

STATEMENT OF LEGAL AUTHORITY
OF THE STATE OF NEW MEXICO BY AND THROUGH
ITS OIL CONSERVATION DIVISION OF THE ENERGY
AND MINERALS DEPARTMENT TO CONDUCT AN
UNDERGROUND INJECTION CONTROL PROGRAM

GENERAL

The legal basis upon which the Oil Conservation Division relies as its authority to administer an Underground Injection Control Program under the federal Safe Drinking Water Act, as amended, depends on a valid enactment of a state regulatory scheme to regulate oil and gas operations in the State.

From a historical viewpoint, the New Mexico "Oil and Gas Act" setting up such a regulatory scheme was initially adopted in 1935 generally for the purpose of encouraging conservation, preventing waste, and requiring sound completion and re-completion practices in the exploration and production of oil and gas reserves.

In order to keep abreast of, and encouraging advances in drilling techniques and in improving drilling equipment and materials, the Oil and Gas Act has been modified and amended from time to time, as necessary, to its current form. As a result, current regulation of oil and gas operations in New Mexico insures that all operators will follow standard and effective conservation practices. Water protection and oil and gas reservoir protection are two of the more important practices which must be observed by oil and gas operators. Essentially both of these practices deal with the integrity of well bores.

Fresh water strata containing underground sources of drinking water are protected by casing set below the deepest zone that might contain such water. The casing is cemented sufficiently to prevent migration of fluids from and into each stratum penetrated. Drilling muds, oil, and water recovered from testing, and the residue from formation treatments are confined or disposed of, so that pollution of the surface, ponds and other watercourses is avoided.

Dry holes must be plugged and abandoned in such a manner that subsurface salt water or brines will be confined to the stratum in which it is found, thereby protecting underground sources of drinking water.

Each oil, gas, and water stratum penetrated by a well must be permanently sealed by casing and cement. Cement must be allowed to set a minimum length of time to assure adequate cement strength before continued drilling, completion or recompletion procedures are continued. Once the required time has elapsed, prescribed testing procedures must be followed. Should the tests reveal defective cementing, necessary remedial work must be done to correct the deficiency.

Research of case law in New Mexico as to the constitutionality and validity of the Oil and Gas Act, as amended, leads to the conclusion that there has never been a serious challenge to its enactment. Obviously, there have been numerous cases challenging the action taken by the Oil Conservation Commission or the Division (both have concurrent jurisdiction under the Oil and Gas Act) in particular cases. None of these researched cases have, however, invalidated statutory authority granted to the Division for administering the provisions of the Oil and Gas Act.

SPECIFIC STATUTORY AUTHORITY

The Division derives its essential source of authority for protection of underground sources of drinking water from the two statutes.

Section 70-2-11(A), New Mexico Statutes Annotated, 1978 Compilation states:

"The Division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof."

The pertinent portions of Section 70-2-12 NMSA, 1978 Compilation, which clearly and specifically outline the Division's powers, insofar as administration of a program such as the Underground Injection Control Program, are as follows:

"A. Included in the power given to the division is the authority to collect data; to make investigations and inspections; to examine properties, leases, papers, books and records; to examine, check, test and gauge oil and gas wells, and tanks, plants, refineries and all means and modes of transportation and equipment; to hold hearings; to provide for the keeping of records and the making of reports and for the checking of the accuracy thereof; to limit and prorate production of crude petroleum oil or natural gas, or both, as in this act provided; to require either generally or in particular areas certificates of clearance or tenders in connection with the transportation of crude petroleum oil or natural gas or any products thereof, or both such oil and products, or both such natural gas and products.

B. Apart from any authority, express or implied, elsewhere given to or existing in the division by virtue of this act or the statutes of this state, the division is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz:

(1) To require dry or abandoned wells to be plugged in such a way as to confine the crude petroleum oil, natural gas or water in the strata in which they are found, and to prevent them from escaping into other strata; the division may require a bond of not to exceed ten thousand dollars (\$10,000) conditioned for the performance of such regulations;

(2) to prevent crude petroleum oil, natural gas or water from escaping from strata in which they are found into another stratum or other strata;

.....

(4) 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, which reduces or tends to reduce the total ultimate recovery of crude petroleum oil or gas, or both such oil and gas, from any pool;

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(6) to prevent "blow-outs" and "caving" in the sense that the conditions indicated by such terms are generally understood in the oil and gas business;

(7) to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties;

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(13) to regulate the methods and devices employed for storage in this state of oil or natural gas or of any other substance into any pool in this state for the purpose of repressuring, cycling, pressure maintenance or secondary recovery operation;

(14) to permit the injection of natural gas or of any other substance into any pool in this state for the purpose of repressuring, cycling, pressure maintenance or secondary recovery operation;

(15) to regulate the disposition of water produced or used in connection with the drilling for or producing of oil or gas, or both, and to direct surface or subsurface disposal of such water in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the state engineer; *

.

(18) to spend the oil and gas reclamation fund and do all acts necessary and proper to plug dry and abandoned oil and gas wells in accordance with the provisions of the Oil and Gas Act (70-2-1 to 70-2-36 NMSA 1978) and the Public Purchases Act (13-1-1 to 13-1-27 NMSA, 1978) including disposing of salvageable equipment and material removed from oil and gas wells being plugged by the state."

RULES AND REGULATIONS

The Division's current regulations, some of which have been promulgated or revised specifically to accommodate the Underground Injection Control Program, have all been promulgated only after proper notice and hearing. While there is always a risk that a regulation or regulations may be legally challenged, it is submitted that appropriate procedural safeguards have been taken by the Division to avoid invalidation of any of its rules and regulations on procedural grounds.

Because other portions of the Division's demonstration will contain a concise explanation and description of pertinent regulations, it suffices to say in this context that requirements of the Underground Injection Program as required by the federal Environmental Protection Agency are being satisfied.

SPECIFIC REQUIREMENTS OF SECTION 1425 OF THE SAFE DRINKING WATER ACT, AS AMENDED

The specific portions of Section 1425 pertinent to this statement state in part:

*See Program Description Exhibit XIII for explanation of designation of fresh water supplies by State Engineer.

". . . the State may demonstrate that (the Class II) portion of the State program meets the requirements of subparagraphs (A) through (D) of Section 1421 (b) (1) and represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources."

A discussion of the requirements of Section 1421 (b) (1), insofar as they relate to New Mexico's Class II program, follows:

(1) Section 1421 (b)(1)(A) requirement that an approvable State program prohibits any underground injection which is not authorized by permit or rule.

By regulation, pursuant to Section 70-2-12 A and B, New Mexico Statutes Annotated, 1978 Compilation, supra, injection of any substance is prohibited by the Division unless and until prior approval of the Division is obtained.

Division Rule 701 (A) states:

"The injection of gas, liquefied petroleum gas, air, water, or any other medium into any reservoir for the purpose of maintaining reservoir pressure for the purpose of secondary or other enhanced recovery or for storage or the injection of water into any formation for the purpose of water disposal shall be permitted only by order of the Division after notice and hearing, unless otherwise provided herein."

Other provisions of the Division's rules and regulations do not grant exceptions to Rule 701 (A) except that under certain circumstances the hearing requirement may be relaxed by the Division where no objections have been submitted to the Division concerning a proposed injection project. Consequently, injection within the jurisdiction of the Division is strictly regulated and may not be accomplished without prior approval of the Division.

(2) Section 1421(b)(1)(B) requirements: (1) that an applicant for a permit must satisfy the State that the underground injection will not endanger drinking water sources, and (2) that no rule be promulgated which authorizes any underground injection which endangers drinking water sources.

An elementary proposition of administrative law requiring no citation is that an administrative agency is as much bound by its own regulations as those it regulates. This proposition is amply supported by case law in New Mexico. In other words, regulations may not be ignored, waived or suspended in a particular case by an agency. However well intentioned, administrative bodies must comply with the law; and it is necessary that they be required to do so, to prevent any possible abuse. Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809 (1962).

In applying the foregoing standards which the Division, as an administrative body must abide by, there is no question but that the Division, once having promulgated rules and regulations designed to protect underground sources of drinking water, pursuant to valid legislative enactments, is under a mandate to uniformly enforce those regulations. As to specific orders approving particular

projects, however, the Division retains continuing jurisdiction to properly maintain an effective program.

Recent revisions of the Division's rules and regulations and reporting forms have been drafted and designed not only to meet legal requirements under the Safe Drinking Water Act, but possibly more important, the technical criteria for assuring that drinking water sources will not be endangered.

Accordingly, in addition to the mandate under the Safe Drinking Water Act, The Division, specifically under Section 70-2-12 NMSA, 1978 Compilation, supra, and its rules and regulations, must approve only those applications for injection which will not endanger drinking water sources.

By the same token, and for the same reasons, the Division cannot promulgate rules which would be inconsistent with protection of underground sources of drinking water. Such inconsistent practice would clearly violate the Division's statutory mandate.

(3) Section 1421(b)(1)(C) requirement of inspection, monitoring, recordkeeping, and reporting requirements.

Pursuant to Section 70-2-12(A) NMSA, 1978 Compilation, quoted in its entirety above, the Division, in its rules and regulations relating to secondary recovery, pressure maintenance, salt water disposal, and underground storage, has made substantial requirements for the Section 1421 (b)(1)(C) requirements. These specific rules being Rules 704, 705, and 706 are discussed in more detail in other portions of the demonstration.

In addition, Division Rules 1100 through 1131 dealing with general reporting and filing procedures and informational requirements enable the Division to trace well histories from commencement of a well to its final plugging and abandonment in accordance with a Division approved plugging program.

(4) Section 1421 (b)1(D) - Requirement that a State Program apply to:

- (1) Underground Injections by Federal Agencies;
- (2) Underground Injections by any other persons, whether or not occurring on property owned or leased by the United States.

A review of the records of the New Mexico Oil Conservation Division reveals that since passage of the Oil and Gas Act in 1935 no Federal agency has operated a Class II Well in the State. However, in the unlikely event that such operations should be conducted by any Federal agency in the future, these operations, under current statutory provisions, would be subject to the jurisdiction of the New Mexico Oil Conservation Division. Consequently, such operations would of necessity be forced to comply with any underground injection control program adopted by the Oil Conservation Commission or Division. The authority for the State of New Mexico assuming responsibility for any Class II Well project conducted by a Federal agency on lands within this state is found in New Mexico Statutes as supplemented by the Safe Water Drinking Act.

Section 70-2-6 NMSA, 1978, it states in part:

"...it (Oil Conservation Division), shall have jurisdiction authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this Act or any other law of this State relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil and gas operations".

In addition to this general grant of authority over "all persons, matters or things, necessary or proper", Section 70-2-12 entitled "Enumeration of Powers" sets forth specifically the powers of the Division. Section 70-2-12 B. states in part:

"...Apart from any authority, expressed or implied, elsewhere given to or existing in the Division by virtue of this Act or the Statutes of this State, the Division is hereby authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated herein, viz:

...

(14) "To permit the injection of natural gas or of any other substance into any pool in this State for the purpose of repressuring, cycling, pressure maintenance or secondary recovery operations;

(15) "To regulate the disposition of water produced or used in connection with the drilling for or producing of oil or gas or both and to direct surface or subsurface disposal of such water in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the State Engineer;

The import of the statutory provisions is clearly that the State intends to control all underground injection activities within its boundaries and that the Legislature saw fit to provide the Oil Conservation Division with the appropriate authority to conduct such activities. 1

1. The case of Southern Union Company v. New Mexico Public Service Commission, 82 NM 405, 482 P.2nd 913 (1971) held that at least under the terms of the Public Utility Act the word "person" did not include governmental entities. This decision applying to a different statute and a different jurisdictional agency is not determinative of the question of whether or not the State has jurisdiction over federal agency projects. The enabling and empowering sections of the Oil and Gas Act presently under consideration do not rely solely upon the word "person" in establishing the jurisdiction of the Oil Conservation Division. Although the word person or persons appears in the enforcement provisions of the Oil and Gas Act, such language does not disenable the Oil Conservation Division from acting in this case since the State could rely upon the broader scope of its enabling section.

In view of these authorities, underground injection projects conducted by Federal agencies are subject to State regulation.

The same logic and statutory authority should be applied to Part 2 of the question posed by 1421 (b) (1) (D) which is whether or not underground injections by any other person, whether or not occurring on property owned or leased by the United States are subject to control under the proposed underground injection plan. The State statutes set forth immediately above, 70-2-12B. (14) (15), clearly indicate jurisdiction in the State to control the injections. If the proposed injection project is conducted upon lands which are owned or leased by the United States and operated by a non-governmental entity, this analysis is once again applicable.

The congress, as it has set forth in the Safe Drinking Water Act, has clearly indicated that this field has not been and was not intended to be pre-empted by the Federal Government. By allowing for the possibility of State primacy in the UIC program and requiring that federal agencies comply with state requirements, there is shown a contrary interest. That being the case, concurrent jurisdiction in the Federal and State Government lies and consequently the state program will apply to Federal agency projects or those conducted by any operator on federally owned or leased land.

In summary, there appears to be no legal impediment and indeed there are clear state mandates authorizing the Oil Conservation Division to exercise jurisdiction over Class II Wells operated directly by the United States on public lands, operated by private individuals on federal lands or operated by private individuals on private lands. Upon approval of the New Mexico Underground Injection Control Plan, the State of New Mexico intends to exercise such jurisdiction to the extent authorized.



W. Perry Pearce,
Assistant Attorney General
General Counsel to the Oil
Conservation Division

2. Proof that the Oil Conservation Division exercises such jurisdiction over operators on federal land is found in Robert G. Cox v. New Mexico Oil Conservation Commission et al (unreported decision in Case # 11,618 entered May 4, 1978) which decision affirmed the Order of the Commission and the affirmation of the order by the District Court of Eddy County. This commission order denied applicant Cox the right to produce a well, which had been drilled under Department of Interior Permit, for violation of the order of the Commission.

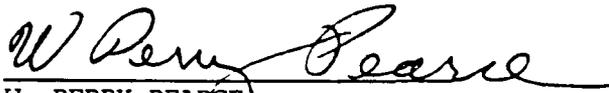
In addition, in the case of OCC v. Roger C. Hanks cause No. 29778 in the District Court of Eddy County, the Commission sought penalty against defendant for operating a salt water disposal on federal land in violation of the terms of Order No. R-4158 of the Commission. This cause was settled upon payment of a fine of \$11,000 and correction of all violations.

CERTIFICATE

STATE OF NEW MEXICO)
)
COUNTY OF SANTA FE)

W. PERRY PEARCE, as Assistant Attorney General for the Oil Conservation Division of the Energy and minerals Department of the State of New Mexico, has prepared and read the foregoing document with full power and authority to do so, and states that the matters and facts set forth therein are true to the best of his information, knowledge and belief; and he further certifies, based upon his examination of appropriate State laws including the Division's rules and regulations that:

- (1) the rules and regulations of the Division do not permit underground injection which will endanger drinking water sources;
- (2) by statute the Division may not promulgate regulations which would authorize any underground injection which endangers drinking water sources;
- (3) the Division is required to inspect, monitor, keep records, and obtain periodic and sundry reports affecting all oil and gas operations including underground water injection under its jurisdiction;
- (4) an Underground Injection Program administered by the Division would apply to underground injection by federal agencies and on lands owned, leased or administered by the United States; and
- (5) the Underground Injection Program as proposed by the Division represents an effective program to prevent underground injection which endangers drinking water.



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