STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

APPLICATION OF NEW MEXICO OIL CONSERVATION DIVISION TO ADOPT 19.15.27 NMAC AND 19.15.28 NMAC, AND TO AMEND 19.15.7 NMAC, 19.15.18 NMAC, AND 19.15.19 NMAC; STATEWIDE **CASE No. 21528**

NEW MEXICO OIL CONSERVATION DIVISION'S RESPONSE TO NMOGA'S MOTION TO STRIKE 19.15.27.8(G)(4) FROM PART 27 RULE ON VENTING AND FLARING OF NATURAL GAS

The New Mexico Oil Conservation Division ("OCD") submits this response to New Mexico Oil and Gas Association's ("NMOGA") motion to strike OCD's proposed language in 19.15.27.8(G)(4) NMAC which requires operators to disclose their waste of natural gas to royalty owners.[1] Picking bits and pieces of the Oil and Gas Act ("Act") that support its position and ignoring those that do not, NMOGA urges the Oil Conservation Commission ("Commission") to adopt a narrow interpretation of its statutory authority to regulate the waste of natural gas. NMOGA also suggests that the Commission should accept its representations about the intelligence of royalty owners and the effect and burden of disclosure before the Commission has even heard a single word of testimony. Such a preemptive strike would be improper in a Commission rulemaking designed for the express purpose of hearing all the arguments and evidence before making a decision.

[1] *See* OCD Exhibit 2 at 6 ("The operator shall report the vented and flared natural gas on a volumetric and percentage basis to all royalty owners in the mineral estate being produced by the well on a monthly basis, keep such reports for not less than five years and make such records available for inspection by the division upon request.")

I. THE COMMISSION HAS THE STATUTORY AUTHORITY TO REQUIRE OPERATORS TO REPORT WASTE TO ROYALTY OWNERS.

The Commission has both the statutory duty and the statutory authority to require operators to disclose their waste of natural gas to royalty owners. The Act expressly states that the Commission and OCD is "empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights." NMSA 1978, § 70-2-11; *Continental Oil Co. v. Oil Conservation Commission,* 1962-NMSC-062, ¶ 11, 70 N.M. 310, 373 P.2d 809 ("The Commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and protect correlative rights."). The Act enumerates both general and specific powers, but also contains a broad grant of authority to "make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof." *Compare* NMSA 1978, § 70-2-12 *and* NMSA 1978, § 70-2-11(A); *Santa Fe Exploration Co. v. Oil Conservation Commission*, 1992-NMSC-044, ¶ 12, 114 N.M. 103, 835 P.2d 819.

The Act does not prescribe how the Commission must exercise its authority to prevent waste. Nor does it limit the Commission's authority to the general and specific powers in Section 70-2-12. Rather, the Commission is empowered by Section 70-2-11(A) to "make and enforce rules, regulations and orders, and to *do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof.*" If the Commission finds that requiring operators to disclose waste to royalty owners could have the effect of preventing waste, then the rule will be upheld as "reasonably related to the legislative purpose." *Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Commission,* 2016-NMCA-055, ¶ 11, 374 P.3d 710. In *Earthworks,* the Commission adopted a rule proposed by NMOGA and

another industry association. The environmental group appealed, and NMOGA intervened to defend the Commission's decision. The New Mexico Court of Appeals affirmed the Commission's decision, observing that "An agency's rule-making function involves the exercise of discretion, and a reviewing court will not substitute its judgment for that of the agency on that issue where there is no showing of an abuse of that discretion. Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement. [citation omitted]." *Id.*

NMOGA ignores this case law and the Act's broad grant of authority, arguing that OCD's proposal must be authorized by either the general powers in Section 70-2-12(A) or the specific powers in Section 70-2-12(B). NMOGA Motion at 5-6. Because Section 70-2-12 does not expressly authorize the Commission to require operators to disclose their waste of natural gas to royalty owners, NMOGA concludes that the Commission has no power to do so.

The Act does not support this narrow reasoning. The Commission's authority to adopt rules to prevent waste is not limited to the general and specific powers in Section 70-2-12. The Commission's authority includes the broader power in Section 70-2-11(A) to "make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purposes of this act, *whether or not indicated or specified in any section hereof*." So long as OCD's proposal is "reasonably related to the legislative purpose" of the Act, which includes the prevention of waste, the Commission has the statutory authority to adopt it.

NMOGA also contends that the Commission cannot require operators to disclose waste to royalty owners because they do not have correlative rights. NMOGA Motion at 3-4. It may be true that some royalty owners do not have the same rights as working interest owners, but the

Commission still can adopt OCD's proposal in order to prevent waste. "Waste" is a defined term which does not depend on the identity or ownership interest of the affected person. *See* NMSA 1978, § 70-2-3. As a matter of law, the Commission may adopt a rule to prevent waste by requiring disclosure of the waste to any person – such as royalty owners - who may be affected by it.

Finally, NMOGA argues that requiring operators to disclose waste to royalty owners has no nexus to the prevention of such waste. NMOGA Motion at 6-7 (disclosure "will contribute no incremental benefit to the goal of reducing volumes of gas vented or flared.") As discussed below, this argument is factual, not legal, and NMOGA must provide evidence to support its position.

II. IT WOULD BE PREMATURE TO STRIKE OCD'S PROPOSAL BEFORE THE COMMISSION HEARS THE EVIDENCE.

NMOGA makes several factual arguments which cannot be resolved until after the parties have presented their evidence in the hearing. Accordingly, the Commission should deny the motion; if NMOGA (or other parties) present evidence in opposition to OCD's proposal, the Commission can consider NMOGA's argument during deliberations.

NMOGA argues that OCD's proposal "does nothing to further the Commission's duty to prevent surface waste." NMOGA Motion at 2, 6-7. OCD disagrees, and intends to present testimony that requiring operators to disclose their waste of natural gas to working interest owners and other royalty owners is more likely than not to encourage operators to prevent that waste. Working interest owners share the cost of production, and therefore have a direct interest in preventing the waste of natural gas produced with their money. Other royalty owners have an interest in receiving their full royalty payments. Typically, their royalties are based on the revenue collected by operators from the sale of natural gas. When an operator wastes natural gas, the royalty owners don't get paid for it. When royalty owners learn that they aren't getting paid because an

operator uses wasteful (and possibly unlawful) production practices, they may pressure the operator to change its practices.

NMOGA further alleges that disclosure "is unnecessarily duplicative and unreasonably burdensome." NMOGA Motion at 2. Specifically, it claims that royalty owners "may not understand these reports", and that disclosure "contributes nothing to physically reducing surface waste", "creates no additional incentive for operators to reduce surface waste", and "raises the specter of interfering with pre-existing contractual relationships." NMOGA Motion at 2, 7. That operators cannot describe their waste of natural gas in an understandable format, that royalty owners don't care about being shortchanged by operators who waste natural gas, and that royalty owners who know about this waste would not pressure operators to change their production practices, are all factual allegations that NMOGA must prove through evidence at the hearing.

Finally, it would be premature to strike OCD's proposal in its entirety because the parties, after hearing the evidence, could propose modifications that address any legal or factual concerns. For instance, if NMOGA can show that some category of royalty owners, such as overriding royalty interest owners, should be excluded from the disclosure requirement, OCD might agree to modify its proposal, and the Commission could adopt that proposal, obviating the need to strike the entire provision.

III. CONCLUSION

Striking portions of a proposed rule after scheduling a hearing but before taking any evidence sets a bad precedent. The Commission holds hearings to allow parties an opportunity to make their legal and factual arguments before it makes a decision. Preemptive motions like NMOGA's short-circuit this well-established process.

NMOGA's motion is predicated on a narrow and distorted reading of the Act. It is premature because NMOGA has not presented any evidence supporting its factual assertions to the Commission. For these reasons, OCD respectfully requests that the Commission deny the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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