

STATE OF NEW MEXICO RECEIVED OGD
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION 2013 JUN 25 A 11:13

IN THE MATTER OF THE APPLICATION OF THE NEW MEXICO OIL AND GAS ASSOCIATION FOR AMENDMENT OF CERTAIN PROVISIONS OF TITLE 19, CHAPTER 15 OF THE NEW MEXICO ADMINISTRATIVE CODE CONCERNING PITS, BELOW GRADE TANKS, CLOSED LOOP SYSTEMS AND OTHER ALTERNATIVE METHODS TO THE FOREGOING, AND AMENDING OTHER RULES TO CONFORMING CHANGES STATEWIDE.

CASE NO. 14784
14785
(consolidated)

REQUEST FOR REHEARING

The Earthworks' Oil and Gas Accountability Project ("OGAP"), by and through its attorneys, the New Mexico Environmental Law Center, requests a rehearing on Order No. R-13506-D ("Order"), which the Oil Conservation Commission ("OCC") entered in the above-captioned matter on June 6, 2013. The grounds for this Request for Rehearing, made pursuant to NMSA 1978, § 70-2-25(A) (1999), which allows a party of record who is "adversely affected" by an OCC decision to request a rehearing by setting forth the issues where the OCC erred, are as follows:

I. OGAP Has an Interest In and Will Be Affected By this Proceeding.

1. OGAP is the only organization in the United States with the sole mission of working with tribal, urban and rural communities to protect their homes and the environment from the devastating impacts of oil and gas development.

2. OGAP has succeeded in building alliances with economically, racially and politically diverse constituencies. By bringing together such diverse partners as Native

Americans, ranchers and environmentalists to work towards a common – and critically important – goal, its ability to voice their concerns and work to lessen impacts has increased.

3. OGAP is a resource for citizens and communities that are dealing with oil and gas development. OGAP's multi-tiered approach involves people who are directly affected by the impacts of oil and gas development in working for strong reforms and better industry practices. It utilizes media, public education and community organizing in our efforts to change the way oil and gas development occurs in North America.

4. OGAP and its members are adversely affected by the OCC's decision in consolidated Case No. 14784/14785, which is set out in OCC Order No. R-13506-D. The OCC's decision will unnecessarily increase the adverse impacts of oil and gas development in New Mexico, which is directly contrary to OGAP's mission, by increasing the number and toxicity of uncontrolled and unmonitored oil field waste disposal sites. OGAP's members who live in New Mexico are adversely affected, because OCC's decision will cause more contamination of their groundwater supplies and soil resources, as well as increase the potential for exposure to toxic chemicals.

II. The Commission Lacks Authority to Amend the Pit Rule.

5. OCC's decision to amend 19.15.17 NMAC ("Pit Rule") was made solely as a political accommodation to the oil and gas industry and not for any purpose relating to OCC's statutory duties of protecting correlative rights, preventing waste, or protecting the environment and fresh water supplies.

6. OCC amended the Pit Rule based on petitions from the New Mexico Oil and Gas Association ("NMOGA") and the Independent Petroleum Association of New Mexico ("IPANM"). Order at 2, ¶¶ 1-2. The primary purpose of amending the Pit Rule was to remedy

increased costs and alleged inconvenience to the oil and gas industry. *Id.* at 40, ¶¶ I-J.

However, the OCC lacks statutory authority to adopt or amend a rule for purely economic reasons or for the convenience of industry.

7. The OCC also lacks jurisdiction to promulgate the amendments adopted by the Order. Because the OCC process of adopting regulations is a formal¹ rulemaking process, the OCC lost jurisdiction when NMOGA and IPANM appealed the 2008 Pit Rule to district court. Since the district court never dismissed or remanded the Pit Rule, it retained jurisdiction of that matter and the OCC was without jurisdiction to affect any changes to it.

III. The Amended Pit Rule is Arbitrary, Capricious and Contrary to Law.

8. The Order demonstrates that the OCC misinterpreted its duty to protect fresh water supplies. As set out in the October 2, 1985, Oil Conservation Division Memorandum regarding “Hearings for Exception to Order No. R-3221” (“OCD Memorandum”), “fresh water supplies” includes all groundwater that has a total dissolved solids concentration of less than 10,000 mg/l, except groundwater for which there is no present or no reasonably foreseeable beneficial use.

9. Whether there is present or reasonably foreseeable beneficial use of groundwater cannot be determined by rule, but must be decided on a case-by-case basis. *See* Order R-3221; OCD Memorandum. “Reasonably foreseeable beneficial use” does not mean merely holding back groundwater contamination for some arbitrary number of years, as the Oil Conservation Division (“OCD”) and OCC appeared to believe in the instant proceeding. *See* Order at 41, ¶ N.

¹ The Order mischaracterizes OGAP’s position on whether the Pit Rule proceeding was a formal or informal rulemaking. Order at 4, ¶ 22. OGAP has consistently maintained that OCC’s rulemakings are formal proceedings; however, OGAP, throughout the proceedings on the Pit Rule amendment noted that the First Judicial District determined (erroneously in OGAP’s view) that the OCC rulemakings are informal proceedings. *See, e.g.*, Transcript (“Tr.”) at 2098; Response to Petitioner’s Motion to Exclude Witnesses at 3 (Jan. 7, 3013); Earthworks Oil and Gas Accountability Project v. New Mexico Oil Conservation Comm’n, et. al., Case No. D-0101-CV-2012-00106.

Instead, OCC and OCD must determine whether there is any reasonably foreseeable future use of groundwater at a given location, based on objective site-specific criteria such as site location, depth to water, present use, background water quality and aquifer characteristics. OCC's failure to do this in the Order, or to include any requirement to do this on a case-by case basis, renders its decision arbitrary and capricious.

10. The Order is *per se* arbitrary and capricious because the evidence presented in consolidated Case No.14784/14785 is substantially identical to the evidence that was presented in the 2008 Pit Rule hearing (Case No. 14015), yet the OCC reached a radically different result. The OCC failed to adequately explain what circumstances had changed and how the Order addresses those changes. Alternatively, because the evidence in the two proceedings is substantially identical, the OCC's Order is not based on substantial evidence in the record.

11. The Order and amended Pit Rule are contrary to law with respect to the provisions governing multi-well fluid management pits because the notice given was insufficient to reasonably inform the public about the nature of the proposed regulations and the pits they were intended to regulate.

12. The OCC's supplemental hearing, which was intended to cure the defect that the bulk of the OCC's deliberations were based on a version of the Pit Rule that was superseded, was arbitrary and capricious because the OCC impermissibly narrowed that hearing's focus, contrary to the public notice provided. *See*, Order at 5, ¶¶ 28-29.

13. The variance and exception provisions in Section 19.15.17.15 are arbitrary and capricious because they fail to establish standards for variances and exceptions. The Order states that the variance procedure will be used for "relatively minor" deviations from the Pit Rule and which will not be subject to public hearing. Order at 49, ¶ BB. A different process, including

notice and public hearing, will be used for exceptions, which are “significant” deviations from the Pit Rule. *Id.* at 48, ¶ BB. Nowhere does the Order or attached regulations indicate what circumstances constitute a “significant” deviation from the Pit Rule and what circumstances would be considered “relatively minor”.

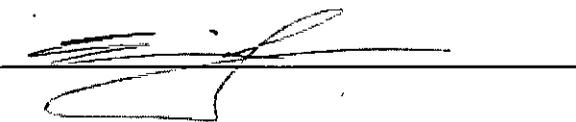
14. OGAP further requests rehearing based on its Proposed Findings of Fact and Conclusions of Law, which the OCC implicitly rejected.

WHEREFORE, OGAP requests a rehearing of this matter before the OCC pursuant to NMSA 1978, § 70-2-25(A).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June 2013, I have delivered a copy of the foregoing pleading in the above-captioned case via electronic mail and/or U.S. Mail, First Class to the following:

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