish a CO2 pilot program in place. This asymmetrical and absurd relief would force Empire to try to prove

recoverability in a reservoir being flooded with produced water. This result would be one-sided and truly extraordinary.

Finally, the public interest requires denying the stay. The Act calls for preventing waste, protecting correlative rights, and enforcing the Commission's orders to protect the state's natural resources that Goodnight seeks to destroy. For these reasons, and those set forth below, the Stay Request should be denied. Additionally, as set forth in Empire's September 23, 2025 Emergency Motion to Enforce Order No. R-24004, the Commission should require Goodnight to immediately shut in its four SWD wells, in accordance with the Suspension Order.

BACKGROUND

1. In 1984, the Commission issued Order No. R-7765, which unitized the Grayburg and San Andres formations in EMSU under the Statutory Unitization Act. The Unit Agreement vested the Unit Operator with the exclusive right to conduct operations in the unitized interval. *See* Suspension Order ¶¶ 16–23.

2. Goodnight is not a party to the Unit Agreement. Instead, it obtained permits from the Commission to operate four saltwater disposal ("SWD") wells in the EMSU: the Dawson, Banks, Sosa, and Ryno wells. Suspension Order ¶ 10.

3. Empire, the EMSU Unit Operator, applied to revoke Goodnight's injection permits. Empire presented evidence that Goodnight's voluminous disposal into the San Andres threatened Empire's ability to recover hydrocarbons in the residual oil zone ("ROZ"). The evidence included core data showing, *inter alia*, visible oil saturation, fracture studies showing vertical communication, and testimony that no continuous barrier exists between the Grayburg and San Andres. Suspension Order ¶¶ 28–36, 43–53.

4. On August 14, 2025, after an exhaustive, five-week evidentiary hearing, the Commission announced it would suspend Goodnight's injection authority for the Dawson, Banks, Sosa, and Ryno wells.[1] The decision cleared the way for Empire to conduct a pilot project testing enhanced oil recovery with carbon dioxide (*i.e.*, "a CO_2 EOR pilot") in the EMSU.

5. In the month following that announcement, Goodnight apparently took no action. Goodnight did not seek clarification of the Commission's decision or request emergency relief. Nor did Goodnight begin to comply with the Commission's directive by shutting in its wells.

6. On September 12, 2025, the Commission issued Order R-24004 (the "Suspension Order") formally memorializing its decision to suspend Goodnight's injection authority. The Order states, in relevant part, that the Commission:

> "Suspends existing Goodnight's injection wells Case No. 24018 (Dawson), Case No. 24019 (Banks), Case No. 24020 (Sosa), Case No. 24025 (Ryno) in order to provide Empire with the opportunity to establish the CO2 EOR pilot project." Suspension Order ¶ 3.

7. In reaching its decision, the Commission found:

a. the Unit Agreement gave Empire the "**exclusive right**, privilege and duty of exercising any and all rights of the parties hereto including surface rights which are necessary or convenient for prospecting for, producing, storing, allocating and distributing the Unitized Substances are hereby delegated to and shall be exercised by the Unit Operator." Suspension Order at ¶ 18 (emphasis added).

b. "Empire purchased the EMSU . . . to start a new project to extract oil from the San Andres formation via a CO2 flood as part of an Enhanced Oil Recovery (EOR) project." Suspension Order at ¶ 26.

c. "Based on the 1984 Commission Order, **Empire has the exclusive rights to decide how to best extract oil in the EMSU**." Suspension Order at ¶ 27 (emphasis added).

d. "injection of hundreds of thousands of barrels a day conflicts with Empire's exclusive rights to extract oil in the EMSU because in order to perform a successful CO2 flood EOR project, the injection of CO2 and water must be monitored closely and adjustments made based upon design." Suspension Order at ¶ 40.

[1] The Commission also denied Goodnight's applications for new injection wells and increased injection volumes.

e. **"<u>the injection of hundreds of thousands of barrels a day [by Goodnight]</u>** conflicts with Empire's exclusive rights to extract oil in the EMSU because approval of the proposed new wells **<u>would contradict the responsibility of the Commission and Division to prevent drowning by water of any stratum or part thereof capable of producing oil</u>**." Suspension Order at ¶ 41 (emphasis added).

8. On September 21, 2025, Goodnight filed a 23-page motion and affidavit seeking a partial stay of the Suspension Order. Goodnight argues that the Commission lacked jurisdiction to suspend its permits, and renews its previously rejected arguments that the 1984 Unitization Order is incorrect or should be amended, and that Empire must show "profitability" to establish correlative rights.

9. Goodnight's proposed stay, if granted, would extend through the end of the appeals process, which could last years, and destroy any possibility that Empire would ever be able to pursue a successful CO_2 project. The stay would also only apply to the provisions affecting Goodnight. It would not toll the three-year period for Empire to complete a pilot study.

10. Empire would be unable to perform a pilot study showing the recoverability of hydrocarbons should Goodnight's injection continue unabated.

ARGUMENT

POINT I
GOODNIGHT HAS NOT MET ITS BURDEN FOR A STAY

Under Rule 19.15.4.23(B), the Division Director may issue an emergency stay only in narrow circumstances: to prevent waste, protect correlative rights, protect public health or the environment, or prevent gross negative consequences. This stay is temporary, effective only until the Commission rules on the motion. When the Commission considers a stay, however, the analysis shifts to the four *Tenneco* factors. A stay applicant must establish: (1) a likelihood that the applicant will prevail on the merits of the appeal; (2) irreparable harm to the applicant unless

the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest. *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, ¶¶ 10-12, 105 N.M. 708.

This is an exacting standard, mirroring the standard for preliminary injunctive relief in court. *See Valdez v. Grisham*, No. 21-cv-783, 2021 WL 8993798, at *1 (D.N.M. Oct. 7, 2021) ("A Rule 8(a) motion for a stay pending appeal is subject to the exact same standards as … a motion for a preliminary injunction."). Like injunctions, stays are "harsh and drastic remedies" reserved for "extreme cases of pressing necessity*." Padilla v. Lawrence*, 1984-NMCA-064, ¶ 22, 101 N.M. 556. Because a stay is extraordinary, the movant's right to relief "must be clear and unequivocal." *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020). The movant must satisfy each *Tenneco* factor, and the strength of one factor cannot compensate for the weakness of another. *Tenneco*, 1986-NMCA-033, ¶¶ 11-12; *Peterson v. Kunkel*, 492 F. Supp. 3d 1183, 1192–93 (D.N.M. 2020) (citing *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). As set forth below, the *Tenneco* factors demonstrate that Goodnight's request must be denied.

POINT II
GOODNIGHT IS NOT LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL

"Likelihood of success on the merits is the threshold issue" in evaluating a stay, and "all other factors depend on the [movant] satisfying this requirement." *Kunkel*, 492 F. Supp. 3d 1183, 1192–93. A "substantial likelihood" of success means a "*prima facie* case showing a reasonable probability that [the movant] will ultimately be entitled to the relief sought." *Id.* (quoting *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781 (10th Cir. 1964)). Because Goodnight cannot establish a "substantial likelihood" of success on appeal, its Stay Request must be denied.

A. Standard of review for Goodnight's appeal of the merits of the Suspension Order

On appeal, a district court may set aside a Commission Order only if it finds that the Commission acted "fraudulently, arbitrarily [,] or capriciously; the final decision was not supported by substantial evidence; or the agency did not act in accordance with law." NMSA 1978, § 74-2-25(B); NMSA 1978, §39-3-1.1(D).

A ruling is arbitrary and capricious only if it is "unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 17, 133 N.M. 97 (citation omitted). In other words, it must be "unreasonable, irrational, willful," not result from a sifting process, or show "no rational connection between the facts found and the choices made." *Sw. Org. Project v. Albuquerque-Bernalillo Cty. Air Quality Control Brd.*, 2021-NMCA-005, ¶ 9 (internal quotations omitted).

"Substantial evidence," in turn, means "relevant evidence that a reasonable person might accept as adequate to support a conclusion." *Wilcox v. N.M. Bd. of Acupuncture & Oriental Med*., 2012-NMCA-106, ¶ 7, 288 P.3d 902. The test is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached." *Id.*

Finally, "[a] decision is not in accordance with law if the agency unreasonably misinterprets or misapplies the law." *Id*. ¶ 11. Courts generally defer to an agency's interpretation of its own rules, especially if it implicates agency expertise. *Rio Grande Chapter*, 2003-NMSC-005, ¶ 17. Agencies must be given "considerable discretion" to fulfill their responsibilities. *Id.* ¶ 25. Indeed, "the validity of agency action is presumed, and substantial deference is afforded the agency's expertise in interpreting those facts." *Joab, Inc. v. Espinosa*, 1993-NMCA-113, ¶ 8, 116 N.M. 554.

Should Goodnight appeal the Suspension Order to the District Court, the Court will apply this deferential standard. As set forth in detail below, it is highly unlikely that any court would set aside the Suspension Order based on the arguments Goodnight raises in the Stay Request.

B. The Commission acted within its authority to prevent waste and protect correlative rights.

The central question at issue is whether the Commission must sit idle until one operator's injection has already drowned out another's hydrocarbons and prevented the interest owners, the State of New Mexico, and the United States from recouping substantial revenues to which they were entitled. The New Mexico Oil and Gas Act answers plainly: the Commission's duty is to prevent waste as much as to remedy it. That is exactly what the Commission did here.

The Act requires the Commission to both prevent "waste" and protect "correlative rights," but accords it broad discretion in how to fulfill those duties.[2] That is, Section 70-2-11 empowers the Commission to "do whatever may be reasonably necessary to carry out the purpose of this act," and Section 70-2-3(A) defines "waste" to include any practice that "reduces or *tends to reduce* the total quantity of oil ultimately recovered".[3] It states, in relevant part:

> "underground waste" as those words are generally understood in the oil and gas business, and in any event to embrace the inefficient, excessive or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner *to reduce or tend to reduce* the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas.

(emphasis added).

[2] NMSA 1978, §§ 70-2-6 and 70-2-11; *see also Continental Oil Co. v. Oil Conservation Comm'n,* 1962-NMSC-062, ¶ 27, 373 P.2d 809 ("Our legislature has explicitly defined both 'waste' and 'correlative rights' and placed upon the commission the duty of preventing one and protecting the other.")

[3] §§ 70-2-3(A), -33(H).

As part of its obligation to prevent waste, the Commission has authority "to prevent the drowning by water of any stratum or part thereof capable of producing oil or gas or both oil and gas in paying quantities *and to prevent the premature and irregular encroachment of water or any other kind of water encroachment that reduces or tends to reduce the total ultimate recovery of crude petroleum oil or gas or both oil and gas from any pool*."[4] New Mexico law is clear that precise proof of a specific volume or hydrocarbons is not required to establish waste,[5] and evidence demonstrating that wastewater operations will *tend to reduce* recovery meets the definition of waste.[6] Thus, waste includes not only actual, ongoing waste, but any practice that prevents an interest owner from producing without waste his just and equitable share of oil in the pool.[7] Similarly, "correlative rights" mean the fair opportunity of each owner in a common source to produce its just share *without waste. Id.* § 70-2-33(H).

Because this matter involves a unitized interval, the EMSU, the Commission must also apply the Statutory Unitization Act,[8] which provides "for the unitized management, operation and further development of . . . oil and gas properties . . to the end that greater ultimate recovery may be had therefrom, waste prevented, and correlative rights protected of all owners and mineral interests in each unitized area."[9]

Goodnight's claim that the Commission can act only upon proof of actual, present-day intrusion or drainage rewrites the statute. As Empire established at hearing, a ROZ exists within

[4] § 70-2-12(B)(4) (emphasis added).

[5] § 70-2-17(A); *Grace v. Oil Conservation Comm'n*, 1975-NMSC-001, ¶ 27, 87 N.M. 205, 531 P.2d 939.

[6] § 70-2-3(A).

[7] §§ 70-2-3(A), -33(H).

[8] NMSA 1978, §§ 70-7-1 to -21 (1975, as amended through 2024).

[9] § 70-7-1.

the San Andres—a fact recognized by the Commission and not disputed by Goodnight.[10] Goodnight's own evidence adduced at hearing confirmed that oil saturation exists throughout the San Andres.[11] Empire has also shown that the wastewater Goodnight is injecting into the Lower San Andres is migrating into the Upper San Andres and Grayburg.[12] On that evidence, the Commission rightly found that Goodnight's continued injection both threatened to impair Empire's correlative rights in the ROZ and made it impossible to conduct a CO_2 project.

Goodnight also misreads 19.15.26.10(E) NMAC. *See* Stay Request at 7. That rule provides that "[t]he division may restrict the injected volume and pressure for, or shut-in, injection wells or projects that have exhibited failure to confine injected fluids to the authorized injection zone or zones, until the operator has identified and corrected the failure." Nothing in this provision requires a showing of actual, present-day "failure to confine" before suspension. It is a permissive grant of authority to the Division—not an exclusive prerequisite that limits the Commission's broader statutory duty under Sections 70-2-11 and 70-2-3(A) to prevent waste and protect correlative rights. Goodnight's reliance on this fragment of the rule to narrow the Commission's power is misplaced.

In short, Goodnight's attempt to circumscribe the Commission's authority by grafting an "actual recovery" requirement into the Commission's enabling statute misstates the statutory definition of waste and is unlikely to prevail on appeal. The question under the Act is whether Goodnight's disposal wells will "reduce or *tend to* reduce" the total quantity of oil ultimately

[10] *See, e.g.*, 04/25 Tr. 104:22-25 (Commissioner Ampomah recognizing that "Empire's experts and also even Goodnight's experts, they've all – they've all presented to the Commission, at least based on the evidence, there is a ROZ.").

[11] 04/21 Tr. 242:17-243:14.

[12] Empire FOF #85(a)-(r), 86, 88(a)-(d).

recovered.[13] Empire's showing of present and future threat to the recoverability of the ROZ demonstrates precisely the "underground waste" the Act prohibits.

C. The Suspension Order did not constitute a regulatory taking or violate any vested right.

Under New Mexico law, an agency action that imposes a reasonable restriction on the use of private property will not constitute a 'taking' of that property if the regulation is (1) reasonably related to a proper purpose and (2) does not unreasonably deprive the property owner of all, or substantially all, of the beneficial use of the property." *Premier Tr. of Nev., Inc. v. City of Albuquerque*, 2021-NMCA-004, ¶ 5, 482 P.3d 1261.

Preliminarily, Goodnight's injection permits do not constitute property interests protected by the Takings Clause of the New Mexico Constitution. *See* Stay Request at 10. Injection permits are revocable licenses subject to stringent conditions and ongoing Commission oversight. They do not entitle Goodnight to indiscriminately inject produced water into a productive zone when doing so would cause waste or impair correlative rights. Indeed, the orders granting Goodnight's injection authority expressly conditioned that authority on continuing agency oversight and compliance with applicable rules. *See, e.g.,* Order No. R-22026 at Ordering ¶ 2 ("Jurisdiction is retained by the OCD for the entry of such further orders as may be necessary for the prevention of waste and/or protection of correlative rights or upon failure of the operator to conduct operations (1) to protect fresh or protectable waters or (2) consistent with the requirements in this order; whereupon the OCD may, after notice and hearing or prior to notice and hearing in event of an emergency, terminate the disposal authority granted herein."). Thus, Goodnight's permits

[13] § 70-2-3(A).

expressly authorized the Commission to revoke its permits to prevent waste and/or protect correlative rights, just as it has done here.

New Mexico courts have routinely rejected constitutional claims in similar circumstances. *Cf. New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶ 53, 138 N.M. 785, 126 P.3d 1149 (observing that a "utility had no vested property right to a particular regulatory rate and even if it did, its contracts were clearly subject to additional regulation" (citing *E. Spire Commc'ns, Inc. v. Baca*, 269 F. Supp. 2d 1310, 1325-26 (D.N.M. 2003), *aff'd sub nom. E. Spire Commc'ns v. N.M. Pub. Regul. Comm'n*, 392 F.3d 1204 (10th Cir. 2004))); *Westland Dev.*, 1995-NMCA-136, ¶ 13, 121 N.M. 144, 909 P.2d 25 (observing that an "owner of land abutting highway has no vested interest in flow of traffic past his premises" (citing *State ex rel. State Highway Comm'n v. Silva*, 1962-NMSC-172, ¶ 8, 71 N.M. 350, 378 P.2d 595)).

Goodnight cites no authority for the proposition that temporarily suspending a revocable injection permit has ever been deemed a regulatory taking, let alone establishes a "reasonable probability" of successfully asserting this claim on appeal. *See Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists.").

And even if an injection permit could be deemed a constitutionally protected property interest, it would not confer any *guarantee* against future regulation and remain subject to the Act's prohibition on waste. New Mexico courts have routinely rejected takings claims in analogous circumstances. *See, e.g., Premier,* 2021-NMCA-004, ¶¶ 2–3, 7 (rejecting takings claim where the asserted property right did not include a "protected property right in static market conditions" and the owner retained all beneficial use); *Sanchez v. City of Santa Fe*, 1995-NMSC-058, ¶ 11, 120 N.M. 395 (explaining that the Takings Clause does not guarantee use of property for all

economically viable purposes and incidental economic loss is not compensable); *Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, ¶ 15, 100 N.M. 342, 670 P.2d 953 (holding that statutory changes reducing liquor license value were not a taking because licensees retained the rights to transfer, devise, and use the licenses); *New Mexicans for Free Enter. v. City of Santa Fe*, 2006-NMCA-007, ¶¶ 52–53, 138 N.M. 785, 126 P.3d 1149 (holding that an increased minimum wage did not constitute a taking even where business owners alleged economic destruction of their businesses); *Westland Dev. Co. v. Romero*, 1995-NMCA-136, ¶ 13, 121 N.M. 144, 909 P.2d 25 (holding that a landowner had no vested property right in traffic flow past his property).

Nor does the Suspension Order violate vested rights. *See* Stay Request at 10. A vested right arises only when a party has acted in reliance on a valid permit such that revocation would be inequitable. But even then, "a vested right may be impaired by the government whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people." *KOB-TV, L.L.C. v. City of Albuquerque*, 2005-NMCA-049, ¶ 16, 137 N.M. 388, 395. Here, Goodnight has not established reasonable reliance, as the injection permits do not allow Goodnight to commit waste or impair Empire's correlative rights. The Commission acted squarely within its statutory duty to prevent waste and protect correlative rights.

Because Goodnight's takings and vested-rights theories fail as a matter of law, they cannot support a stay or establish likelihood of success on the merits.

D. The Commission properly rejected Goodnight's barrier claim.

Goodnight argues that the Commission improperly shifted the burden of proof by requiring it to disprove Empire's evidence of fractures and vertical communication. Stay Request at 6–9. This is wrong. The existence of a "continuous barrier" was not part of Empire's burden to prove waste or impairment; it was a defense that *Goodnight raised* in response to Empire's showing of

fractures and vertical migration pathways. Empire rebutted that defense with core data, fracture studies, and modeling, while Goodnight's own witnesses admitted no laterally continuous barrier exists. *See* Empire Closing Br. at 16–18 (July 3, 2025).

As discussed in Empire's post-hearing briefing, New Mexico law distinguishes between the burden of persuasion and the burden of production: only the latter may shift. *See Gemini Las Colinas, LLC v. New Mexico Taxation & Revenue Dep't,* 2023-NMCA-039, ¶ 27, 531 P.3d 622 ("[W]hile the burden of production often shifts (or even disappears) during civil litigation, the burden of persuasion generally remains on the party who bears it initially."). Here, the "continuous barrier" theory was Goodnight's attempt to rebut Empire's affirmative case. As such, Goodnight bore only the burden of production – the duty to come forward with competent evidence of a barrier. Goodnight failed to do so. The Commission's Final Order reflects this point, finding that "Goodnight did not adduce substantial evidence of the existence of a continuous barrier … and therefore did not refute the potential for FUTURE impairment or waste in the EMSU." Suspension Order II(B). Far from shifting burdens, the Commission rejected a defense Goodnight itself failed to support.

E. The Commission has already considered and rejected Goodnight's continued, futile collateral attack on the 1984 Unitization Order.

Goodnight again suggests that the San Andres formation should be excluded from the EMSU. *See* Stay Request at 11-13. But that argument has already been raised and rejected. As Empire explained in its post-hearing response brief, the Commission stayed and severed Goodnight's exclusion theory in the Scope Order, [14] rejected it again in Goodnight's January 2025

[14] *See* Joint Order on Goodnight's Motion to Limit Scope of Hearing on Cases within the EMSU and the Oil Conservation Division Motion Concerning the Scope of the Evidentiary Hearing Set for September 23-27, 2024 (July 2, 2024) (the "Scope Order"); Order Partially Amending the Commission's July 2, 2024 Order with Respect to the Scope of the Hearing (March 4, 2025) (the "Amended Scope Order").

motion for partial summary judgment,[15] and held it procedurally barred from this proceeding. *See* Empire Post-Hearing Response Br. at 2–6 (July 18, 2025).

The Commission confirmed the point in its Final Order. It held that "based on the 1984 Commission Order, Empire has the exclusive rights to produce the ROZ in the EMSU" and expressly denied Goodnight's renewed motion to exclude the San Andres, finding the issue "premature," "outside the scope," and "not well-taken" (Suspension Order, at ¶¶ 66–73 (Sept. 12, 2025) ("Goodnight's Motion request was previously stayed and denied and remains outside the scope of this proceeding and cannot be taken up at this time.").

In addition, as discussed above, Goodnight's injection is resulting in the waste of hydrocarbons within the San Andres notwithstanding the Unitization Order. The Commission's obligation to prevent waste of hydrocarbons for the benefit of the state and citizens of New Mexico is paramount and is not contingent upon the Unitization Order. Goodnight's argument has no merit and should be rejected.

Goodnight's attempt to re-litigate the scope of the 1984 Unitization Order is an impermissible collateral attack and does not impact the Commission's authority to prevent waste regardless. The Commission has already ruled, and those rulings foreclose any likelihood of success on the merits, as the issue was not before the Commission and thus not appealable.

POINT III
GOODNIGHT DOES NOT ESTABLISH IT WILL SUFFER IRREPARABLE HARM IF THE STAY IS NOT ISSUED

"Irreparable harm" means harm "which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard." *State ex rel. State Highway & Transp.*

[15] *See* Goodnight's Motion for Partial Summary Judgment (Jan. 23, 2025) (arguing that the San Andres "was improperly included within the EMSU's unitized interval" and demanded its removal "as a matter of law."); Order Denying Goodnight's Motion for Partial Summary Judgment (Feb. 14, 2025).

Dep't of N.M. v. City of Sunland Park, 2000-NMCA-044, ¶ 19, 129 N.M. 151. The injury must be actual and substantial, not speculative. *Id.*; *Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969). Courts uniformly reject claims of irreparable harm "where the claimed injury is doubtful, speculative, or contingent." *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, ¶ 25, 111 N.M. 608.

Goodnight's claimed harm falls into three categories, none of which qualifies as irreparable: financial losses, reputational harm, and speculative market impacts. *See* Stay Request at 13-15.

First, the alleged financial losses are classic monetary damages. Goodnight cites the costs of offloading water, building new facilities, lost revenue, and lost contracts. *Id.* at 13-14. But these are all quantifiable economic harms. They can be measured in dollars, and courts repeatedly reject such claims as irreparable. *See Sunland Park*, 2000-NMCA-044, ¶ 21, 129 N.M. at 157 (lost revenues and construction costs "clearly quantifiable" and therefore not irreparable); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (denying injunction where alleged harms were lost revenue and diminished property value, both compensable by damages).

Second, the supposed reputational and goodwill harms are speculative. Goodnight asserts that suspension of its permits will damage customer relationships and reputation. Stay Request at 14. But speculative injuries of this sort do not meet the irreparable-harm standard. *See Los Ranchos*, 1991-NMCA-015, ¶ 25 (injunctive relief not available for speculative harms); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (no irreparable harm where alleged injuries were conjectural or remediable by money damages). And, Goodnight brought this claimed harm

on itself by choosing to inject produced water into a known unitized interval.[16] In fact, Goodnight even proceeded to drill the Verlander SWD while it was the subject of Empire's pending application to revoke injection authority.[17]

Third, Goodnight's claim that producers and the industry at large will suffer harm is speculative and legally irrelevant. The argument rests on a chain of conjecture that reduced disposal capacity might impair oil production. But speculative, contingent harms are not irreparable. *See Los Ranchos*, 1991-NMCA-015, ¶ 25. And even if producers faced disruption, that would not establish irreparable harm to Goodnight itself. *See Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (party seeking a stay must show actual, imminent harm to itself, not to third parties). Producers will seek disposal options elsewhere, through SWDs that do not inject into another operator's unitized interval.

In short, Goodnight's claimed harms are insufficient to show irreparable injury and should be rejected. *See Valdez v. Grisham*, No. 21-cv-783, 2021 WL 8993798, at *1 (D.N.M. Oct. 7, 2021) (irreparable harm requires a "clear showing" of injury not remediable by money damages).

POINT IV
A STAY WOULD IRREPARABLY HARM EMPIRE

The balance of harms also weighs decisively against a stay. *See Bidi Vapor, LLC v. Vaperz LLC*, 543 F. Supp. 3d 619, 633 (N.D. Ill. 2021) (preliminary injunction not warranted when extraordinary expense and injury to defendant would result). If Goodnight's injection is allowed to continue, Empire will face immediate and ongoing harm. As the Commission already held, "the

[16] Goodnight was aware it was injecting into the EMSU unitized interval but chose not to disclose that information anywhere in its permit applications. 4/24 Tr. 54:11-58:14; 72:9-73:5; 81:9-82:13.

[17] *See* Case Nos. 23614 *et al.*, H'g Tr. at 173:13-175:5 (Goodnight's witness, admitting that Goodnight did not inform Empire and that the Verlander well was close enough to the EMSU for Empire to see "the rig standing up out there"). *See generally* 170:23-177:11.

injection of hundreds of thousands of barrels a day conflicts with Empire's exclusive rights to extract oil in the EMSU because approval of the proposed new wells would contradict the responsibility of the Commission and Division to prevent the drowning by water of any stratum or part thereof capable of producing oil." Suspension Order ¶ 41.

Empire's evidence at hearing demonstrated that Goodnight's injection to date and proposed injection into the future adversely impacts Empire's ability to recover hydrocarbons by:

- Washing out and reducing secondary recovery of oil in the Grayburg Formation;[18]
- Washing out and reducing future tertiary development of oil in the Grayburg Formation;[19] and
- Washing out and reducing future tertiary recovery of oil in the San Andres Formation.[20]

The evidence adduced at hearing shows that these negative impacts within the Grayburg and San Andres Formations are occurring, and will continue to occur, because Goodnight's injection of commercial volumes pressurizes the San Andres and forces wastewater to migrate upwards through vertical plumes into the Upper San Andres and Grayburg formations.[21] The evidence established that Goodnight's wastewater is communicating out of the permitted formation and into the Grayburg through fractures,[22] and via the waterflood that is currently being conducted by Empire to produce the Grayburg.[23] Grayburg producers have extracted more water than expected, and the additional unanticipated volumes are unquestionably coming from the San

[18] Empire Ex. B at 8-9, 13; Empire Ex. C at 6; id. at 8, ¶ 15; Empire Ex. G at 5, ¶ 15; Empire Ex. I at 15.

[19] Empire Ex. B at 8-9, 13; Empire Ex. I at 12-13.

[20] Empire Ex. B at 12; Empire Ex. C at 6; *id.* at 8, ¶ 15; Empire Ex. I at 12-13, 15; Empire Ex. I-2.

[21] Empire Ex. N-23; 04/10 Tr. 156:21-158:5; 04/11 Tr. 62:25-64:25.

[22] Empire Exs. N-23; N-24; *see* 02/24 Tr. 29:22-30:3, 34:18-21, 154:11-13; 04/09 Tr. 163:5- 167:4; 04/11 Tr. 79:2-82:25.

[23] 04/09 Tr. 161:8 – 162:22, 196:24-198:20.

Andres as evidenced by Chevron's water chemistry work and modeling and studies done by Empire witnesses.[24] The wastewater disposal rates create higher pressures in the ROZ and increase the potential for hydraulic fracturing and vertical communication, which have a negative impact on current field operations in the traditional Grayburg producing zone as well as future ROZ operations.[25]

Moreover, there are significant water chemistry differences between the Delaware Basin water that Goodnight is injecting and water within the San Andres and Grayburg formations.[26] As a result, the injection is causing scale and damaging the formations.[27] The off-lease produced water has high saline content that creates scale when it reacts with the sulfates in the unitized formations, which will irreparably "block off" and "cement up" the ROZ and Grayburg and reduce both reservoirs' potential.[28] Additionally, scale and corrosion (caused by iron in the injected wastewater) has damaged Goodnight's own wells and will damage Empire's wells and equipment.[29]

Goodnight's operations not only threaten the very existence of the ROZ but also increase the costs to operate a field by causing equipment wear and tear, requiring Empire to operate its CO_2 tertiary recovery at a higher pressure than necessary, and requiring Empire to inject the produced water into another zone to make room for the CO_2 to avoid fracturing the formation.[30]

These harms are neither speculative nor compensable by money damages. They go to Empire's exclusive rights under the EMSU Unitization Order and to the statutory objectives of

[24] 02/24 Tr. 28:16-30:13, 34:12-21; 02/27 Tr. 766:6-11; 04/09 Tr. 163:14-16; 04/24 Tr. 160:7-23.

[25] Empire FOF #60

[26] 04/09 Tr. 160:7-17, 180:20-188:18.

[27] *Id.*; *see also* 02/24 Tr. 38:13-39:15.

[28] 02/24 Tr. 38:13-39:15; 04/09 Tr. 160:7-17, 180:20-188:18; 04/09 Tr. 184:8-185:12.

[29] 4/09 Tr. 186:17-23, 190:15-191:17.

[30] Empire FOF #89(d), 90(f), (l).

preventing waste and protecting correlative rights. In contrast to Goodnight's alleged economic losses, the harms to Empire are direct, substantial, and irreparable.

POINT V

THE PUBLIC INTEREST WILL BE HARMED IF THE SUSPENSION ORDER IS STAYED

The Act charges the Commission with preventing waste and protecting correlative rights. *See* NMSA 1978, § 70-2-11 (empowering the Commission to "do whatever may be reasonably necessary to carry out the purpose of this act"); *id.* § 70-2-3(A) (defining "waste" to include practices that "reduce or tend to reduce the total quantity of oil ultimately recovered"). The Act likewise defines "correlative rights" as each owner's fair opportunity to recover its equitable share without waste. *See* id. § 70-2-33(H).

As established at hearing, Goodnight's SWD operations are increasing costs and threatening recoverability. Indeed, its continued operations will eventually close off the ROZ—making it inaccessible to any producer and leaving more than a billion dollars in royalties and taxes to the State of New Mexico, effectively sealed underground.[31] Thus, continued injection does not just harm Empire—it irreparably harms New Mexico's natural resources by drowning hydrocarbons that can never be recovered.

The Suspension Order embodies these mandates. It found that Goodnight's continued injection threatened to drown hydrocarbons in the residual oil zone and "made it impossible to conduct the CO_2 pilot needed to test recoverability." Suspension Order ¶¶ 40–41. Staying the Order would expose state, federal, and private interest owners to precisely the waste and impairment the Act is designed to prevent. And, revenues lost due to Goodnight's destruction of the ROZ would

[31] 02/24 Tr. 38:13-39:15; 04/09 Tr. 160:7-17, 180:20-188:18; 04/09 Tr. 154:3-7, 184:8-185:12.

never be recouped. The public interest therefore lies in enforcing the Commission's decision, not suspending it.

CONCLUSION

Goodnight cannot meet any of the factors required to obtain a stay. It is unlikely to succeed on the merits, its claimed harms are insufficient or speculative, a stay would impose direct and irreparable injury on Empire, and the public interest requires enforcing the Commission's mandate to prevent waste and protect correlative rights. The request for stay should be denied, and the Commission should require Goodnight to immediately shut in its four SWD wells, consistent with the Suspension Order and as set forth in Empire's September 23, 2025 Emergency Motion to Enforce Order No. R-24004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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