

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

CASE NO. 16078

6/17/18 9:07:49

IN THE MATTER OF THE:

PROPOSED AMENDMENTS TO THE COMMISSION'S RULES ON FINANCIAL
ASSURANCE AND PLUGGING AND ABANDONMENT OF WELLS, 19.15.2, 19.15.8,
AND 19.15.25 NMAC

**OIL CONSERVATION DIVISION'S RESPONSE TO
LARRY MARKER'S APPLICATION FOR REHEARING**

Applicant, the New Mexico Oil Conservation Division ("OCD"), files this Response to the Application for Rehearing filed in this case by Larry Marker ("Marker").

This Response addresses legal issues only.

1. **Standing.** *Marker is not a party to this proceeding. Accordingly, he has no standing to request a rehearing, and his Application should be summarily denied.*

Section 70-2-25, NMSA 1978, as amended, authorizes only a party to file an application for rehearing. OCC Rule 19.15.3.7.A NMAC defines a "party" to a rulemaking proceeding as "the applicant or any person filing a pre-hearing statement." Marker was not the applicant and did not file a pre-hearing statement. Accordingly, he is not a party and has no standing to file an application for rehearing. The Commission should deny Marker's application without consideration of its merits, if any.

2. **Premature Filing.** *Marker's Application will be automatically overruled unless the Commission grants a rehearing on August 20, 2018.*

Section 70-2-25, NMSA 1978, as amended, authorizes a party to file an application for rehearing of "an order or decision" of the Commission within 20 days. Marker filed his

Application for Rehearing on August 6, 2018. No Commission order had been issued in this case, and no order has yet been issued. However, the Commission made certain decisions at its meeting on July 20, 2018. Marker filed his application for rehearing on August 6, 2018, within 20 days after the Commission's announcement of its decisions.

It does not matter, however, whether Marker's application is viewed as premature challenge to an order to be entered in the future or a timely request for the Commission to reconsider its decisions. Section 70-2-25(A), NMSA 1978 requires the Commission to act on an application for rehearing "within ten days after the application is filed." There is no provision in statute or rule that extends to the time for reconsideration of a prematurely filed application. A time period of less than 11 days excludes Saturdays, Sundays, and holidays. Section 12-2A-7(E), NMSA 1978. Thus, the time for the Commission to consider Marker's application expires on August 20, 2018, ten business days after August 6, the date Marker filed its application, and is not extended by the subsequent issuance of a final order.

If the Commission does not act on Marker's application on or before August 20, its non-action "shall be deemed a refusal and final disposition of that application." Section 70-2-25(A), NMSA 1978.

3. **Federal Preemption.** *The proposed rule is not pre-empted by federal law even if some wells will be required to have financial assurance pursuant to both state and federal requirements.* New Mexico Attorney General's Opinion 35-1110 does not indicate otherwise.

The opinion does not say, as Marker asserts, that the OCC's jurisdiction over federal lands is limited to making rules involving waste of oil and gas. Rather it opines that the state can adopt rules for prevention of waste, while expressly recognizing the state's more general power

to adopt “reasonable police regulations” that apply to the activities of private lessees on federal land.¹

Financial assurance requirements are not unrelated to prevention of waste of oil and gas, since unplugged or improperly plugged wells can allow leakage of hydrocarbons from reservoirs, making production of those hydrocarbons problematic. Thus, even if the Commission’s power to regulate oil and gas operations on federal land *were* limited to adopting rules to prevent waste the financial assurance requirements would be within the OCC’s jurisdiction. However, the state’s power is not so limited.

Section 70-2-14, NMSA 1978, as amended, does not limit OCD’s power to require financial assurance to wells not on federal lands. Section 70-2-38(B), NMSA 1978 expressly authorizes OCD to order plugging of wells located on federal lands, to expend funds from the Oil and Gas Reclamation Fund to plug such wells if the operator fails to do so, and to bring suits against operators for recover of funds so expended. These statutes have never been challenged.

In addition to preventing waste and protecting correlative rights, financial assurance requirements also safeguard the environment. The United States Supreme Court, in *California Coastal Commission v. Granite Rock Company*, 107 U.S. 1419 (1987), recognized that states have power to enforce state environmental rules on federal land, and to impose state permit requirements for that purpose.

Of course, the *Granite Rock* decision does not allow states to impose requirements that are expressly preempted by federal statute or regulation or that involve operational conflicts. However, the proposed rule in this case is not expressly preempted. The federal financial assurance regulations, 43 CFR 3104, say nothing that would preclude states imposing financial

¹ Since this opinion may not be readily available to the Commissioners, a copy is attached to this response.

assurance requirements, and no evidence introduced in this case indicates that any federal agency has asserted that its regulations would have that effect. Also, there is no evidence indicating that the proposed rule would interfere with the operation of the Bureau of Land Management's financial assurance and well plugging programs. Accordingly, federal preemption is not an issue.

For the above reasons, Marker's Application for Rehearing should be denied.

Respectfully submitted,



David K. Brooks
Assistant General Counsel
Energy, Minerals and Natural
Resources Department
1220 S. St. Francis Drive
Santa Fe, NM 87505
(505) 476-3215
Email: davidk.brooks@state.nm.us
Attorney for the Oil Conservation Division