

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

**WHIPTAIL MIDSTREAM LLC'S
APPLICATION FOR A HEARING
AND REQUEST TO STAY THE
HEARING DATE TO ALLOW
FOR FURTHER DISCUSSION**

CASE NO. 22782

**OIL CONSERVATION DIVISION'S RESPONSE TO
WHIPTAIL MIDSTREAM LLC'S MOTION FOR SUMMARY
JUDGMENT AND CLOSURE**

The New Mexico Oil Conservation Division ("OCD") submits this Response to Whiptail Midstream LLC's ("Whiptail") Motion for Summary Judgment and Closure ("Motion"), pursuant to the Amended Scheduling Order entered by the Division Hearing Examiner on January 13, 2023. In response to the Motion, the OCD states as follows:

I. Responses to Whiptail's factual and procedural background

1. OCD disputes, for the purpose of clarification, Whiptail's assertion that the release occurred into a lined containment area. This assertion is technically true but represents an incomplete statement of fact. *See* page 73 of Whiptail's combined Motion and exhibits, where operator documents that the release breached the containment. Whiptail's statement of fact implies that the release was contained within a containment area. OCD disputes the assertion to the extent that it implies that the horizontal extent of the release is defined by the containment. This distinction is salient to OCD's denial of Whiptail's closure report. OCD does not contest the remainder of facts asserted in Motion paragraph 1.

2. OCD disputes, for the purpose of clarification, Whiptail's assertion that form C-141 was executed on September 10, 2021. Whiptail appears to have generated the form on the

stated date, however the C-141 was not created in OCD's Permitting system until September 13, 2021. OCD does not dispute the initial Notice of Release occurred on September 10, 2021, and agrees that Whiptail timely submitted form C-141 pursuant to Part 29.

3. OCD disputes Whiptail's assertion that the release "[...] did not extend beyond areas reasonably necessary for operating the midstream transfer site." OCD finds that Whiptail's delineation of the site was not adequate to determine the horizontal extent of the release. As such, Whiptail has not provided sufficient delineation upon which this assertion may be based. For this same reason, the delineation outlined in Whiptail's C-141 is not sufficient for OCD to verify the horizontal extent of the release, approve closure of remediation, or to confirm Whiptail's assertion in paragraph 3 of the Motion. Further, both Whiptail's Motion and Application for a Hearing and Request to Stay the Hearing Date to Allow for Further Discussion ("Application") each state that Whiptail "pulled back the liner to examine certain places of the liner believed to be compromised." Motion para. 3. Based on the information presented to the OCD, delineation is not adequate as to any area affected by the release through compromised locations in the liner. Lastly, Whiptail's assertion that "[t]he spill was contained within 'areas reasonably needed for production operations' and did not extend beyond the operational site of the established pad" (Application para. 4.) constitutes a legal conclusion rather than an undisputed fact.

4. OCD does not dispute the facts asserted in paragraph 4 to the extent that they detail Whiptail's timely form C-141 submission. OCD disputes the characterization that Whiptail's Request for Closure ("Closure") demonstrated that requirements were met sufficient for incident closure. Whiptail's Closure demonstrated that the delineated area met the remediation standard only (Table I of 19.15.29.12 NMAC). As outlined below, the delineation is not sufficient to support deferred reclamation and the reclamation requirement is not complete.

5. OCD disputes the facts and/or conclusions which Whiptail presents in paragraph 5. Application ID 48187 is the identification given to Whiptail's initial Notice of Release (non-verbal). Application ID 48186 is the identification given to Whiptail's first C-141 submitted to OCD on September 13, 2021. Neither Notices of Release ("NOR") nor initial forms C-141 are "approved" as to substance by the OCD. Such forms, once complete and submitted through OCD's Permitting system, are "accepted" as to form by OCD and remain subject to future review. These submissions were accepted into OCD's Permitting system as being administratively complete. Neither of the initial forms contained delineation, remediation, or closure information. Further, Whiptail's Closure could not have been processed under the Application IDs 48186-7. Whiptail's Closure request was not submitted to the OCD until November 12, 2021, and was assigned Application ID 61609. The Closure request was never approved by OCD. *See* page 87 of Whiptail's combined Motion and exhibits, which documents the statuses of the NOR and initial C-141 and a series of rejections and "returned to review" statuses for Application ID 61609 (also a C-141).

6. OCD disputes the facts asserted in paragraph 6. None of the three referenced submissions were "approved" as to any substance by the OCD at any point in time. *Id.* Further, Whiptail's Closure was not submitted to OCD until November 12, 2021. *Id.* OCD rejected the Closure on February 24, 2022 and then returned it to "under OCD review" the next day. OCD next rejected the Closure on March 23, 2022, returned it to "under OCD review", then finally rejected it all on the same day. *Id.* OCD's purpose in the referenced status changes was to make administrative corrections to the rejection. Further explanation of the status changes requires presentation by fact witnesses, but is not necessary for a ruling on the instant Motion. At no point did OCD approve the Closure.

7. OCD disputes the facts asserted in Motion paragraph 7. Application ID Nos. 48186-7 were never substantively approved, never included or constituted a closure request, and were never assigned a new Application ID number by OCD. As indicated above, Application ID 61609, the Closure request, was created by OCD's system when Whiptail first submitted the final C-141 Request for Closure on November 12, 2021.

8. OCD agrees that OCD denied Closure on March 23, 2022, for the reasons cited in Motion paragraph 8.

9. OCD does not dispute the facts asserted in Motion paragraph 9. However, the facts as stated in the Motion differ materially from the facts as stated in Whiptail's Application. OCD asserts that the facts as stated in the Motion are incomplete and imply containment of the release, which is not supported by Whiptail's delineation, as submitted to the OCD.

10. OCD agrees that it intends to assign a new category of incident status, which will clarify the steps in the remediation, restoration, and reclamation process which Whiptail completed, and which remain pending. OCD disputes the remainder of Motion paragraph 10 as conclusion and legal argument. The referenced incident status updates are slated for coding by the Energy, Minerals and Natural Resources Department, Information Technology group. Further explanation requires presentation by fact witnesses, but is not necessary for a ruling on the instant Motion.

11. Whiptail relies in part on newly stated facts in support of its Motion. Certain of these facts are in dispute. Whiptail also appears to rely on inferences drawn from previously stated general facts in support of its Motion. Whiptail's inferences are also in dispute.

12. OCD's Incident system within OCD Permitting tracks qualifying releases by, primarily, an incident number assigned to each major or minor release. The Incident ID for the

referenced release at the MC COM #160 is NAPP2125652492. The Application IDs referenced in prior paragraphs represent individual submissions, or steps, in the incident response process.

13. Reclamation pursuant to 19.15.29.12(C)(2) & 19.15.29.13 NMAC has not occurred.

II. Statement of issues under motion

14. Whiptail argues, in essence, that an operator is entitled as a matter of law to closure of an entire environmental Incident ID upon a showing that operator has met the remediation standards set forth in Table I of 19.15.29.12 NMAC, notwithstanding any required reclamation.

15. OCD argues that no reasonable interpretation of Part 29 relieves Whiptail of the obligation to reclaim the affected area at the appropriate time and consistent with 19.15.29.13 NMAC.

16. OCD further argues that closure of the Incident ID despite pending required reclamation, triggered by the occurrence of a qualifying major release, would conflict with the plain language of Part 29.

III. Construction of 19.15.29 NMAC

17. OCD concurs that when construing the instant regulation and the intent of the Oil Conservation Commission, the first look should be to the plain language of the regulation. At issue in this case are several specific sub-sections of 19.15.29.12 & 19.15.29.13 NMAC:

19.15.29.12 (C)(2) NMAC – Remediation plan requirements: *The responsible party shall restore the impacted surface area of a release occurring on a developed well pad, central tank battery, drilling site, compressor site or other exploration, development, production or storage sites to meet the standards of Table I of [19.15.29.12](#) NMAC or other applicable remediation standards and restore and reclaim the area pursuant to [19.15.29.13](#) NMAC. If contamination is located in areas immediately under or around production equipment such as production tanks, wellheads and pipelines where remediation could cause a major facility deconstruction, the remediation, restoration and reclamation may be deferred with division written approval until the equipment is removed during other operations, or when the well or facility is plugged or abandoned, whichever comes first.* The deferral may be granted so long as the contamination is

fully delineated and does not cause an imminent risk to human health, the environment, or ground water. *Final remediation and reclamation shall take place in accordance with 19.15.29.12 and 19.15.29.13 NMAC once the site is no longer being used for oil and gas operations. [emphasis added].*

19.15.29.12 (D) NMAC – Closure Requirements: The responsible party must take the following action for any major or minor release containing liquids.

(1) The responsible party must test the remediated areas for contamination with representative five-point composite samples from the walls and base, and individual grab samples from any wet or discolored areas. The samples must be analyzed for the constituents listed in Table I of 19.15.29.12 NMAC or constituents from other applicable remediation standards. [...].

(b) The responsible party may submit a composite and grab sample plan for the division's review and approval separately of with the remediation plan.

(c) Alternatively, without division approval, the responsible party may elect to perform a composite and grab sample plan of the remediated area where each composite sample is not representative of more than 200 square feet.

(2) If all composite and grab sample concentrations are less than or equal to the parameters listed in Table I of 19.15.29.12 NMAC or any conditions of approval, then the responsible party may proceed to backfill any excavated areas.

19.15.29.12 (E) NMAC – Closure reporting: The responsible party must take the following action for any major or minor release containing liquids.

(1) The responsible party must submit to the division a closure report on form C-141, including required attachments, to document all closure activities including sampling results and the details on any backfilling, capping or covering, where applicable. [...]. The final report must include:

(a) a scaled site and sampling diagram; [...].

19.15.29.13 NMAC – RESTORATION, RECLAMATION AND RE-VEGETATION:

(A) The responsible party must substantially restore the impacted surface areas to the condition that existed prior to the release or their final land use. Restoration of the site must include the replacement of removed material and must be replaced to the near original relative positions and contoured to achieve erosion control, long-term stability and preservation of surface water flow patterns.

(B) Areas reasonably needed for production operations or for subsequent drilling operations must be compacted, covered, paved or otherwise stabilized and maintained in such a way as to minimize dust and erosion to the extent practical. [...].

(D) The responsible party shall reclaim all areas disturbed by the remediation and closure, except areas reasonably needed for production operations or for subsequent drilling operations, as early and as nearly as practical to their original condition or their final land use and maintain those areas to control dust and minimize erosion to the extent practical.

(1) The reclamation must contain a minimum of four feet of non-waste containing, uncontaminated, earthen material with chloride concentrations less than 600 mg/kg as analyzed by EPA Method 300.0, or other test methods approved by the division. The soil cover must include a top layer, which is either the background thickness of topsoil or one foot of suitable material to establish vegetation at the site, whichever is greater. [...].

(3) The division will consider reclamation of all disturbed areas complete when uniform vegetative cover has been established that reflects a life-form ratio of plus or minus fifty percent of pre-disturbance levels and a total percent plant cover of at least seventy percent of pre-disturbance levels, excluding noxious weeds.

- (4) For any major or minor release containing liquids, the responsible party must notify the division when reclamation and re-vegetation are complete.
- (E) The surface restoration, reclamation and re-vegetation obligations imposed by federal or state agencies or tribes on lands managed or owned by those agencies supersede these provisions and govern the obligations of any responsible party subject to those provisions, provided that the other requirements provide equal or better protection of fresh water, human health and the environment.

18. Remediation plan requirements expressly require both remediation and reclamation of impacted areas such as well pads, tank batteries, and storage sites, among others. 19.15.29.12(C)(2) NMAC. This section directly references the reclamation standards under 19.15.29.13 NMAC and states that reclamation must occur at various facilities, such as the MC COM #160.

19. 19.15.29.12(C)(2) NMAC further expressly provides a mechanism for the deferral of remediation, restoration and reclamation of areas which would require a major facility deconstruction. Deferred reclamation, for instance, is subject to OCD approval, requires full delineation of the area to be reclaimed, and the reclamation must be completed when the equipment is removed or the facility is decommissioned, whichever occurs first. *Id.* The mechanism for deferred remediation, restoration and reclamation – constituting an OCD-approved *delay* of reclamation – is consistent with the language of 19.15.29.13(D) NMAC.

20. Reclamation under 19.15.29.13 NMAC triggers only in instances of major or minor releases containing liquids. 19.15.29.12(C) NMAC. In other words, the requirement of reclamation attaches to any qualifying incident. This reclamation requirement is not satisfied by successful remediation to the standards of Table I of 19.15.29.12 NMAC. Completion, or ‘closure’, of the remediation portion of the response does not resolve operator’s obligation to reclaim the site consistent with 19.15.29.13 NMAC. As such, closure of the entire incident prior to completion of reclamation is not appropriate and would conflict with the plain language of the rules. Whiptail’s

Motion requests administrative closure of the entire incident despite the fact that reclamation has not occurred.

21. Whiptail misconstrues the plain language of 19.15.29.13(D) NMAC by inappropriately emphasizing the qualifying clause of “[...] except areas reasonably needed for production operations or for subsequent drilling operations [...].” The main sentence, which this clause qualifies, otherwise reads as “[t]he responsible party shall reclaim all areas disturbed by the remediation and closure [...] as early and as nearly as practical to their original condition or their final land use and maintain those areas to control dust and minimize erosion to the extent practical.” This section speaks to the timing of reclamation, not the requirement for reclamation. Whiptail’s emphasis on the qualifying clause and its application to 19.15.29.12 NMAC ignores the grammar of the provision and suggests a reading in conflict with the plain language of the rule.

22. OCD asserts that the rule language is unambiguous. 19.15.29.12 NMAC requires reclamation for all qualifying releases, in conformity with 19.15.29.13 NMAC, which establishes the standards and timing for such reclamation. 19.15.29.12 NMAC specifically requires remediation at facilities like the MC COM #160. As the plain language is unambiguous, no further interpretation is necessary.

23. To the extent that the rules are considered ambiguous, Whiptail’s interpretation still fails.

24. Whiptail appears to argue that the “carve-out” language permanently and completely exempts areas “reasonably needed for production” from the reclamation standard. This read places the detailed, specific language of 19.15.29.12(C)(2) NMAC in direct conflict with the more general language of 19.15.29.13(D) NMAC.

25. Whiptail also appears to argue that the “carve-out” language controls, because it is the more specific provision between 19.15.29.13(D) and 19.15.29.13(D)(1) NMAC. Motion para. 25. This analysis is misplaced, as Whiptail’s argument ignores the fact that any exception in 19.15.29.13(D) must modify 19.15.29.12(C)(2), which is the provision that imposes the reclamation requirement in the first place. In reading these two sections together, 19.15.29.12(C)(2) NMAC is clearly the more specific provision.

26. Whiptail’s interpretation of this ‘carve-out’ generates an absurd result – an exception that swallows the rule. This interpretation would result in a rule that does not require surface reclamation for impacted areas on well pads, tank batteries, storage facilities, etc. Despite the specific inclusion of such areas and facilities in 19.15.29.12(C)(2) NMAC, Whiptail argues that the qualifying language 19.15.29.13 NMAC excepts all of the same areas from the express requirement. Further, this exception to the reclamation requirement would effectively apply to those areas where releases most commonly and significantly occur.

27. OCD’s interpretation is that 19.15.29.13(D) NMAC creates an exception only to the timing of reclamation. Operators responsible for reclamation subject to the exception in 19.15.29.13(D) NMAC must otherwise comply with 19.15.29.12 NMAC. This interpretation allows all aspects 29.12 and 29.13 to be read in concert, gives full force to the specific sections of 29.12 which address the timing and location of reclamation, and preserves the explicit and overriding requirement that surface areas impacted by major and minor releases must be reclaimed to their original condition or final land use sufficient to maintain vegetation. *See* 19.15.29.12 & 13(D) NMAC.

28. Contrary to Whiptail’s representation, it’s interpretation of Part 29 does not conform to the standards of construction in New Mexico Case law. Whiptail’s interpretation

requires reading 19.15.29.12 and 19.15.29.13 NMAC in conflict, gives preference to a more general provision of the rule, and yields an absurd result that areas most likely to be heavily impacted by releases do not need to be reclaimed.

IV. Whiptail's existing reclamation plan does not satisfy the language of 19.15.29.13(E) NMAC and does not supersede OCD reclamation standards

29. Reclamation requirements imposed by other agencies only supersede OCD's reclamation requirements if they "[...] provide equal or better protection of fresh water, human health and the environment." 19.15.29.13(E) NMAC. Whiptail's argument overlooks this critical qualifying language.

30. OCD reclamation standards include concentration limits for contaminants, equivalent to the most stringent standard set out in Table I of 19.15.29.12 NMAC. *See* 19.15.29.13(D)(1) NMAC.

31. Whiptail's existing reclamation plan includes qualitative requirements. The plan does not appear to include concentration limits for contaminants of concern. Motion pp. 102-119.

32. Whiptail's reclamation plan as submitted cannot, as a matter of law, constitute equal or better protection of fresh water, human health, or the environment.

33. Further, Whiptail's claim that the existing BLM reclamation plan supersedes OCD's requirements depends on factual and technical determinations which are not supported by the record. As such, this argument cannot support Whiptail's motion for summary judgment.

V. Whiptail has not satisfied the requirements for remediation in 19.15.29.12 NMAC

34. The site was not adequately delineated, or alternatively, the delineation was not adequately represented in Whiptail's Closure. OCD cannot verify that Whiptail complied with

remediation and closure requirements if Whiptail does not disclose sample depth. OCD denied the Closure because it required additional information.

35. Further, Whiptail did not delineate the horizontal extent of the release, or alternatively, the delineation was not adequately represented in Whiptail's Closure. For instance, SS32 and SS33 samples returned contaminant levels above the Reclamation standard (equivalent to the most stringent standard in Table I, *see* 19.15.29.13(D)(1) NMAC) at the periphery of the sampled area. *See* Motion p. 22. Because the release escaped the lined containment (Motion pp. 14,73), Whiptail must delineate the full horizontal extent of the release to the reclamation standard. *See* 19.15.29.12(C)(2) NMAC. To explain, absent the delineation of the horizontal extent of the release to the reclamation standard, OCD does not have sufficient information to evaluate the requirements and timing of reclamation. Horizontal extent must be fully delineated in order to determine whether any impacted areas occur within or outside of areas "reasonably needed for production," and whether specific requirements for such areas have been met. *See* 19.15.29.13(B – D) NMAC.

VI. Conclusions

36. The plain language of 19.15.29.12 NMAC requires that reclamation take place consistent with 19.15.29.13 NMAC for major or minor releases involving liquids.

37. Incident NAPP2125652492 is a qualifying major release, triggering both the requirement to remediate and to reclaim.

38. The plain language of 19.15.29.13(D) NMAC includes an exception to the timing of reclamation, but no such exception to the requirement of reclamation.

39. Whiptail did not fully delineate the horizontal extent of the release and did not provide sufficient information for OCD to verify the adequacy of Whiptail's sampling.

40. Upon a showing of appropriate sample depth, OCD can document completion of remediation.

41. Satisfaction of Table I remediation standards under 19.15.29.12 NMAC does not require or justify closure of an environmental incident which requires further reclamation.

42. Upon a showing that the full horizontal extent of the release has been delineated to the reclamation standard in 19.15.29.13(D) NMAC, OCD may approve deferred reclamation of the incident.


43. To the extent that the referenced rules are considered ambiguous, Whiptail's interpretation fails for unnecessarily reading sections of the rules in conflict, yielding an absurd result, and elevating a more general provision of rule over a more specific provision of rule.

44. Whiptail has not established that its existing reclamation plan provides equal or better protection of fresh water, human health and the environment. The existing BLM reclamation plan does not, as a matter of law, supersede OCD's reclamation standard.

PROCEDURAL MATTERS

OCD reserves the right to call a witness in the hearing on this matter.

Respectfully submitted,



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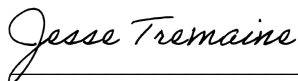
CERTIFICATE OF SERVICE

I certify that on February 3, 2023, this pleading was served by electronic mail to:

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