

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

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

**CASE NO. 22626**

**RESPONSE IN OPPOSITION TO MOTION FOR STAY**

Goodnight Midstream Permian, LLC (“Goodnight Midstream”) respectfully files this response in opposition to Empire New Mexico LLC’s (“Empire”) Motion for a Stay. For the reasons outlined below, the Motion should be denied and the Division should enter an order.

**INTRODUCTION**

There is no legal or procedural basis to stay entry of an order in this case to await the outcome of a separate set of cases that have not yet gone to hearing when there has been a full hearing on the merits and the evidentiary record is closed in this matter. In addition to such fundamental procedural issues, Empire has failed to make the proper evidentiary showing necessary for a stay. It also has not followed the requirements of the regulation governing stays. Finally, granting a stay before an order is issued is premature. The cases Empire relies on do not support granting a stay in this circumstance. To the contrary, the cases demonstrate a stay should be reserved for after an order is entered and only upon the proper evidentiary showing.

## ARGUMENT

### **I. A Stay Will Serve No Valid Purpose When the Evidentiary Record in this Case is Closed.**

Empire's request for the Division to delay entering an order in this case until a separate set of contested cases can be heard by the Division would serve no valid purpose. There is no procedural mechanism for the Division to consider evidence outside the record in this case and, therefore, no valid reason to delay entry of an order.

The Division took this case under advisement on September 15, 2022. The evidentiary record has been closed since February 6, 2023.<sup>1</sup> Empire had a full and fair opportunity to present its legal arguments, evidence, and testimony in this case. Goodnight Midstream filed its application for hearing on March 4, 2022. Empire entered an appearance through counsel and objected to the case proceeding by affidavit. Empire appeared at a status conference on April 7, 2022, and filed motions to dismiss and to quash a subpoena. Empire made extensive legal arguments before the Division Examiner at a hearing on June 16, 2022. A contested hearing was set under a prehearing order for September 15, 2022. At the hearing, Empire presented its case with exhibits and testimony, and cross-examined Goodnight Midstream's witnesses. There is nothing further for the Division to consider other than the complete record before it and to render a decision and enter an order.

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<sup>1</sup> The Division kept the evidentiary record open for the limited purpose of collecting additional information from the parties on the status of Empire's EMSU Unit #462 well (API No. 30-025-29622). Empire satisfied the Division's order compelling it to produce responsive documents or submit a verified statement that it has no such documents on February 6, 2023, at which point the evidentiary record was closed. *See* [https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/cf/20230206/22626\\_02\\_06\\_2023\\_03\\_18\\_41.pdf](https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafe/cf/20230206/22626_02_06_2023_03_18_41.pdf).

Once an order issues, if it is adversely affected, Empire can file an application for a de novo hearing before the Commission where it can present new evidence and testimony. *See* 19.15.4.23.A NMAC. The Division's rules protect Empire's interests and allow it to present additional evidence if it is adversely affected by a Division order. Approving a stay at this time is inappropriate and not supported by any valid legal basis.

**II. Empire's Motion Fails to Meet the Stringent Requirements Demonstrating a Stay is Necessary.**

Empire has made no evidentiary showing that a stay is necessary and therefore fails to meet the threshold standard required for the Division to grant a stay.

Under the Division's regulations, a party seeking a stay is required to demonstrate "the stay is necessary to prevent waste, protect correlative rights, protect public health or the environment or prevent gross negative consequences to an affected party." 19.15.4.23.B NMAC (emphasis added). In addition, under Division precedent, parties seeking a stay must show "they are likely to prevail on the merits" and that the party requesting a stay will be irreparably harmed unless a stay is granted. *See* Order No. R-14300-A ¶ 5 (quoting and adopting the standard for an administrative stay in *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10).

A "showing" under a motion for stay requires some proffer of evidence. *See id.* ¶ 7; *see also* Black's Law Dictionary (8th Ed.) ("Showing, n. The act or an instance of establishing through evidence and argument; proof <a prima facie showing>." (emphasis added)). "Mere allegations of irreparable harm are not, of course, sufficient. A showing of irreparable harm is a threshold requirement in any attempt by applicants to obtain a stay." *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-

NMCA-033, ¶ 12, 736 P.2d 986 (emphasis added). As noted in *Tenneco Oil*, the applicant for a stay must make a showing as to each of the elements necessary for a stay. *Id.* Empire has not made the required showing for even one element.

In its motion, Empire presents “mere allegations” of gross negative consequences and irreparable harm.<sup>2</sup> Without evidentiary support, Empire claims their “initial analysis indicates” Goodnight Midstream’s proposed produced water disposal wells “may reduce effective recovery by up to 1.5 billion barrels of oil.” *See* Motion at ¶ 4. Empire attaches no affidavit, data, or results from this initial analysis to support the allegation.

Notably, Empire does not cite to the record evidence in this case because none of it supports Empire’s claims. When considering Empire’s allegations, the Division should instead adopt a negative inference because Empire withheld documents responsive to a Division order to compel. *See, e.g.*, Tr. Sept. 15, 2022, 232:2-238:22 (Testimony of Eugene Sweeney) (“Q: Mr. Sweeney, I’m asking you because you’re going to be systematic and in control, do you have a written plan about how you’re going to evaluate this field, including the San Andres? A: Yes. Q: Okay. Mr. Sweeney, I am asking you to produce that plan because it’s responsive to our requests for documents; okay? . . . And any emails or correspondence relating to that plan should be produced.”). Until contrary evidence is presented, the Division should infer Empire’s records or documents reflect that the San Andres disposal zone is not prospective for hydrocarbons.

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<sup>2</sup> Empire also suggests a stay is necessary to prevent surface disturbances, but as explained previously Empire has a surface-use agreement with a landowner that gives them the right to use the surface for this purpose. Empire has articulated no basis to allege an interest in preventing surface disturbances on a private landowner’s surface estate.

Without proof supporting Empire's allegations, there is no prima facie showing and no basis for entry of a stay.

### **III. Empire's Motion Does Not Meet the Procedural Requirements for a Stay.**

The regulation governing issuance of stays requires that an applicant "shall attach a proposed stay order to the motion." NMAC 19.15.4.23.B. The Empire has not met this mandatory procedural requirement, thereby subjecting the motion to an immediate denial.

### **IV. Empire Can Request a Stay Once the Division Issues an Order.**

In addition to being substantively deficient, Empire's request for a stay is also premature. Until the Division issues an order that approves Goodnight Midstream's proposed injection well, a stay is not necessary to prevent waste, protect correlative rights, or prevent gross negative consequences to Empire. Empire is speculating—perhaps reasonably given the weight of the evidence—that the Division is going to issue an order adverse to its interests; however, under the governing regulation, a party may request a stay of a Division order. 19.15.4.23.B NMAC. No order has been issued, making a stay premature. The cases Empire relies on are inapposite.

First, Empire cites to Division cases where the Commission stayed proceedings before going to hearing. *See* Order No. R-21454.<sup>3</sup> Those cases were in a different procedural posture and involved competing compulsory pooling applications and well development plans, not a single disposal well case with a closed evidentiary record that has already been taken under advisement. In the cited cases, the Commission reasonably

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[https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20200826/21277\\_08\\_26\\_2020\\_12\\_00\\_38.pdf](https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20200826/21277_08_26_2020_12_00_38.pdf).

stayed de novo cases pending before the Commission to allow competing compulsory pooling cases involving the same tracts of land to be heard at the Division so all the competing cases could be resolved at one time before the Commission. *Id.* That is simply not the procedural posture of this case.

Second, Empire cites two other cases (Order Nos. R-20315 and R-14484) where (1) an order had already been issued and (2) the applicant in each case made a showing based on evidence that applicant would be unjustly harmed without a stay. Under Order No. R-20315, Marathon explained that it had disagreed with Mewbourne's proposed development but dropped its competing pooling applications because it had entered into an "agreement in principle" with Mewbourne.<sup>4</sup> However, due to title issues, Mewbourne was unable to perform under the agreement. Consequently, after pooling orders had issued, Marathon sought a stay to re-file competing pooling applications to prevent it from being forced into a development plan it believed to be wasteful and inefficient. Under Order No. R-14484, a stay was issued based on an extensive undisputed factual record and apparent legal infirmities that together demonstrated clear harm and that the stay applicant would likely prevail.<sup>5</sup>

Empire's request to impose a stay before issuance of an order but after a full hearing on the merits and months after the evidentiary record has closed is premature. The precedent relied upon is inapposite and does not support issuing a stay under this set of facts. If the Division issues an order that is adverse to Empire, and if Empire can

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[https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20190123/16313\\_01\\_23\\_2019\\_01\\_15\\_16.pdf](https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/20190123/16313_01_23_2019_01_15_16.pdf).

<sup>5</sup> [https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/315063/15855\\_36\\_cf.pdf](https://ocdimage.emnrd.nm.gov/Imaging/FileStore/santafeadmin/cf/315063/15855_36_cf.pdf).

make the proper showing, Empire can seek a stay while a de novo hearing is pending before the Commission. Until that time, issuance of a stay is premature.

**CONCLUSION**

For the reasons stated, Empire's motion should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2023, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

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