

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

**APPLICATION OF APACHE CORPORATION
FOR AN ADJUDICATORY HEARING TO
CONTEST THE DIVISION'S CONDITIONS OF
APPROVAL ON APACHE CORPORATION'S
SCOPE OF WORK FOR ADDITIONAL
INVESTIGATION, LEA COUNTY, NEW MEXICO**

CASE NO. 24912

APACHE CORPORATION'S APPLICATION FOR REHEARING

Apache Corporation ("Apache" or "Applicant") (OGRID No. 873), a party of record adversely affected by Order No. R-23728, filed on February 29, 2025 ("Order") of the New Mexico Oil Conservation Commission ("Commission"), timely applies for rehearing before the Commission pursuant to NMSA 1978, Section 70-2-25(A) (1999) and 19.15.4.25 NMAC. In support of this Application, Apache states as follows:

INTRODUCTION

1. A party of record who is adversely affected by an order or decision of the Commission may file an application for rehearing of any matter determined by the order or decision, describing the reasons why the order is "believed to be erroneous." NMSA 1978, § 70-2-25(A). A party who is dissatisfied with the Commission's decision on an application for rehearing may subsequently appeal to the district court pursuant to NMSA 1978, Section 39-3-1.1. NMSA 1978, § 70-2-25(B).

2. The Commission, through its concurrent jurisdiction and authority with the Oil Conservation Division ("Division") is empowered pursuant to the Oil and Gas Act, to prevent waste and to protect correlative rights. NMSA 1978, § 70-2-11.

PROCEDURAL HISTORY

3. On May 8, 2024, Apache submitted its Scope of Work for Additional Investigation related to EBDU # 37, Incident No. NDHR1922141227 (IRP-5636) in Lea County, NM. The Division approved Apache's May 8, 2024 Scope of Work with the Conditions of Approval ("COAs") which mandated that Apache drill 14 additional monitoring wells to the 5 proposed by Apache, for total of 19 new wells. *See Apache Ex. B-3* at 398.

4. On September 23, 2024, Apache submitted its Additional Groundwater Delineation Work Plan to the Division, which contained a plan to install seven, rather than five, additional monitoring wells. *See Apache Ex. B-4*.

5. Upon receipt of Apache's September 23, 2024 work plan, the Division cancelled meetings with Apache to further discuss the COAs and advised Apache that it must either fully comply with the COAs, apply for a hearing, or face an enforcement action.

6. On October 1, 2024, Apache applied to the Division for an adjudicatory hearing pursuant to the provisions of 19.15.4.8 and 19.15.29.12.C(5) NMAC to contest the Conditions of Approval (COAs) imposed on Apache by the Division on Apache's Scope of Work for Additional Investigation submitted on May 8, 2024, and seeking approval of Apache's September 23, 2024 work plan.

7. On October 28, 2024, the Division referred Case No. 24912 to the Commission for hearing. Order No. R-23532.

8. On January 16 and 17, 2025, Apache presented its testimony and evidence before the Commission, including the testimony of its qualified expert.

9. On February 3, 2025, the Commission deliberated in closed session on Case No. 24912. Following the Commission's deliberations, the Commission approved the Division's

COAs to Apache's May 8, 2024 Scope of Work with amendments. The Commission reinstated the Division's COA 1B¹, well TMW-31, with the requirement that it be moved 200 feet east of the windmill. Commission Special Meeting Tr. 48:18-25, Feb. 3, 2025. The Commission approved the Division's removal of COA 1J, requiring a well identified by the Division as TMW-39, located 200 feet southeast of TMW-18. This well location was proposed by Apache as TMW-30. *Id.* at 49:1-4. The Commission further decided that COA 1K, requiring TMW-40 be installed 200 feet southeast of TMW-16 be moved to 200 feet southwest of TMW-19.² *Id.* at 49:5-10.

10. On February 19, 2025, the Commission entered its Order No. R-23728 in Case No. 24912, approving the Division's COAs with the amendments described in Paragraph 9 *supra*, and imposing additional requirements on Apache, including the installation of two additional wells³ beyond those proposed by the Division. *See* Order **Ex. A**.

ARGUMENT

11. Apache seeks rehearing on three issues related to the Order: (A) the Commission exceeding its statutory authority by adding additional requirements beyond the COAs imposed by the Division, and in determining that the Division can impose monitoring wells for the purpose of designing future abatement plans under Part 19.15.30 NMAC ("Abatement Rule") when a release is subject only to Part 19.15.29 NMAC ("Spill Rule"); (B) the Commission's mischaracterization of evidence in the record; and (C) multiple errors within the Order and **Exhibit A**, the Final Conditions of Approval which make it impossible for Apache to comply with said Final Conditions of Approval.

¹ This application references the Conditions of Approval (COA) by number and letter corresponding to the numbering and lettering on page 398 of Apache **Exhibit B-3**.

² The Commission's Final Conditions of Approval, attached as **Exhibit A** to the Order, contains a typographical error and instead requires TMW-40 be installed 200 feet southeast of TMW-19 instead of southwest. Order **Ex. A** at 9.

³ The Commission added a well located approximately halfway between the Windmill well and TMW-17, and a well located 200 feet directly due west of TMW-19. Order **Ex. A** at 10.

A. The Commission's Order and Final Conditions of Approval, attached to the Order as Exhibit A, exceed the Commission's statutory authority under the Oil and Gas Act and 19.15.4 NMAC.

12. Agencies are created by statutes and “are **limited** to the power and authority that is expressly granted and necessarily implied by statute.” *Application of PNM Elec. Services, Div. of Pub. Serv. Co. of New Mexico*, 1998-NMSC-017, ¶ 10, 125 N.M. 302 (internal citation and quotations omitted) (emphasis added). Whether an agency acts within its statutory authority is an issue reviewable by the courts. *See id.* ¶ 11; *Fasken v. Oil Conservation Comm'n*, 1975-NMSC-009, ¶ 6, 87 N.M. 292.

13. The Commission was created by Section 70-2-4 of the Oil and Gas Act (the “Act”) and pursuant to the Act “has two primary duties regarding the conservation of oil and gas: prevention of waste and protection of correlative rights.” *Marbob Energy Corp. v. New Mexico Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 2, 146 N.M. 24 (quoting NMSA 1978, § 70-2-11(A) and *Santa Fe Exploration Co. v. Oil Conservation Comm'n of N.M.*, 114 N.M. 103, 112 (1992)).

14. The Commission was granted concurrent jurisdiction to the Division “to the extent necessary for the commission to perform its duties as required by law.” NMSA 1978, § 70-2-11. The Division, and therefore the Commission, is granted authority pursuant to the Act “to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring lease or properties.” NMSA 1978, § 70-2-12(B)(7). Further, the Commission has authority to regulate “the disposition, handling, transport, storage, recycling, treatment and disposal of produced water . . . in a manner that protects public health, the environment and fresh water resources.” NMSA 1978, § 70-2-12(B)(15).

15. Apache's initial remediation in response to the release at issue and its subsequent groundwater investigation are presently subject to the Spill Rule. Under the Spill Rule, if the Division determined that more information is necessary to characterize a release, it "may request the responsible party **submit additional information**"⁴ by notifying the responsible party in writing within 30 days of receipt of a characterization report or remediation plan. 19.15.29.12.C NMAC (emphasis added).

16. The purpose of Apache's request for adjudicatory hearing in this matter was to request that the Commission reject the Division's COAs to Apache's May 8, 2024 Scope of Work and instead approve Apache's September 23, 2024 Scope of Work. The Commission's Order and Final Conditions of Approval (Order **Exhibit A**) exceed the scope of Apache's request that the Commission review the Division's determination that an additional 14 wells were necessary for characterization of the release under the Spill Rule. *See* Order ¶¶ 20, 21, 22, and **Exhibit A**.

17. Further, the Commission's Order exceeds its own statutory authority by (a) determining that wells listed in the Division's COAs should be moved without any reasoned explanation, and (b) by adding three⁵ additional wells beyond what the Division mandated to its Final Conditions of Approval ("Final COAs"). There exists no statutory authority within the Act or the rules promulgated under the Act for the Commission to (a) determine the location of groundwater monitoring wells, or (b) add monitoring wells to an existing remediation permit. The determination of placement of groundwater monitoring wells requires specialized expertise. The

⁴ As explained more fully in Apache's Closing Argument (at 4), the Division's "information requests" were not timely pursuant to the Spill Rule, and the Commission's assertion in its Order that "[t]o the extent that the Division requested more information from Apache . . . the Division did so pursuant to 19.15.29.11.C NMAC" is erroneous. Apache contests the notion that the Division's mandate that Apache drill 43 groundwater monitoring wells is an "information request" under the Spill Rule.

⁵ Prior to the Commission's Order, the Division had struck its requirement in its original COAs for TMW-31 (COA 1B), and the Commission subsequently added TMW-31 back in as a requirement in its Final COAs. *See* Order ¶ 22. The Commission then added two additional wells in its Final COAs as items 5 and 6. *See* Order at 10.

Commission's expertise "pertains to the regulation and conservation of oil and gas," not to groundwater abatement and remediation plan design. *Marbob*, 2009-NMSC-013, ¶ 7.

18. The Commission's Order lacks sufficient explanation and reasoning to support either its changes to the Division's COAs or its addition of wells in the Commission's Final COAs. *See generally*, Order. Findings by the Commission "should be sufficiently extensive to show the basis of the [C]ommission's order." *Fasken*, 1975-NMSC-009, ¶ 8 (internal citation and quotations omitted).

19. The Commission's Order contradicts itself by asserting both that "the Commission does not consider at this time what further abatement and remediation may be required as a condition of the Permit" and also that the Commission's Final COAs "will ultimately facilitate a proper remediation plan." Order ¶ 24. The Commission's determination that Apache must drill 15 additional wells in order to design and facilitate a future remediation plan, which theoretically could be required under the Abatement Rule, ignores the Division's testimony, through Mr. Powell, that the Division has not yet determined that the release at issue, which has been managed by Apache and the Division under the Spill Rule, will require ground water remediation under the Abatement Rule. *See Hr'g Tr.* 406:13-21, Jan. 17, 2025. Without any determination by the Division or the Commission that ground water remediation is required under the Abatement Rule, requiring Apache to install 15 additional wells (in addition to the 5 proposed by Apache in the May 8, 2024 Scope of Work) for the purpose of designing and facilitating a future remediation plan is arbitrary, contrary to law and unsupported by substantial evidence. *See Order* ¶ 24.

20. The Commission's Order and Final COAs, if not remedied, could result in future Division mandates that require operators to design and install complex groundwater remediation and abatement systems under the Spill Rule, which is designed to address **soil** remediation and

initial site characterization, instead of under the Abatement Rule, which addresses groundwater remediation and abatement. *See* Hr’g Tr. 402:23-404:11, Jan. 17, 2025 (where Mr. Powell’s testimony confirms that the Spill Rule specifically addresses soil characterization and remediation). This result ignores the clear structure of the rules and would grant authority to the Division that is not authorized by statute. *See Application of PNM*, 1998-NMSC-017, ¶ 10.

21. The Commission’s Order ignores the expert testimony of Apache’s witness John Grams, a professional geologist, and expert in geology, hydrology, and groundwater contaminant delineation, with regard to the location and placement of wells. *See Apache Ex. C*; Hr’g Tr. 180:12-15; 183:11-14, Jan. 16, 2025.

22. Mr. Grams testified at the hearing that currently, Apache has a network of 24 groundwater monitoring wells (TMW-1 through TMW-24). Hr’g Tr. 193:17-19, Jan. 16, 2025. Apache’s May 8, 2024 Scope of Work proposed the drilling of five additional monitoring wells (TMW-25 through TMW-29). **Apache Ex. B-3** at 5; Hr’g Tr. 196:16-19, Jan. 16, 2025. In addition to the five additional monitoring wells, Apache proposed a soil boring and pump test. Hr’g Tr. 196:21, Jan. 16, 2025. The Division’s response to Apache’s May 8, 2024 Scope of Work was to require an additional 14 monitoring wells⁶ to the five proposed by Apache for a total of 19 wells. **Apache Ex. B-3** at 398; Hr’g Tr. 197:1-8, Jan. 16, 2025. Following negotiations with the Division, Apache proposed the five wells (TMW-25 through TMW-29) plus an additional two wells from the Division’s COAs (TMW-30 and TMW-31) and four soil borings and an aquifer pump test in

⁶ The Division’s COAs to Apache’s May 8, 2024 Scope of Work [**Apache Ex. B-3** at 398] contains two typographical errors which have caused confusion regarding the number of required wells. COA 2 states “and the additional thirteen (14) monitoring wells.” **Apache Ex. B-3** at 398. Also, COA 1N labels an additional well “TMW-42” to be installed 75 feet NE of TMW-13, however COA 1M mandates TMW-42 be installed 220 feet east of TMW-23. *Id.* The Division’s COAs 1M and 1N are repeated in the Final COAs, with the same error reprinted. *See* Order **Ex. A**.

Apache's Additional Groundwater Delineation Work Plan, on September 23, 2024. **Apache Ex. B-4** at 1-2; Hr'g Tr. 197:15-22, Jan. 16, 2025. This plan was rejected by the Division.

23. Mr. Grams testified at the hearing that two of the wells mandated by the Division in their COAs were also proposed by Apache in its September 2024 work plan. Apache TMW-31, listed as TMW-42 by the Division, and Apache TMW-30, listed as TMW-39 by the Division. Hr'g Tr. 210:6-20; 211:15-20, Jan. 16, 2025.

24. Mr. Grams' testimony explained that Apache's proposed TMW-26 well is a preferable location to the Division's proposed TMW-38 well, which is located northwest of TMW-26, because TMW-26 "provides all of the downgradient control and information" that Apache needs in the southeast corner. Hr'g Tr. 211:24-212:12, Jan. 16, 2025. The Final COAs include TMW-38 as condition II. Order **Ex. A**.

25. Mr. Grams' testimony further explained that TMW-25 is designed to be the "absolute downgradient well" in the southwest corner, directly south of the release site. Hr'g Tr. 213:22-214:14, Jan. 16, 2025. Mr. Grams' testimony clarified that TMW-25 serves the purpose of providing the downgradient delineation that the Division's proposed TMW-41 would provide, because the location of TMW-25 is several hundred feet south of proposed TMW-41. Hr'g Tr. 214:15-23, Jan. 16, 2025. The Final COAs include TMW-41 as condition 1K. Order **Ex. A**.

26. Mr. Grams' testimony also clarified that the Division's proposed TMW-40 is also unnecessary given the downgradient delineation provided by Apache's proposed TMW-25. Hr'g Tr. 215:13-19, Jan. 16, 2025. The Commission determined that TMW-40, as proposed by the Division, should be moved from its original proposed location, approximately 200 feet southeast of TMW-16, to a new location, 200 feet southwest of TMW-19. *See Apache Ex. B-3* at 398,

compare with Order ¶ 22. The Final COAs include TMW-40 as condition 1J.⁷ Importantly, the Commission's Order is devoid of a sufficient explanation for the movement of the well, with the exception of vague language in Paragraph 21, which states:

The proposed wells in the Final COA are located to include areas either where the horizontal extent of the chloride plume is not fully delineated or within large gaps between existing wells with elevated samples, or to otherwise provide more predictive information regarding the extent of future contamination in the judgment of the Commission.

27. Mr. Grams' testimony explained that centrally, the plume is well delineated and defined by the current wells in that location, and the area between TMW-4 and TMW-17, where Apache has proposed TMW-27 will provide further characterization. Hr'g Tr. 216:18-23; 218:5-8, Jan. 16, 2025. Mr. Grams further testified that the wells proposed by the Division in the central location of the plume, TMW-34, TMW-35, TMW-36, and TMW-37 are "interior to the plume" and are not likely to provide additional information necessary to characterize and delineate the plume. Hr'g Tr. 218:5-219:7, Jan. 16, 2025. The Final COAs include TMW-34, -35, -36, and -37 in COAs 1E through 1H respectively. Order **Exhibit A**.

28. Mr. Grams testified that to the north of the plume, Apache proposed wells TMW-28 and TMW-29 as two upgradient wells to determine background conditions. Hr'g Tr. 221:24-222:25, Jan. 16, 2025. In the northern area, the Division proposed TMW-30, -31(42)⁸, -32, -43, and -33. Mr. Grams explained that the additional wells proposed by the Division in the northern area are unlikely to "provide any information that's going to change what we do at the plume or how we direct our remediation efforts." Hr'g Tr. 223:4-20, Jan. 16, 2025. The Final COAs include each of the Division's proposed wells in the northern area. See Order **Ex. A**.

⁷ Note that the Final COA 1J contains a typographical error, stating that TMW-40 shall be installed approximately 200 feet **southeast** of TMW-19, while Paragraph 22 states that the well should be moved to 200 feet **southwest** of TMW-19. Order at 5, 10.

⁸ TMW-31 as proposed by Apache is in the same location as TWM-42 proposed by the Division.

29. Mr. Grams testified that in his expert opinion, Apache's September 23, 2024 work plan is "a reasonable step" that will hopefully complete the delineation and if not guide future investigations. Hr'g Tr. 225:10-20, Jan. 16, 2025.

30. In addition to failing to consider the expert testimony provided by Mr. Grams at the hearing, the Commission here has given the testimony of the lay Division witnesses⁹ more weight than that of Apache's expert geologist.

31. The Commission, in its Final COAs, also included two wells that the Division was willing to drop from its COAs, well TMW-31 (Division COA 1B) and TMW-38 (Division COA 1I). Order **Exhibit A**, COAs 1B and 1J. Mr. Powell's testimony clarified that Apache had "found an equivalent area" for these wells. Hr'g Tr. 421:10-21, Jan. 17, 2025. The Order notes that TMW-31, the Division's proposed well at COA 1B, "was withdrawn by the Division but is included in the Final COA and moved 200ft East of the windmill." Order ¶ 22. This explanation does not sufficiently explain the Commission's reasoning of including TMW-31 in the Final COAs, nor does it attempt to explain why the Commission also included TMW-38 in the Final COAs after the Division agreed that it was no longer requiring this well.

B. The Commission's Order mischaracterizes evidence in the record.

32. The Commission's Order erroneously states "Apache cannot estimate the volume of produced water necessary to cause the level of contamination observed in the ground water samples." Order ¶ 14. In fact, Mr. Grams testified during his cross-examination by Mr. Tremaine that Apache could in fact look at the data and contour maps that it has to provide an estimate of the mass of produced water, but that these calculations have not yet been completed. Hr'g Tr. 233:6-18, Jan. 16, 2025.

⁹ The Division did not tender the testimony of Rosa Romero or Brandon Powell as expert testimony. See Hr'g Tr., Jan. 17, 2025.

33. The Order erroneously concludes that Apache is the only potentially responsible party for the groundwater contamination at the site. *See* Order ¶¶ 3; 20; and Order at 7, ¶ 6. Mr. Grams' testimony clarified that Apache cannot rule out the possibility that there may be additional sources, which could be from other operators, natural conditions, or from historical operations at the site. Hr'g Tr. 219:8-18, Jan. 16, 2025. The Commission's determination that Apache is the solely responsible operator was made without supporting evidence.

34. The Commission states in its Order that, based on its expertise, the "aforementioned exceedances reflect injury and damage to neighboring land, and a danger and threat to local sources of fresh water, public health, and the environment." There is no evidence in the record to support the Commission's determination that there has been injury or damage to "neighboring land" nor that any is expected. The site of the release at issue is on a desert oil field, with no nearby residences or structures. *See Apache Ex. C-5*. It is also unclear, based on the record, how the Commission arrived at the determination that the release poses a "danger and threat" to "local sources of fresh water" and "public health." Order ¶ 12. The only source of "fresh water" near the release site is the windmill, which is used "strictly for cattle consumption" according to Mr. Bole's testimony. Hr'g Tr. 119:8-10, Jan. 16, 2025. Mr. Bole explained in his testimony that the U.S. Department of Agriculture sets water quality standards for cattle consumption and that samples taken from the windmill have been within these standards. *Id.* 119:8-23. As there are no humans utilizing the water from the windmill, and there are no other sources of fresh water at the site, the Commission's determination that the groundwater contamination poses a risk to "public health" lacks supporting evidence in the record.

35. The Commission's Order repeatedly and erroneously describes a "neighboring landowner" when no such neighboring landowner has been described in the record. *See, e.g.,*

Order at 2, ¶ 8. The only landowner at issue in this matter is William Stephens, the surface owner of the lands at issue, described by the Division as “landowner.” *See, e.g.,* **OCD Ex. 2-0015**. The distinction here is of import because the Commission repeatedly states in its Order that the release poses a danger to “neighboring land” which has not been raised in this proceeding. *See, e.g.,* Order at 3, ¶ 12; *compare with* Hr’g Tr.

36. The Commission included provisions taken from the Division’s withdrawn **OCD Rebuttal Exhibit 9** in its Final COAs. *See* Order at 10, Final COA 3; *see also* **OCD Rebuttal Ex. 9**; Hr’g Tr. 286:1-3, Jan. 17, 2025. Final COA 3 is listed as COA 6 on the **Division’s OCD Rebuttal Exhibit 9** and is not listed as a supplemental condition to the original conditions. *See* **OCD Rebuttal Ex. 9**. However, COA 6, as written, was not included in the Division’s original COAs to Apache’s May 8, 2024 Scope of Work. *See* **Apache Ex. B-3** at 398. It is clear error to include wording from a **withdrawn exhibit** that was not in the record in the Commission’s Final COAs.

C. The Final Conditions of Approval contain numerous errors making compliance with the Final COAs impossible.

37. The Commission’s Order requires Apache to drill TMW-40 at a location “200 ft Southwest of TMW[-]19” [Order, ¶ 22], while the Final COAs (1J) requires TMW-40 to be installed “approximately 200 feet southeast of TMW-19.” The Commission should clarify for Apache which location it is mandating for TMW-40.

38. The Final COAs include a reference to TMW-42 twice, an error which was carried over from the Division’s COAs. Condition 1L and 1M in the Final COAs both prescribe a well described as TMW-42, to be installed in different locations. The Commission should clarify which well should be identified as TMW-42, and which should be identified as TMW-43.

CONCLUSION

39. Final administrative actions are subject to appeal at the New Mexico Court of Appeals, and may be set aside pursuant to NMSA 1978, § 74-2-9(C) if the action is found to be: (1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) not in accordance with law. NMSA 1978, § 74-2-9(C). A reviewing court is likely to set aside the Commission's Order as arbitrary, capricious, and not supported by substantial evidence.

WHEREFORE, Apache respectfully requests that the Commission schedule a rehearing for this matter and enter an order consistent with the points and authorities raised in the hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 11, 2025, the foregoing pleading was filed with the Oil Conservation Commission via the OCD Permitting website and served via electronic mail on:

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