

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

**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

**APPLICATION OF GOODNIGHT MIDSTREAM
PERMIAN, LLC FOR APPROVAL OF A
SALTWATER DISPOSAL WELL, LEA
COUNTY, NEW MEXICO.**

**DIVISION CASE NO. 24123
ORDER NO. R-22869-A**

GOODNIGHT MIDSTREAM PERMIAN, LLC'S REHEARING BRIEF IN CHIEF

Goodnight Midstream Permian, LLC ("Goodnight") respectfully submits this Rehearing Brief in Chief in accordance with the New Mexico Oil Conservation Commission's ("Commission") October 17, 2025 Order (the "Rehearing Order").

BRIEF ANSWER TO THE COMMISSION'S TWO ISSUES

The Commission asked the parties to address two discrete issues: (1) can the Commission suspend Goodnight's existing injection wells given that Empire presented insufficient evidence that the claimed ROZ is recoverable, and (2) does the Division have discretion in implementing the Commission's R-24004 Order (the "Original Order"). The answer to the first question is

straightforward: No. To be sure, the Commission has the power to prevent waste and protect correlative rights. But to exercise that power, the Commission must *first* find that the alleged ROZ is both physically and economically recoverable. Without these findings (as is the case here), there is neither waste to prevent nor correlative rights to protect. While Goodnight believes this answer relieves the Commission of needing to analyze the second issue, that issue is equally straightforward. The plain language of the Original Order delegates authority to the Division by stating the “Division will implement this Order,” and the Division’s own briefing makes it clear that discretion—in both suspending operations and approving enhanced recovery projects—is critical to its function as the primary regulating body of New Mexico’s oil and gas operations.

INTRODUCTION

Goodnight’s SWD wells within the EMSU are vital to its customers and the state’s oil and gas industry. In 2023 alone, wells connected to Goodnight’s Llano system produced 48.4 million barrels of oil, 110.7 BCF of gas, and 100.6 million barrels of water. Nearly 53.9 million barrels of that produced water were delivered to Goodnight for disposal via a disposal interval in the EMSU’s Lower San Andres formation. Without the Goodnight wells, Delaware Basin producers will have insufficient available options for disposing the amount of produced water generated through their oil and gas exploration efforts, which will force them to rely upon interstate disposal options, if available, that could potentially be subject to restriction.

There is no legal basis to suspend these valuable operations, however, because Empire failed to meet its burden to show (among other things) that the claimed ROZ in the EMSU is recoverable. And to be sure, Empire has had ample opportunity to do so—whether in the ordinary course of its business or as part of these proceedings that it initiated. Yet since purchasing the EMSU assets in March 2021 with a purported interest in developing an ROZ, Empire has

undertaken no meaningful efforts to identify or further delineate an ROZ within the EMSU (nor, for that matter, have any of its predecessors over the 40-year life of the EMSU).

Some of the best evidence that there are no practically recoverable hydrocarbons is Empire's decision not to do any meaningful testing itself. Empire has not drilled or cored any new wells. It has not collected any mud logs. It has not invested in any relevant seismic data. It has not provided any evidence of comparable wells in the market area. And it has not provided any core samples from the interval where Goodnight is disposing water. (That lack of effort is perhaps unsurprising given that Empire apparently did not even bother to attempt to understand the nature of the operations in the EMSU before purchasing the assets, as it was entirely unaware of commercial injection into the EMSU until 2023—two years after the purchase.) Rather than undertake these or other meaningful development efforts, it has attempted to engage in wild speculation based upon decades old sampling, data from wells that are 45 miles away, and a smattering of unreliable expert evidence.

In short, it is highly speculative that an ROZ somewhere in the EMSU (let alone in the interval of Goodnight's disposal operations) is actually recoverable. Thus, when the Commission issued the Original Order, it rightly found that Empire had failed to present evidence that the claimed ROZ is recoverable.

A concrete finding of "recoverability"—both in the physical sense (can any hydrocarbons be extracted) and the economic sense (can hydrocarbons be extracted in commercial quantities)—is a prerequisite to any potential basis for suspension of Goodnight's SWD wells. Whether suspension is achieved through NMSA § 7-2-11 (prevention of waste and protecting correlative rights), NMSA § 7-2-12(B)(4) (prevention of the drowning by water of any stratum capable of producing oil or gas in paying quantities), or 19.15.26.10(E) NMAC (injection fluids have

exhibited a failure to confine), a finding of physical and economic recoverability (among other criteria) is necessary for the Commission to exercise the authority to suspend because each provision incorporates the concept of recoverability. For example, the definition of “waste” refers to activities that “reduce or tend to reduce the total quantity of crude petroleum oil or natural gas *ultimately recovered*.” Thus, if no oil or natural gas can be “ultimately recovered,” then no activity can be characterized as waste—i.e., activity that “reduce[s] or tend[s] to reduce” the total quantity ultimately recovered. Or, for example, the definition of “correlative rights” refers to oil and gas “so far as can be *practicably determined* and so far as can be *practicably obtained* without waste.” Thus, the Commission’s finding that Empire failed to establish that any ROZ is recoverable necessarily means that Empire failed to establish that Goodnight’s activities are impairing its correlative rights in a way that the Commission is authorized to protect under § 70-2-11.

Because the Commission found that Empire had not proven recoverability, it cannot then order suspension of Goodnight’s SWD wells. As such, the Original Order should be amended to allow Goodnight to continue its existing injection within the EMSU.

In the alternative, should the Commission proceed with ordering suspension, the Division—through the Commission’s Original Order—has been properly delegated with the task of implementing the Original Order. That discretion necessarily includes the ability to (a) determine when (if ever) suspension of Goodnight SWD wells is legally required in light of Empire’s yet-to-be-determined CO₂ flooding plans, and (b) set milestones for Empire to achieve related to any CO₂ flooding plans.

FACTUAL & PROCEDURAL BACKGROUND

I. Goodnight’s Operations

Goodnight provides saltwater disposal services to oil and gas operators in the Delaware Basin. To do so, Goodnight operates a large, high-pressure pipeline system in Lea County called

the Llano System, which transports and injects produced water from areas in the Delaware Basin. McGuire Direct, Ex. B to Goodnight's Proposed Findings of Fact, ¶¶ 7–10. Four of Goodnight's existing SWD wells in the Llano System dispose of produced water within the EMSU, and each of those EMSU wells inject into the interval known as the Lower San Andres. *Id.* ¶ 8; 4/22/25 Tr. 52:9-13 (Knights).

Goodnight's SWD wells are vital to both its customers and the industry at large. There is a substantial and growing demand for produced water disposal in southeastern New Mexico necessary to support increasing oil and gas development. McGuire 5/19/25 Tr., 158:6-163:17; McGuire 5/20/25 Tr., 176:5-177:1; 201:22-203:19. In 2023 alone, Delaware Basin wells connected to the Llano System produced 48.4 million barrels of oil, 110.7 BCF of gas, and 100.6 million barrels of water, nearly 53.9 million barrels of which were delivered to Goodnight for disposal. McGuire Direct, Ex. B to Goodnight's Proposed Findings of Fact, ¶ 10; Davidson 4/21/25 Tr. 254:22-25; 256:10-11 (testifying that Goodnight's injection is valuable to the producers in New Mexico because "they've got to have somewhere to put the water they're producing or they're going to have to shut wells in."). Goodnight's current injection capacity for its disposal wells within the EMSU is approximately 105,000 barrels of produced water per day, which directly supports the production of approximately 34,000 barrels of crude oil production per day. G. Adams Decl., Ex. A to Goodnight's Application for Rehearing, ¶ 2.

Goodnight has invested considerably in the Llano system, spending approximately \$300 million on its development alone. McGuire 5/20/25 Tr. 175:1-176:4. Moreover, it would cost Goodnight approximately \$40 million to relocate its four wells inside the EMSU to at least two miles outside the EMSU. McGuire 5/19/25 Tr., 50:8-24.

After the Commission issued the Original Order, Goodnight was forced to notify its customers in the affected area of a force majeure event, resulting in irreparable and continuing damage to existing customer relationships and business reputation. *Id.* ¶ 7. One of Goodnight's customers has already terminated previously ongoing negotiations for a future disposal opportunity due to concern about the viability of New Mexico injection as a result of the Commission's ordered three-year suspension. *Id.* ¶ 8. Goodnight expects that if the three-year suspension moves forward, additional business opportunities will be impaired and the Company will continue to suffer irrevocable impacts to its goodwill, among other cognizable injuries. *Id.* ¶¶ 8-14.

II. Empire's Operations

Empire purchased XTO's assets in the EMSU, EMSU-B, and AGU in March 2021. Wheeler 4/9/25 Tr., 13:5-7; *see also* Original Order at 6. Although Empire claims to have intended to pursue an ROZ development in all three units, it did not conduct on-site due diligence to inspect the properties before purchasing them. Wheeler Direct, Ex. A to Goodnight's Findings of Fact, ¶ 10; Wheeler 4/8/25 Tr., 171:7-172:1, 174:1-4, 241:11-19; *Id.* 4/9/25 Tr., 91:21-24; Goodnight Cross Ex. 13. Empire claims that it cannot commence activities to support development of the ROZ until Goodnight's injection ceases, despite readily admitting that Empire was not even aware of third-party commercial San Andres disposal operations in the EMSU, including Goodnight's operations, until August 2023 when visiting the field two years after they acquired the EMSU. Wheeler 4/9/25 Tr., 9:9-22, 29:22-31:8.

If Empire wants to attempt to produce residual oil that it believes is in the Lower San Andres at some point, Goodnight's operations are not interfering with Empire's ability to do so in the future. Given that an ROZ contains—by definition—only oil that cannot be mobilized by injection waters, Goodnight's current permitted injection could not and is not reducing the total

volume of residual oil in the alleged ROZ. *See, e.g.*, Rehearing Order at ¶ 16 (citing West 4/10/25 Tr., 86:3-6; McBeath 4/23/25 Tr., 226:3-23); *see also* Davidson 4/21/25 Tr. 256:3-20.

Since purchasing assets in the EMSU, Empire has made no effort to identify or further define or delineate an ROZ within the EMSU. It has not drilled or cored any new wells and has not collected any mud logs. Wheeler 4/9/25 Tr., 26:4-25, 91:25-93:10. It has not provided any core samples from the Lower San Andres interval where Goodnight is disposing water, choosing instead to provide decades old samples from only the Grayburg and the upper reaches of the San Andres. *See* Original Order at 6–7. There is no evidence that it has invested in any relevant seismic data. And it has not provided any evidence of comparable wells in the market area, instead choosing to focus on wells that are 45 miles away from the EMSU. Original Order at 10.¹

Also since purchasing assets in the EMSU, Empire has suffered significant financial setbacks, with increasing losses to net income and working capital. Goodnight Cross Ex. 15 at 12, 27–28; Goodnight Cross Ex. 17 at 27, 32, 47–48. In both 2023 and 2024, and continuing into 2025, Empire reported that there was “substantial doubt” about whether it could maintain itself as a “going concern.” *Id.*; *see also* Goodnight Response in Opposition to Empire Motion for Rehearing at 2 n.2.

III. The Applications, Hearings, and Orders

Following 18 days of hearing related to the parties’ various applications in this matter, the Commission entered the Original Order on September 12, 2025. As indicated in the first question presented by the Rehearing Order, the Commission found that “there was insufficient evidence presented at the hearing to prove whether the ROZ is recoverable.” Original Order at 10. As

¹ Each of the examples listed above are inexpensive, quick, and readily available. Empire’s decision to pursue costly, protracted litigation without undertaking any of this work is noteworthy.

explained below, that finding—following the presentation of weeks’ of evidence, hundreds of exhibits, thousands of pages of direct and rebuttal testimony, scores of legal briefs, and the opportunity to cross-examine, through which Empire had more than sufficient opportunity to present evidence of a recoverable ROZ—is fatal to efforts to suspend Goodnight’s injection wells. The Commission also found that “Empire DID NOT adduce substantial evidence that their correlative rights in the Grayburg are CURRENTLY impaired by Goodnight’s injection into the San Andres.” *Id.* at 9. Similarly, the Commission did not find that Goodnight’s past or present injection operations have exhibited failure to confine injection fluids to the authorized injection zone. *See generally id.*

Despite those findings and others, the Commission ordered injection through Goodnight’s four existing disposal wells within the EMSU to be suspended (and applications for new permits be denied), while also “provid[ing] Empire the opportunity to establish a CO2 EOR pilot project within a period of 3 years to ascertain the recoverability of the ROZ.” *Id.* at 12–13. The Commission further explained that “[t]he Division will implement this Order.” *Id.* at 13.

Subsequently, both Goodnight and Empire filed competing applications for rehearing with the Commission. On October 17, 2025, the Commission granted Goodnight’s requested rehearing in part, denied Empire’s requested rehearing, granted Goodnight’s Motion for Stay, and entered the Rehearing Order. The Rehearing Order, which noted there would be no “relitigat[ion] of the Commissions’ findings of fact,” granted a “limited rehearing” on an expedited basis for the following two questions:

- i. Does the Commission have the legal authority to “Suspend[] existing Goodnight[] injection wells . . . in order to provide Empire with the opportunity to establish the CO2 EOR pilot project” given that “there was insufficient evidence presented at hearing to prove whether the ROZ is recoverable?” Commission Order R-24004 pages 13 and 10, respectively.

- ii. Does Commission Order R-24004 provide OCD with discretion in managing the “Suspen[sion of] existing Goodnight[] injection wells . . . [and] to provide Empire with the Opportunity to establish the CO2 EOR pilot project”? Commission Order R-24004 page 13.

Original Order at 3. As to the first question, the Commission lacks authority to suspend SWD operations where no evidence exists showing that the ROZ is recoverable. As to the second question, the Original Order (Order R-24004) provides the Division authority to implement and manage Empire’s CO2 EOR pilot project. Goodnight’s answers to both questions are explained in more detail below.

ARGUMENT & AUTHORITIES

I. The Commission Does Not Have Authority to Suspend Existing Goodnight Injection Wells Given Its Finding That There Was “Insufficient Evidence Presented at the Hearing to Prove Whether The ROZ Is Recoverable.”

Under the Oil and Gas Act, the Commission has “jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste.” NMSA 1978, § 70-2-6(A); *see* § 70-2-6(B). As a creature of statute, the Commission’s powers are limited to the conservation of oil and gas by the prevention of waste and protection of correlative rights, with the Supreme Court identifying “the prevention of waste” as being “paramount”:

The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its power is founded on the duty to prevent waste and to protect correlative rights. Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights.

Cont’l Oil Co. v. Oil Conservation Comm’n, 1962-NMSC-062, ¶ 11, 70 N.M. 310, 373 P.2d 809 (internal citation omitted).

Under the Act and administrative provisions implementing the Act, three potential bases exist to suspend Goodnight’s existing SWD injection operations within the EMSU: (A) to prevent waste or protect correlative rights pursuant to NMSA § 7-2-11; (B) to prevent the drowning by

water of any stratum or part thereof capable of producing oil or gas in paying quantities pursuant to NMSA § 7-2-12(B)(4); or (C) where the injection fluids have exhibited a failure to confine, as outlined in 19.15.26.10(E) NMAC.² Under any of these bases, however, the Commission was first required to find (among other criteria) that the oil or gas at issue is recoverable—both physically and economically. Because the Commission did not make this finding and instead affirmatively found there was not substantial evidence of recoverability, it does not have the authority to suspend Goodnight’s existing EMSU injection wells.

A. Recoverability Is a Required Finding for the Commission to Act to Prevent Waste or Protect Correlative Rights Under NMSA § 7-2-11.

The Commission has the power and duty to (1) “prevent waste” and (2) “protect correlative rights.” NMSA § 70-2-11(A). To exercise that power, however, the Commission must first find that the oil or gas at issue is both physically and economically recoverable. Without these findings, there is neither waste to prevent nor correlative rights to protect.

1. For the Commission to take action to prevent waste, oil and gas must be physically and economically recoverable.

Under the plain language of the Act, and consistent with the Commission’s long-standing administrative construction, oil or gas must be recoverable for the Commission to take action to prevent waste.

“Underground waste,” which is the only potential type of waste at issue, is defined in the Act and regulations as follows:

“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

² Goodnight focuses on these three provisions, as they are the statutory and regulatory provisions that Empire has relied upon in seeking to revoke Goodnight’s permits.

petroleum oil or natural gas ***ultimately recovered*** from any pool, and the use of inefficient underground storage of natural gas.

NMSA § 70-2-3 (emphasis added); *accord* 19.15.5.7(W)(1)(a) NMAC.

The critical language here is “reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered.” NMSA § 70-2-3. If no oil or natural gas can be “ultimately recovered,” then no activity can be characterized as waste—i.e., activity that “reduce[s] or tend[s] to reduce” the total quantity ultimately recovered. Thus, because Empire—which has been the operator of record for over four years and has had ample opportunity to prove recoverability both in the ordinary course of its business and in the course of these proceedings—failed to carry its burden to establish an ROZ is recoverable anywhere within the EMSU, Goodnight’s injection activities cannot be characterized as reducing or tending to reduce the total quantity ultimately recovered. More specifically, because Empire failed to establish that the ROZ is recoverable in the San Andres disposal interval where Goodnight is actually injecting produced water (i.e., the Lower San Andres), Goodnight’s injection activities in that specific interval cannot constitute waste. That is especially so given that “the Residual Oil Zone at issue in these consolidated cases, by definition, contain only oil that cannot be mobilized by injection waters.” Rehearing Order ¶ 16 (emphasis in original).

The Commission has repeatedly highlighted the need for both physical and economic recoverability of hydrocarbons on the many occasions that it has evaluated allegations of operations creating waste (including for produced-water operations). For example, in Case No. 12905, the Commission considered an application for a permit to dispose of produced water in the San Andres and Glorieta formations. *See* Ex. 9 to Goodnight Closing Brief, Order No. R-11855-B, ¶ 3. An operator opposed the application, arguing that the proposed injection would create waste due to “the ***potential productivity*** of the San Andres and Glorieta formations.”

Id. ¶ 14 (emphasis added). After hearing testimony that the injection formations contained “some hydrocarbons,” the Commission granted the application and permitted the proposed SWD operations, in part, because the party opposing the application “failed to produce any evidence supporting its apparent assertion that either the San Andres or the Glorieta will produce oil or gas.” *Id.* ¶ 16; *see also id.* ¶ 15 (noting testimony revealed that the “relative permeability of the rock and the [high] water saturation make it extremely unlikely that any of the hydrocarbons could move to a well bore and be recovered.” *Id.* ¶ 15. The Commission concluded, “[i]t thus appears that the Glorieta and San Andres are wet and will not produce **commercial quantities** of oil or gas in the vicinity of the proposed injection well.” *Id.* ¶¶ 16-17 (emphasis added). This Order confirms that recoverability is not simply a test of physical recoverability (i.e., can a single drop of oil or gas be extracted) but also one of economic recoverability (i.e., can oil and gas be extracted in “commercial quantities”). *Id.* ¶¶ 14-17.

The requirement for economic recoverability (in addition to physical recoverability) is present throughout the Act. For example, the Act prohibits operators from producing or handling oil or gas “in such amounts as to constitute waste.” NMSA § 70-2-2. This means that the loss of small volumes of oil and gas that are not commercial does not constitute waste when such volumes could not be produced for a profit. *See id.* § 70-2-3(C). Or, for example, the definition of underground waste (as quoted above) prohibits “excessive” dissipation or loss without beneficial use. *Id.* §§ 70-2-3 (A) & (B). Thus, small volumes of gas that are lost during transportation via pipelines or that fall out in the treatment process are not considered “waste” when the amount lost is insignificant or when such losses are necessary. *See, e.g.,* 19.15.28.8.B(2) NMAC (identifying activities that are exempted from the natural gas gathering “waste rule” that either result in a de minimis loss of gas or are necessary as part of normal operations).

As indicated in the discussion above regarding Order R-11855-B, these principles related to economic recoverability have been repeatedly applied in the context of injection. Indeed, for at least the 40 years since formation of the EMSU, whether the injection interval targeted by a proposed disposal well contains commercial amounts of oil and gas production has been integral to the Commission's conservation considerations regarding waste. In 1984, the Commission authorized a SWD well, in part, because "no commercial oil and gas production has been found in the 'C' or 'D' zones in the immediate area of the said proposed disposal well." Ex. 11 to Goodnight Closing Brief, Order No. R-7637 at 2, ¶ 4; *see also id.* ¶ 6 (finding no drowning would occur in a "zone capable of producing commercial quantities of oil and gas in the area").

Similarly, in 2014 the Division considered an application for approval to convert a stripper well to a SWD well. The party opposing the application argued that the Division should not allow the conversion because the well was still capable of producing in paying quantities. *See* Ex. 12 to Goodnight's Closing Brief, Order No. R-13922 (the objectors failed to provide evidence of commercial production and did not appear to contest the application whereas the applicant provided a decline curve analysis to show the stripper well operation costs would exceed its revenues). The Division concluded that "the well is truly a stripper well, and the cost of producing the well to abandonment will be greater than the revenues generated [by authorizing the proposed disposal injection]." *Id.* ¶ 12. The Division continued, "[t]he evidence submitted by the Applicant also demonstrates that if the well is not converted to a salt water disposal well, the cost of disposing . . . water from these new wells will be great." *Id.* ¶ 13; *see also* Ex. 13 to Goodnight Closing Brief, Order No. R-13958 at 2, ¶¶ 5(h) & 7 (ordering that a stripper well be converted to a SWD well because the "[stripper] well is uneconomic to produce" and "therefore [the operator] has the right to use the well for other beneficial purposes").

The Division thus balanced the competing interests of (a) the loss of a small volume of oil and gas, which was not producing in paying quantities, against (b) the more substantial economic benefit of supporting new offsetting production. *See* Ex. 12 to Goodnight's Closing Brief, Order No. R-13922, ¶¶ 12-13. And in granting the application to convert, it determined that approving the proposed disposal operations weighed more favorably in the interest of prevention of waste and, overall, prevented waste. *See id.* Like the objectors in Case No. 15159, Empire's failure to adduce evidence that any oil in the ROZ can be commercially recovered is dispositive here. *Id.* And like the applicant's proposed operations in that case, Goodnight's actual operations here convey a substantial benefit and support existing oil and gas production efforts.

The need for physical and economic recoverability as recognized by this Commission is standard throughout the oil and gas industry. *See* Williams & Meyers, OIL AND GAS LAW, at "W Terms" (defining "waste" as "the loss of oil or gas that could have been recovered and put to use."). Courts in oil-producing states routinely require that oil and gas be shown to be recoverable before waste can result. *See, e.g., Kuykendall v. Corporation Comm'n*, 1981 OK 105, ¶ 12, 634 P.2d 711 (considering the "practicable recoverability of minerals" in determining whether its order created waste); *Big Piney Oil & Gas Co. v. Wyoming Oil & Gas Conservation Comm'n*, 715 P.2d 557, 562 (Wyo. 1986) (affirming a Wyoming Commission order that shut in certain wells, in part, because it prevented waste caused by oil migrating into the gas cap and rendering it unrecoverable). The reason "recoverability" is a precondition to finding "waste" is obvious: it makes no sense to restrict productive and commercially viable oil and gas operations (such as produced water disposal) where there is no showing that those operations reduce the amount of physically recoverable oil and gas that can be sold in commercial quantities.

So, to determine whether the production or handling of oil and gas will be done “in such manner,” “under such conditions,” or “in such amounts” that constitute waste or result in waste, NMSA § 70-2-2, the Commission is required to determine whether oil and gas is recoverable, both in terms of physical and economic limitations. Because the Commission found that Empire had not met its burden to prove the existence of a recoverable ROZ (i.e., Empire did not show the ROZ was physically recoverable, let alone economically recoverable), the Commission lacks authority to suspend Goodnight’s injection authority as to its four existing EMSU wells.

2. For the Commission to take action to protect correlative rights, oil and gas in the target zone must be recoverable, and correlative rights must actually be impaired.

In addition to preventing waste, the Commission is empowered to protect correlative rights.

NMSA § 70-2-11. Correlative rights means:

The opportunity afforded, *so far as it is practicable to do so*, to the owner of each property in a pool to produce without waste the owner’s just and equitable share of the oil or gas or both in the pool, being an amount, *so far as can be practicably determined and so far as can be practicably obtained without waste*, substantially in the proportion that the quantity of recoverable oil or gas or both under the property bears to the *total recoverable oil or gas* or both in the pool and, for such purpose, to use the owner’s just and equitable share of the reservoir energy.

NMSA § 70-2-33(H) (emphases added); *accord* 19.15.2.7(C)(16) NMAC. In order to act to protect correlative rights, the Commission must find the oil or gas at issue can be “practicably obtained”—i.e., it is physically and economically recoverable. But the Commission has made no such finding. Indeed, the Commission’s finding that Empire failed to establish that any ROZ is recoverable necessarily means that Empire failed to establish that Goodnight’s activities are impairing its correlative rights in a way that the Commission is authorized to protect under § 70-2-11.

Critically, the only finding related to present impairment of correlative rights establishes that there is no impairment: “Empire DID NOT adduce substantial evidence that their correlative rights in the Grayburg are CURRENTLY impaired by Goodnight’s injection into the San Andres.”

Original Order at 9. To be sure, the Commission did find that “Empire DID adduce substantial evidence of the possibility of FUTURE impairment of correlative rights or waste in the EMSU.” But that finding of *possible* impairment in the *future* is insufficient to warrant suspension at the *present* time. Only when present (not future) impairment is actually (not possibly) established can the Commission remedy an impairment of correlative rights. *See, e.g.*, NMSA § 70-2-2 (oil and gas production and/or handling may not “constitute or result in waste”); *id.* at § 70-2-3(C) (defining “waste” by reference to current, not future conditions); *id.* at §§ 70-2-3 (A) & (B) (defining “underground waste” and “surface waste” by reference to current, not future conditions). And as the Commission found, there is no evidence of impairment at this time. When—if ever—the “possibility” alluded to in the Original Order actually comes to fruition at some point in the uncertain “future” (whether years or decades from now), then at that time Empire is free to ask the Commission to protective its correlative rights. *Cf. infra* Part II.B (discussing Order No. R-13889 and the ability to revisit prior Division decisions if hydrocarbons are found in the future to exist in commercial quantities). Until the Commission finds actual and present impairment of Empire’s correlative rights, the Commission lacks authority to suspend Goodnight’s injection activities as to its existing SWD wells in the EMSU.

B. Recoverability Is Also a Required Finding for the Commission to Act to Prevent Drowning Under NMSA § 70-2-12(B)(4).

The second potential authority for suspension of injection permits is particular to water operations and is found in NMSA § 70-2-12(B)(4). Under this provision, the Commission has the power to make rules and orders 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.

NMSA § 70-2-12(B)(4) (emphases added). Thus, for the Commission to act pursuant to this provision, it must—consistent again with the pervasive requirement of physical and economic recoverability—find that the stratum at issue is (a) “capable of producing oil or gas” and (b) capable of doing so “in paying quantities.”

The first prong—whether the stratum is capable of producing oil and gas—means that the oil or gas within the threatened stratum must be physically recoverable. NMSA § 70-2-3 (limiting the definition of waste to the quantity of oil or gas “ultimately recovered”); *see also* Ex. 9 to Goodnight Closing Brief, Order No. R-11855-B, ¶ 3 (addressing the operator’s failure to produce “any evidence supporting its apparent assertion that either the San Andres or Glorieta will produce oil or gas”); *Kuykendall*, 1981 OK 105, at ¶ 12 (considering the “practicable recoverability of minerals” in determining whether its order created waste).

The second prong—whether the threatened stratum is capable of producing oil and gas in paying quantities—means that the quantities capable of production must be economic or commercial. In Case No. 15059, for instance, the Division determined that its authority to prevent waste does not extend to formations that are not proven to be capable of producing commercial amounts of oil or gas. *See* Ex. 10 to Goodnight Closing Brief, Order No. R-13889. In considering whether to approve a SWD well over the objection of an oil and gas operator, the Division explained,

[T]he Division is required to prevent the drowning by water any stratum or part thereof ***capable of producing 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 from any pool. Under the Oil and Gas Act, the Division’s authority to prevent ‘the drowning by water any stratum’ ***does not extend into formations that are not the targeted hydrocarbon reservoirs or pools***.

Id. at ¶ 7 (emphases added). The Division’s analysis and decision to permit the SWD well shows that waste does not occur absent evidence that the hydrocarbons can be produced in paying

quantities (i.e., quantities that are commercial or economic) from the target reservoir. *Id.*; *see also* Ex. 11 to Goodnight Closing Brief, Order No. R-7637 at ¶ 6 (finding, by Commission, that “the disposal of produced water into the proposed disposal interval will not cause the premature drowning by water of any zone capable of producing **commercial quantities** of oil and gas in the area” (emphasis added)). Notably, the Division required the operator to notify it of “significant hydrocarbon shows” and stated that its order would be terminated if “significant hydrocarbon shows” indicate the permitted interval is “capable of producing in paying quantities.” *Id.* The Commission will likewise retain jurisdiction in this matter.

Because the Commission found insufficient evidence of recoverability (let alone in “paying quantities”), the Commission lacks the authority to suspend Goodnight’s injection wells under NMSA § 70-2-11(B)(4).

C. Recoverability Is a Required Finding for the Commission to Act to Restrict Injection Volume Under 19.15.26.10(E) NMAC, and in any Event the Commission Made No Finding Establishing an Exhibited “Failure to Confine.”

The third potential authority to suspend existing injection authority is 19.15.26.10(E) NMAC. This is the only provision in the Act or its implementing regulations that specifically addresses when and under what circumstances the Commission can order suspension of an existing injection well. Specifically, this provision authorizes the Commission to

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.

19.15.26.10(E) NMAC (emphases added). The Commission lacks authority to suspend the Goodnight wells under this provision for two reasons: (1) Empire did not establish any hydrocarbons in the alleged ROZ are recoverable, and (2) Empire did not establish that there is an exhibited failure to confine.

Although 19.15.26.10 NMAC does not explicitly refer to the recoverability of oil or gas, it is implied. This section of the regulations is adopted pursuant to NMSA § 70-2-11, which is the provision granting the Division and Commission the power and duty to take actions to prevent waste and protect correlative rights. *See* 19.15.26.3 NMAC (“19.15.26 NMAC is adopted pursuant to the Oil and Gas Act . . . **Section 70-2-11**” (emphasis added)). This provision also partially implements the Commission’s statutory authority to prevent waste and protect correlative rights by preventing the drowning of water by any stratum capable of producing oil or gas in paying quantities. *See* NMSA § 70-2-12(B)(4); Order No. R-7637 at 2, ¶¶ 4, 6 (approving disposal where injection “into the proposed disposal interval will not cause the premature drowning by water of any zone capable of producing commercial quantities of oil and gas in the area.”). In construing its authority to prevent waste and protect correlative rights under Section 70-2-12(B)(4), the Commission promulgated 19.15.26.10(E) NMAC, providing that it “may” shut in injections wells only after such wells “have exhibited failure to confine injected fluids to the authorized injection zone or zones.” As such, recoverability is a required finding in order for the Commission to take action to shut-in existing injection wells under 19.15.26.10(E) NMAC. Because the Commission affirmatively found that Empire failed to present sufficient evidence of recoverability, the Commission lacks the authority to shut-in Goodnight’s existing wells pursuant to this provision.

Alternatively, to exercise its authority under 19.15.26.10(E) NMAC, the Commission needed to have found that Empire presented sufficient evidence that Goodnight’s injection wells “have exhibited failure to confine” the injected fluids within Goodnight’s disposal zone. 19.15.26.10(E) NMAC. The Original Order, however, contains no such finding. Indeed, the Commission found the opposite. The finding that Empire failed to prove Goodnight’s injection into the San Andres impaired its correlative rights is antithetical to the notion that Goodnight’s

wells injecting water into the Lower San Andres “have exhibited failure to confine injected fluids to the authorized injection zone or zones” as required by 19.15.26.10(E) NMAC.

Therefore, the Commission lacks authority to suspend Goodnight’s existing injection within the EMSU under 19.15.26.10 NMAC.

II. The Original Order Grants the Division Discretion to Manage Injection Suspension and Empire’s EOR Pilot Project.

Given the Commission’s finding that Empire failed to present sufficient evidence to establish the recoverability of the ROZ, the Commission does not have authority to order that Goodnight’s existing EMSU injection wells be suspended, and it should amend the Original Order to eliminate any suspension requirement. If, however, the Commission declines to amend the Original Order and proceeds with the temporary shut-in of Goodnight’s wells, the Division should be allowed to exercise its discretion to implement such suspension.

The Original Order states that “[t]he Division will implement this Order.” Original Order at 13. This statement—by its plain language—means the Division will carry out the ordered suspension, including managing the suspension through any concrete measures it chooses to impose. *See, e.g., Implement, Merriam-Webster, <https://www.merriam-webster.com/dictionary/implement> (last visited October 23, 2025) (defining “implement” as to “carry out, accomplish” including “to give practical effect to and ensure of actual fulfillment by concrete measures”).* As the Division’s protocol for enforcing suspension is highly case specific, discretion is an inherent part of its power. *See Exhibit A to OCD’s Response to Goodnight’s Application for Rehearing at ¶ 5.*

The Division’s discretion includes the responsibility to determine when (if ever) suspension should be initiated and set milestones for Empire to meet for its CO2 EOR pilot project, as the Original Order does not expressly address either of these issues. As the Division outlined in its

Response to Goodnight's Application for Rehearing and Empire's Motion for Rehearing (the Division's "Response Brief"), Goodnight's injection suspension should be tied, in some form, to specific milestones in Empire's EOR project. Response Brief at 6 (noting that, based on "OCD's experience . . . Empire's EOR project will take considerable time to plan, submit for OCD approval, and then ultimately execute"). These milestones would be appropriate for any operator pursuing tertiary recovery efforts, but they are particularly important here given (a) Empire's failure to develop or carry out a plan for an EOR project thus far, (b) Empire's dire financial condition, which makes the prospect of the actual and complete implementation of an EOR project unlikely, and (c) Empire's significant plugging liability and outstanding environmental remediations costs. *See* Wheeler 4/9/25 Tr., 18:21-19:24, 23:5-24:10 (explaining that Empire acquired more than \$56 million in plugging liability and outstanding environmental remediation costs). For these reasons, Goodnight supports the Division's proposed scheduling of milestones for Empire's EOR project and any SWD suspensions, as discussed in the Division's Response Brief. It submits that the parties should, at the Division's direction, file further briefing with the Division regarding the scheduling and nature of these milestones.

In the alternative, should the Commission amend its Original Order to clarify the scope of the Division's delegated authority, then Goodnight believes that clarification should, at a minimum, do the following:

- a. instruct the Division to implement deadlines for performance by Empire of CO2 EOR pilot project milestones (including the development of an actual pilot plan and regular reporting to the Division and Goodnight on the status of the pilot project),
- b. clarify that suspension of Goodnight's SWD wells should only occur once Empire establishes (after notice an opportunity to be heard to Goodnight) that an ROZ in the Lower San Andres formation (i.e., the interval where Goodnight is actually injecting water) is physically and economically recoverable—in addition to any other requirements in the statutory or regulatory provisions that serve as the basis for Empire's future suspension efforts, and

- c. clarify that suspension of Goodnight's SWD wells should also only occur once Empire (i) is actually ready, willing, and able to begin CO2 flooding given that an ROZ definitionally contains only oil that cannot be mobilized by injection waters (and so Goodnight's current permitted injection could not ever reduce the total volume of residual oil (recoverable or otherwise) in the alleged ROZ), and (ii) demonstrates that simultaneous SWD injection and CO2 flooding (of the type ultimately proposed by Empire) results in waste.

CONCLUSION

For the foregoing reasons, Goodnight Midstream Permian, LLC respectfully requests the Commission to (a) amend its Original Order to remove any suspension requirement and allow Goodnight to continue its current SWD injection into the Lower San Andres, and (b) clarify that the Division has the authority to implement the Original Order, which Goodnight believes is already plain from the text of the Original Order itself.

In the alternative, the Commission should revise the Original Order in the manner set forth in Part II, *supra*, regarding milestones for the Empire CO2 EOR project and timing of future suspension of Goodnight's SWD wells.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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