KEMP SMITH LLP
ATTORNEYS AT LAW

221 NORTH KANSAS, SUITE 1700, EL PASO, TEXAS 79901-1441 | P.O. BOX 2800 79999-2800
915.533.4424 | FAX 915.546.5360 | www.kempsmith.com

CHARLES C. HIGH, JR.
BOARD CERTIFIED, LABOR AND EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
chigh@kempsmith.com

August 14, 2006

VIA FACSIMILE
505-476-3462

Mr. Mark E. Fesmire, P.E.
Director
Oil Conservation Division
New Mexico Department of Energy,
Minerals and Natural Resources
1220 South Saint Francis Drive
Santa Fe, New Mexico 878505

Re: Cases Nos. 13367 and 13368, Orders No. R-12402-A and 12403-A

Dear Mr. Fesmire:

Enclosed for filing in the above-captioned case is the Opposition of Mosaic Potash Carlsbad, Inc. To the Application for Rehearing filed by Devon Energy Production Company and Bass Enterprises Production Company in the above-captioned cases.

A copy of the Opposition was served on counsel for Devon Energy Production Company by facsimile and certified mail on August 15, 2006.

Your attention to these matters is appreciated.

Yours very truly,

KEMP SMITH LLP

By:
Charles C. High, Jr.

Cc: Dan Morehouse

12414.00700/CHIG/CORR-3/955650.1

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:	)	
APPLICATION OF BASS ENTERPRISES PRODUCTION COMPANY FOR AN ORDER AUTHORIZING THE DRILLING OF A WELL IN THE POTASH AREA, EDDY COUNTY, NEW MEXICO	)	Case No. 13367
APPLICATION OF DEVON ENERGY PRODUCTION COMPANY L.P. FOR AN ORDER AUTHORIZING THE DRILLING OF A WELL IN THE POTASH AREA, EDDY COUNTY, NEW MEXICO	)	Case No. 13368
APPLICATION OF DEVON ENERGY PRODUCTION COMPANY, L.P., FOR APPROVAL OF AN UNORTHODOX WELL LOCATION[1] AND AUTHORIZATION TO DRILL A WELL IN THE POTASH AREA, EDDY COUNTY, NEW MEXICO	)	Case No. 13372

OPPOSITION OF MOSAIC POTASH CARLSBAD, INC. TO APPLICATION FOR REHEARING FILED BY BASS ENTERPRISES PRODUCTION COMPANY AND DEVON ENERGY PRODUCTION COMPANY, L.P.

MOSAIC POTASH CARLSBAD, INC. ("Mosaic Potash") opposes the Application for Rehearing ("Application") filed by Bass Enterprises Production Company ("Bass") and Devon Energy Company ("Devon")(collectively referred to as "Applicants") on August 1, 2006. While the Application raises, in rambling fashion, virtually every reason ever cited for a rehearing, none

[1] The portion of the Application seeking an unorthodox well location was dismissed by the Division Hearing Examiner and is not an issue before the OCC. OCC Hearing Transcript, page 21 (hereinafter referred to as "Tr." followed by the page number.

warrants the extraordinary proceeding of rehearing this matter. Two full and complete hearings have already been held in these cases - one before the Hearing Examiner and one before the Oil Conservation Commission ("OCC"). Even after the close of the *de novo* hearing before the OCC, the record was kept open and the parties were again given an opportunity to submit additional written comments and arguments. All accepted the invitation and submitted lengthy written arguments and comments. With such extensive hearings and opportunities to present evidence, it cannot seriously be argued that any party was surprised by the position or arguments being made by any other party or was denied an opportunity to fully present their case.

Nor is there anything about the Orders issued in this consolidated case that warrant a rehearing. The Orders, in usual fashion, track the evidence presented, contain findings of ultimate facts which are material to the issues, are certainly sufficient to disclose the reasoning of the OCC in reaching its ultimate conclusions and findings, and are clearly supported by the record evidence. Nothing more is required. *See, e.g., Fasken v. Oil Conservation Commission*, 87 N.M. 292 (1975).

Despite the clarity and completeness of the Orders, as well as their compliance with this settled law, Bass and Devon nevertheless contend that this matter should be reheard for a multitude of reasons, none of which, as explained below, have merit. For ease of reference, the points raised by Bass and Devon are addressed in the order set forth in their Application.

"BACKGROUND"

The information set forth by Applicants under the heading of "Background" reflects, at best, a superficial and, in some instances, incorrect, understanding of the history of Order R-111-P and the cases decided since its adoption in 1988. Indeed, Appellants' contention that the

Noranda case (Case No. 10490, Order R-9990) is "virtually identical" to these cases is just plain wrong. The only similarities between the Noranda case and these cases is that both involved the drilling of a well on fee lands. Here, however, unlike in Noranda, there are multiple surface locations where the instant wells can be located and directionally drilled to the bottom hole locations desired. That was simply not the case in Noranda. For that reason, the decision and Order in Noranda provides no support for Appellant's request for a rehearing.

POINT I. THE DECISIONS AND ORDERS ARE NOT CONTRARY TO LAW

In their first point, Appellants argue that the Orders in these cases are contrary to law because they will "cause the waste of oil and gas." Application, p. 12. This argument is based upon Appellants' oft repeated erroneous contention that the Noranda case held that a fee owner and an oil and gas operator can, without any oversight or regulatory intervention by the OCC, drill an oil and gas well that will, under the facts presented, result in the waste of potash. To state such a proposition is to reject it. The New Mexico Oil and Gas Act, cited but ignored by Appellants, clearly charges the OCC with the responsibility to prevent oil and gas drilling that "would unduly reduce the total recovery of commercial potash..." N.M.S.A. § 70-2-3.A. This includes all drilling in New Mexico and there is no exception to this statutory obligation when the proposed drilling location is on fee lands.

Nor is this "waste of oil and gas" argument supported by Appellants' further contention that the alternative methods of development identified by the OCC will not allow for the "economic recovery" of the oil and gas. On the contrary, the record is devoid of any evidence regarding the economics of directional vs. straight hole drilling. Appellants knew from the very beginning of these cases that Mosaic was not opposed to the development of the oil and gas

underlying these fee tracts but, instead, contended that they could be developed by directional drilling. Surely, if such drilling was not economic, evidence of the comparative costs would have been presented. Because it was not, Appellants cannot now be heard to complain that it is not economic.

Similarly, Appellants presented no evidence that the proposed wells cannot be drilled after mining has occurred, as they now argue. Moreover, this was not even an issue at either of the two full hearings held in these matters because, as clear from the record, Mosaic never made such an argument but, as stated earlier, simply argued that the wells could be directionally drilled and prevent the waste of millions of dollars of potash. This argument, therefore, has clearly been waived and provides no support for Appellants' request for rehearing.

Finally, Appellants' argument that the Orders "impair correlative rights" ignores entirely the OCC's finding that the tracts can be developed in alternative ways. While Appellants disagree with this finding and argue that the proposed wells cannot be developed by directional drilling, these conclusionary contentions do not take the place of evidence. This absence of evidence is especially glaring in this case because virtually all of the existing wells in Section 24 and all of the wells producing in Section 7 were directionally drilled. Surely, if the existing wells could be directionally drilled, as they were, the same is true for the proposed wells in these cases.

In short, none of the arguments made by Appellants support their contention that the Orders are contrary to law.

POINT II. THE ORDERS IN THIS CASE DO NOT VIOLATE THE DUE PROCESS RIGHTS OF OWNERS OF OIL AND GAS INTERESTS IN THE POTASH AREA

In their second point, Appellants claim that they have been denied due process. While

not entirely clear, this argument appears to be based upon the procedure for the designation of life-of-mine reserves (LMR's) under Order R-111-P. As argued by Appellants, "the owners of constitutionally protected mineral interests are denied the opportunity to develop these reserves as the result of a proceeding where they were neither in attendance or permitted to review or respond to the data used to deny their property interests" and, for this reason, "the due process rights of all owners of oil and gas interests in the subject leases are violated." *Application, p. 15.* This argument is both irrelevant and, simply stated, just plain wrong.

First, the fee lands at issue here are not part of an LMR determination. The OCC has previously addressed this issue and concluded that an LMR cannot include lands not leased by the mine operator. For this reason, there was no LMR determination made with respect to these fee tracts from which the fee owners were excluded. As such, there was no denial of due process to the fee land owners or the owners of the oil and gas rights on the fee lands.

Further, no attempt was made by either Bass or Devon to challenge or otherwise question Mosaic's LMR in either Section 7 or Section 23, which adjoins the location of Devon's proposed wells in Section 24. If they truly believed that Mosaic's LMR was improperly determined they could have raised that issue either before the Hearing Officer or before the full OCC. Having failed to do so, they waived the issue and should not now be heard to complain.

Finally, and in any event, the OCC has previously held that when the designation of an LMR may prevent the owner of oil and gas rights from accessing the property, the oil and gas operator "must be given the opportunity to review the geologic basis for the designation..." New Mexico Potash, Order R-9650. This access to data used by a mine operator in designating an area as LMR precludes any claim of a due process violation because it clearly provides an oil and

gas operator with information necessary to meet its burden under Order R-111-P of making "a clear demonstration" that the drilling of a proposed oil or gas well will not waste commercial potash. Order R-111-P, Finding 20. Having access to the data supporting Mosaic's LMR but not requesting it or raising the issue during the course of two full hearings, Appellants' claim that they were somehow denied due process is just plain wrong.

POINT III. THE ORDERS DO NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING OF OIL AND GAS INTEREST WITHOUT COMPENSATION

Appellants' argument that the Orders constitute a taking of their property without compensation misses the mark for two reasons. First, it ignores completely the fact that the Orders do not deny them the right to develop their oil and gas interests - they simply say that the oil and gas interests must be developed in another manner. Regulating the manner of development, as opposed to denying the right to develop, does not constitute a taking. *See, e.g., Mock v. Dep't of Environmental Services*, 153 Pa. Cmnwlth 380, 623 A.2d 940 (agency denial of right to build at one location on land not a taking when owner could still build on another location).

Second, the proposed wells were not denied "to provide a buffer for the development of potash on an adjacent federal tract" as Appellants erroneously contend. Application, p. 17. Instead, as the Orders make clear, the wells were denied because they would result in the waste of commercial potash, an entirely proper and statutorily required reason under the New Mexico Oil and Gas Act, not simply because they were located within the buffer zone of Mosaic's LMR.

For these reasons, there is no merit to Appellants' contention that the Orders will result in an unconstitutional taking of their oil and gas interests without compensation.

POINT IV. THE ORDERS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND PROPERLY DISCLOSE THE REASONING OF THE OCC IN DENYING THE APPLICATIONS FOR PERMITS TO DRILL

Little needs to be said in response to Appellants' contention that the Orders are not supported by substantial evidence and do not properly disclose the OCC's reasoning in denying the proposed wells. Order No. R-12402-A (Case No. 13367) contains 45 numbered paragraphs of facts developed at the hearing. Not only does the Order detail the evidence presented, but, in addition, details what was not proved. For example, in Paragraph 35, the OCC noted that Bass did not present evidence showing the potential of oil and gas production in any formation other than the Morrow. Similarly, in Paragraph 44 it noted that Bass likewise failed to present evidence that the drilling of a horizontal or directional well to a bottomhole location under the 40-acre fee tract was not technologically feasible.

The same is true with respect to Order No. R-12403-A (Case No. 13368). In 47 numbered paragraphs of factual findings, the OCC sets forth in detail why the proposed wells would result in the waste of potash. Going beyond this, it further noted in Paragraph 39, as the evidence established, that Devon had not explored the possibility of unitizing the 40-acre fee tract which, of course, would have allowed development of the tract without the waste of additional potash. Even more, it noted in Finding No. 47 that there were four wells in Section 24 drilled from a drilling island on the East side of Section 24 and that Devon could have drilled these wells from the same location but chose not to.

Given the factual detail recited in the Orders, as well as what was not proven, it stains credulity to say that the Orders do not show the reasoning of the OCC in denying the proposed wells.

This result is not changed by Applicants' further argument that the OCC failed to "disclose the reasoning of the Commission in rejecting the express language in Order R-111-P that permits the drilling of wells on lands on which there is no LMR and where the owners of the potash and the oil and gas rights agree that the oil and gas should be developed first." Application, p. 18. The answer to this argument, of course, is that it misstates R-111-P and the OCC's responsibilities under the New Mexico Oil and Gas Act ("Act") and required no explanation.

As specifically provided in the Act, NMSA 70-2-6, the OCC has jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil and gas operations in New Mexico. This jurisdiction and authority extends to "all persons, matters or things"necessary or proper to enforce effectively the provisions of the Act or any other law of New Mexico relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil and gas operations. This language, under any standard, includes the owners of mineral rights on fee lands.

In the face of this broad grant of jurisdiction and authority, Appellants seek, by this argument, to minimize, if not eliminate, the role of the OCC in overseeing and regulating the drilling of oil and gas wells whenever, as they contend, "the owners of the potash and the oil and gas rights agree" to drill an oil and gas well even if the drilling of the well would admittedly result in the waste of large amounts of commercial potash. Such a result was never intended by Order R-111-P, either expressly or otherwise, nor is such an interpretation even possible given the OCC's clear statutory obligations under NMSA 70-2-6 to prevent the waste of potash from oil and gas operations.

Nor is the interpretation of R-111-P urged by Appellants established by the New Mexico Potash and Noranda cases referred to by Appellants. One of the key issues in the New Mexico Potash case was the fact that the LMR at issue was designated after the applications for permits to drill were filed with the Division. That fact, of course, is not present here. Similarly, in the Noranda case, unlike here, there was no possibility of unitization or the availability of multiple locations where the tract could be developed by horizontal or directional drilling. These cases, therefore, are distinguishable on their facts and do not, as argued by Appellants, show that the OCC somehow departed from a prior interpretation of Order R-111-P. For these reasons, there is nothing in Appellants' Point IV that warrants a rehearing.

POINT V. THE ORDERS DO NOT RESULT IN CONFUSION, WILL NOT DISCOURAGE THE DEVELOPMENT OF MINERALS IN NEW MEXICO, WILL NOT CAUSE WASTE, AND DO NOT CONTRAVENE THE PUBLIC INTEREST

In their Point V, as in all their previous points, Appellants raise no issues requiring a rehearing. Their claim of "confusion" from the Orders is nothing but hype. Both the Act and Order R-111-P have long prevented oil and gas operations that waste commercial potash. This finding in the current Orders, therefore, breaks no new ground.

Moreover, the underpinning of this "confusion" argument is clearly Appellants' mistaken contention that under R-111-P and the Act, an owner of the mineral rights on fee lands and an oil and gas operator can agree, without intervention by the OCC, to drill an oil and gas well even if it would waste millions of dollars worth of potash. That is not what Order R-111-P provides nor is it consistent with the OCC's obligations under the Act.

The Orders likewise create no confusion over what lands are covered by R-111-P as

Appellants contend. On the contrary, as made clear by NMSA 70-2-6, as well as R-111-P, all lands in New Mexico are subject to the jurisdiction and authority of the OCC. Thus, whether an oil and gas well is to be drilled on fee lands or State lands, it is the obligation of the OCC to prevent the waste of commercial potash. There is nothing about the Orders that changes, alters, or creates confusion regarding this clear and long-standing statutory obligation.

The remaining arguments in support of this Point have the same fundamentally flawed premise - that heretofore the owner of the mineral rights on fee lands and an oil and gas operator could agree to "waste" potash with nothing more than their agreement to do so and without intervention or regulation by the OCC. That is not the law in New Mexico and never has been. It is simply precluded by the clear language in NMSA 70-2-6 and 70-2-2, which 70-2-2(F) which defines "waste" as including the 'drilling...for oil and gas within any area containing commercial deposits of potash where such operations would have the effect unduly to reduce the total quantity of such commercial deposits of potash...." Such was the case here and the OCC's carrying out of its statutory obligation creates no confusion.

Finally, Appellants' arguments concerning the burden of proof are just that - arguments. The record is replete with clear, specific testimony and evidence concerning the potash that would be wasted if the proposed wells were allowed, as well as the multiple alternatives available to develop each of the 40-acre tracts. This evidence stands in stark contrast to the total absence of any evidence concerning the potential for oil in the Delaware in Section 7, the cost of directional drilling, or why, given the many directional wells already existing in both sections, that these wells could not likewise be directionally drilled.

CONCLUSION

For all the foregoing reasons, Mosaic submits that the Application for Rehearing should be denied.

Respectfully submitted,

KEMP SMITH LLP
P.O. Box 2800
El Paso, Texas 79999-2800
915.533.4424
915.546.5360 (FAX)

By: _____
CHARLES C. HIGH, JR.
CLARA B. BURNS

Attorneys for Mosaic Potash Carlsbad, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record this 15th day of August, 2006.

_____
CHARLES C. HIGH, JR.