

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

2007 MAR 7 AM 11 01

IN THE MATTER OF THE APPLICATION
OF HARVEY E. YATES COMPANY FOR AN
EXEMPTION TO COMMISSION RULE
19.15.2.50(A)

CASE NO. 13817

ENTRY OF APPEARANCE

Pursuant to 19.15.14.1208 NMAC, Gail MacQuesten enters her appearance in this matter on behalf of the Oil Conservation Division.

RESPECTFULLY SUBMITTED, this
7th day of March 2007 by



Gail MacQuesten
Assistant General Counsel
Energy, Minerals and Natural Resources
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CERTIFICATE OF SERVICE

I certify that I faxed and e-mailed a copy of this motion to Modrall, Sperling, Roehl, Harris & Sisk, P.A, attorneys for HEYCO, at 505 848-9701 and eed@modrall.com this 7th day of March 2007.



Gail MacQuesten

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MOTION TO DISMISS

The Oil Conservation Division moves to dismiss the application of Harvey E. Yates Company for an exemption to 19.15.2.50(A) NMAC, because the application seeks relief that is unavailable.

PROCEDURAL BACKGROUND

On September 29, 2006, Harvey E. Yates Company (HEYCO) filed the application in Case No. 13817 seeking an exemption from 19.15.2.50(A) NMAC (Rule 50.A) to allow the use of a reserve pit in the Bennett Ranch Federal Exploratory Unit (BRU) as part of an underbalanced (air drill) system for the proposed BRU #6 exploratory well in Section 24, Township 26 South, Range 12 East, Otero County, New Mexico. HEYCO's application states that the pit will comply with all the design, construction, and operational requirements set out in Rule 50, as well as Rule 50's standards for disposal, closure and restoration. The only "exemption" HEYCO seeks is exemption from the requirement that the pit be "permitted."

Rule 19.15.2.50 NMAC (Rule 50) is the general rule governing pits and below grade tanks not covered by Rule 19.15.9.711 NMAC (Rule 711) or Water Quality Control Commission (WQCC) regulations. Rule 50.A prohibits operators from discharging into or constructing any pit or below-grade tank covered by the rule "absent possession of a permit issued by the division, unless otherwise herein provided or unless the division grants an exemption pursuant to Subsection G of 19.15.2.50 NMAC." Rule 19.15.2.50(G) NMAC (Rule 50.G) provides procedures for the OCD to attach additional conditions to any permit, and provides procedures for an operator to obtain an exemption from "any requirement" of Rule 50 if the operator demonstrates that the granting of such exemption will not endanger fresh water, public health or the environment.

Rule 19.15.1.21 NMAC (Rule 21) governs selected areas of Sierra and Otero Counties, including Section 24 of Otero County, where the BRU #6 well is to be located. Rule 19.15.1.21.B NMAC (Rule 21.B) provides: "The division shall not issue permits under 19.15.2.50 NMAC....for pits located in the selected areas."

On October 27, 2006, the OCD issued Order R. 12656, denying HEYCO's application, finding 1) that Rule 50.G did not provide for exemptions from the requirement that an operator

obtain a pit permit; 2) that Rule 21.B prohibited the OCD from issuing permits under Rule 50 for pits located in Section 24 of Otero County; and that 3) Rule 21 did not provide for the grant of an exemption to that prohibition.

On November 27, 2006, HEYCO applied for a hearing de novo before the Oil Conservation Commission.

ARGUMENT

I. Rule 21, a Specific Rule Prohibiting Pits in Selected Areas of Sierra and Otero Counties, Controls Over Rule 50, a General Rule Regulating Pits.

In December, 2003, the Commission adopted Rule 50, which requires pits to be permitted. Less than one year later, the Commission adopted Rule 21, titled "Special Provisions for Selected Areas of Sierra and Otero Counties." Rule 21.C expressly prohibits the OCD from issuing permits under Rule 50 for pits located in specified areas of Sierra and Otero Counties, including the area where the BRU #6 well is to be located. Administrative rules are construed in the same manner as statutes. New Mexico Dept. of Health v. Ulibarri, 115 N.M. 413, 416, 852 P.2d 686 (Ct. App. 1993). And it is a fundamental concept of statutory interpretation that a specific statute governs over a general statute. See Compton v. Lytle, 2003-NMSC-031, Paragraph 16. Rule 21 applies, and prohibits permitting of a pit in the area where the BRU #6 well is located.

II. The Commission Cannot Grant an Exception to Rule 21's Prohibition Against Pits in the Area where the BRU #6 Well is Located.

A. Rule 21 Itself Does Not Provide for Exemptions.

HEYCO does not seek an exemption to Rule 21 itself, because the rule does not provide for exemptions. Rule 21 is absolute: it prohibits the permitting of pits in the selected areas of Sierra and Otero Counties.

In adopting Rule 21, the Commission heard, and rejected, the very arguments HEYCO makes in its application. HEYCO argues that allowing its reserve pit would not endanger public health, fresh water, or the environment, and that requiring it to use a closed-loop system would be impractical and unsafe. Before it adopted Rule 21, the Commission heard two days of testimony and reviewed voluminous written comments. See Order No. R-12172, pp. 2 and 3. A majority of the Commission determined that the areas of Sierra and Otero Counties identified in Rule 21 "are areas of unique flora and fauna, home to an unusual diversity of species, some of which are endangered or threatened, indicating a special need for protection of wildlife in these areas." Order No. R-12172, p. 12. The majority of the Commission also concluded that the areas of Sierra and Otero Counties identified in Rule 21 contain "protectible fresh water resources ...that are, in many places, encountered at very shallow depths and particularly sensitive to contamination by pollutants that may escape from leaking pits." Order No. R-12172, p. 12. The majority of the Commission concluded that pits were not necessary to oil and gas operations in the selected areas because the use of closed-loop systems presented a practicable alternative, rejecting industry's argument that closed loop systems could not be used or would create safety problems. Order No. R-12172, p. 12. The majority of the Commission then adopted Rule 21, prohibiting the issuance of permits under Rule 50 for pits located in specified areas of Sierra and Otero Counties.

The Commission obviously knows how to write a rule that provides for exemptions. They chose not to provide for exemptions to Rule 21. That is consistent with the purpose of Rule 21, which is to protect the unique Chihuahaun desert grasslands in the selected areas and the water underlying those areas from the risks associated with pits. The Commission did not contemplate that operators would be allowed to re-litigate the issue on a case-by-case basis.

B. HEYCO Cannot Use the Exemption Provisions in Rule 50 to Create an Exemption Under Rule 21.

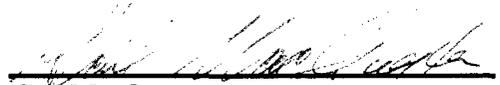
Because Rule 21 does not recognize any exemptions, or provide a process for requesting an exemption, HEYCO looks to the exemption provision in Rule 50 to create an end-run around Rule 21. HEYCO's reasoning is that Rule 21 doesn't prohibit pits in the selected areas, it just prohibits the permitting of pits in the selected areas. And Rule 50 requires pit permits "unless the Division grants an exemption" pursuant to Rule 50.G. Therefore, HEYCO reasons, if it can obtain an exemption to Rule 50's permit requirement under Rule 50.G, it can have a pit in the area covered by Rule 21 without being in violation of Rule 21. HEYCO's reasoning is clearly contrary to the intent of Rule 21 which is, as discussed above, to prohibit pits in the selected areas. HEYCO's reasoning is also contrary to the intent of Rule 50.

Rule 50 contemplates that all pits not permitted under Rule 711 or WQCC regulations will be permitted under Rule 50's provisions. Rule 50.G provides only that the division may grant an exemption "from any requirement" if the operator demonstrates that the granting of such exemption will not endanger fresh water, public health or the environment. Read in context, Rule 50.G provides a procedure for operators to obtain exemptions from the various requirements of Rule 50, such as the liner requirements, leak detection system requirements, fencing and netting requirements, and closure requirements. It does not provide for an exemption from Rule 50 itself. As the Commission found in adopting Rule 50, "a general permitting requirement applicable [to] all pits is necessary to enable the Division to manage the hazards associated with pits and to conform New Mexico to national regulatory standards." Order R-12011-B, p. 6. Allowing an operator to obtain an exemption from the permitting requirement itself would defeat the purpose of Rule 50.

CONCLUSION

HEYCO's application seeks an exemption to the permit requirements of Rule 50 -- in effect a permit to have an un-permitted pit -- so that it can avoid the prohibition in Rule 21. The relief HEYCO seeks is not available. When the Commission adopted Rule 21 it decided that pits would not be allowed in the selected areas; no exemptions. HEYCO cannot create an exemption through a mis-interpretation of the provisions of Rule 50.G. The Commission should dismiss HEYCO's application.

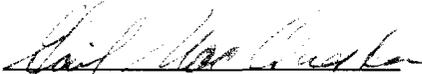
RESPECTFULLY SUBMITTED, this
24 day of March 2007 by


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I certify that I faxed and e-mailed a copy of this motion to Modrall, Sperling, Roehl, Harris & Sisk, P.A, attorneys for HEYCO, at 505 848-9701 and eed@modrall.com this 7th day of March 2007.


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