

MEMORANDUM

TO: W. Thomas Kellahin, Chair
NMOCC Rule 116 Change Committee

FROM: Edmund H. Kendrick *EHK*

DATE: November 9, 1995

RE: Applicability of Water Quality Control Commission
Regulations to Abatement of Spills and Releases at Oil
and Gas Facilities

I understand that the Rule 116 Change Committee is examining the interplay between Oil Conservation Division ("OCD") Rule 116 and the Water Pollution Abatement Regulations ("Abatement Regulations") that were recently adopted by the Water Quality Control Commission ("WQCC"). I have reviewed the October 6, 1995 memorandum to you from Rule 116 Change Committee Members Chris Shuey and Bob Menzie, framing two legal issues of interest to the Committee. I understand that the Committee is concerned that the new Abatement Regulations may have somehow taken away the Oil Conservation Division's ("OCD") jurisdiction to impose cleanup requirements on spills and releases from oil and gas facilities. I do not believe that the OCD's jurisdiction is in any way diminished by the new Abatement Regulations. I will address a general question that I believe captures the concerns underlying the two issues framed by the Committee. I offer this memorandum from my perspective as an attorney for oil and gas companies. However, because I have not had an opportunity to discuss this memorandum with any companies or with the New Mexico Oil & Gas Association, it should be considered as my opinion only.

QUESTION PRESENTED

How do Water Quality Control Commission Regulations concerning the remediation of spills and releases apply to oil and gas facilities?

SHORT ANSWER

Section 74-6-12.G of the Water Quality Act precludes application of WQCC Regulations to spills resulting from the exploration, development, production or storage of crude oil or natural gas. Section 74-6-12.G of the Water Quality Act may not preclude application of WQCC Regulations to spills resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil. However, the OCD would have discretion to apply

either the requirements of OCD Rule 116 or the requirements of WQCC Regulations to these spills and releases.

DISCUSSION

A response to the question presented requires a review of the new WQCC Abatement Regulations, existing WQCC regulation § 1-203 ("WQCC Spill Regulation") and the WQCC Delegation of Responsibilities to Environmental Improvement Division and Oil Conservation Division, dated July 21, 1989 ("Delegation Statement") to establish the context for the analysis. Then the question can be answered by an analysis of the limitation on the application of the Water Quality Act at § 74-6-12.G and the grant of authority to the Oil Conservation Division in the Oil and Gas Act at § 70-2-12.B.(21) and (22).

(1) WQCC Spill Regulation

WQCC Regulation § 1-203 requires notifications and corrective actions for "any discharge from any facility of oil or other water contaminant. . ." in harmful quantities. These notifications and reports of corrective actions must be made to the New Mexico Environment Department ("NMED") or to the OCD. The regulation clarifies that these requirements are not intended to be duplicative of any requirements promulgated by the Oil Conservation Commission ("OCC") or by the OCD. WQCC Reg. § 1-203.A.4. In fact, the regulation exempts "any facility which is subject to OCC or OCD discharge notification and reporting requirements." Id.

(2) WQCC Abatement Regulations

These regulations have been adopted by the WQCC and filed with the State Records Center on October 27, 1995. They will become effective on December 1, 1995. There are principally two situations that trigger the application of these regulations. The first situation is a discharge subject to § 1-203 discussed above. If the Secretary of NMED or the Director of OCD determines that a discharge is likely to cause an exceedance of WQCC ground water standards and the water pollution will not be abated within 120 days, that official may require the submission of an abatement plan. WQCC Reg. § 1-203.A.9. The second situation is a discharge plan that is not successful in protecting ground water standards. In that situation, the Secretary of NMED or the Director of OCD may require a discharger to modify the discharge plan so that the water pollution is abated to meet standards. WQCC Reg. § 3-109.E.1. Such an

Memorandum to W. Thomas Kellahin
November 9, 1995
Page 3

abatement must be consistent with the requirements of the WQCC Abatement Regulations. It should be emphasized that the application of the WQCC Abatement Regulations to each of these two situations is discretionary on the part of the NMED Secretary or the OCD Director.

Once the WQCC Abatement Regulations are determined to apply, a Stage 1 abatement plan must be submitted. The purpose of that document is to design a site investigation that defines site conditions and provides the data necessary to select and design an effective abatement option. WQCC Reg. § 4106.C. After approval of the Stage 1 abatement plan, the responsible person is required to submit a Stage 2 abatement plan that selects and designs an abatement option that will result in the attainment of abatement standards. WQCC Reg. § 4106.D. Public notice and participation is required before the selected abatement option can be implemented. WQCC Reg. § 4108.

(3) WQCC's Delegation Statement

As indicated above, the WQCC Regulations are implemented by both NMED and OCD. Each agency is a constituent agency of the WQCC. § 74-6-2.J. NMSA 1978. The term "secretary" and "director" are each defined in the WQCC Regulations to mean the secretary of NMED or the director of a constituent agency, which includes OCD. WQCC Reg. § 1-101.P.

In its Delegation Statement dated July 21, 1989, the WQCC made the following determination as to how administration of the WQCC Regulations should be divided between NMED (then the Environmental Improvement Division) and OCD:

As a general rule, OCD will administer and enforce applicable [Water Quality] Commission regulations pertaining to surface and ground water discharges at oil and natural gas production sites, oil refineries, natural gas processing plants, geothermal installations, carbon dioxide facilities, natural gas transmission lines, and discharges associated with activities of the oil field service industry. The Commission recognizes that OCD also administers regulations under both the Oil and Gas Act and the Geothermal Resources Act, and that OCD shall have discretion as to which regulations to enforce in any given situation. OCD shall have jurisdiction over all activities associated with exploration for or development, production, transportation before

refinement, refinement, storage or treatment of unrefined oil and natural gas, or oil or gas products on refinery premises.

Thus, it is apparent that to the extent WQCC Regulations apply to oil and gas facilities, those regulations are to be administered by the OCD.

(4) Limitation on Application of the Water Quality Act to Oil and Gas Facilities

Section 74-6-12.G of the Water Quality Act severely limits the application of that Act to oil and gas facilities. Any doubt that existed as to the scope of the limitation was removed by a 1993 amendment of that section.

Prior to June 18, 1993, § 74-6-12.G stated as follows:

G. The Water Quality Act does not permit the adoption of regulations or other action by the commission or other constituent agencies which would interfere with the exclusive authority of the oil conservation commission over all persons and things necessary to prevent water pollution as a result of oil or gas operations through the exercise of the power granted to the oil conservation commission under Section 70-2-12 NMSA 1978, and other laws conferring power on the oil conservation commission.

This limitation is a restriction on any action by the WQCC interfering with the exclusive authority of the OCC necessary to prevent water pollution resulting from oil and gas operations.

Any ambiguity as to the meaning of the word "exclusive" in the context of WQCC Regulations that overlap OCD regulations under § 70-2-12 of the Oil and Gas Act was removed by the New Mexico Legislature effective June 18, 1993. That provision now states as follows:

G. The Water Quality Act does not apply to any activity or condition subject to the authority of the oil conservation commission under the Oil and Gas Act [Chapter 70, Article 2 NMSA 1978], Section 70-2-12 NMSA 1978, and other laws conferring power on the oil conservation commission to prevent or abate water pollution.

Now, rather than referring to the "exclusive authority" of the OCC, the limitation addresses "any activity or condition" subject to the authority of the OCC "to prevent or abate water pollution." Thus, the limitation applicable to the Water Quality Act and WQCC Regulations promulgated thereunder applies to any activity or condition subject to the authority of the OCC without the requirement that such authority be "exclusive." Further, § 74-6-12.G of the Water Quality Act clarifies that § 70-2-12 of the Oil and Gas Act confers power on the OCC to abate as well as prevent water pollution.

(5) OCD Jurisdiction Under the Oil and Gas Act

For many years, the primary grant of environmental regulatory jurisdiction to the OCD under the Oil and Gas Act was the following provision of § 70-2-12.B:

(15) to regulate the disposition of water produced or used in connection with the drilling for or producing of oil or gas or both and to direct surface or subsurface disposal of the water in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the state engineer;

Effective June 16, 1989, the New Mexico Legislature expanded OCD's environmental regulatory jurisdiction by adding the following two provisions of § 70-2-12.B:

(21) to regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment; and

(22) to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment, including administering the Water Quality Act [Chapter 74, Article 6 NMSA 1978] as provided in Subsection E of Section 74-6-4 NMSA 1978.

The New Mexico Legislature chose to divide the additional rule making authority given to the OCD under the Oil and Gas Act into two categories. Subsection B.(21) concerns "exploration," "development," "production," and "storage" and does not mention

Memorandum to W. Thomas Kellahin
November 9, 1995
Page 6

any concurrent jurisdiction under the Water Quality Act. Subsection B.(22) concerns the "oil field service industry," "transportation," "treatment of natural gas" and "refinement of crude oil," and makes a reference to the Water Quality Act. This distinction suggests that the Legislature is dividing the grant of rule making authority to OCD between authority that stands alone and authority that may overlap with authority under the Water Quality Act.

Subsections B.(21) and B.(22) must be read in conjunction with § 74-6-12.G of the Water Quality Act. That provision prohibits the Water Quality Act from applying to any activities subject to the authority of the OCC under § 70-20-12 of the Oil and Gas Act. Because subsections B.(21) and B.(22) are clear grants of authority to the OCD under the Oil and Gas Act, it could be argued that the Water Quality Act, and WQCC Regulations promulgated thereunder, cannot apply to activities covered by those sections.

However, an alternative reading of subsection B.(22) would give meaning to the phrase "including administering the Water Quality Act." That phrase could be interpreted as a recognition that spills and releases from the activities described in this subsection could be regulated under the Water Quality Act. Under this analysis, the OCD could exercise its discretion as to which statute, the Oil and Gas Act or the Water Quality Act, it wishes to apply to these activities. In other words, the OCD could regulate spills and leaks associated with these activities under either Rule 116, implementing the Oil and Gas Act, or under the Spill Regulation and the Abatement Regulations, implementing the Water Quality Act. Such an approach would be consistent with language in the Delegation Statement concerning OCD discretion as to which regulations to enforce in any given situation. However, I do not believe that the OCD would have such discretion concerning the enforcement of regulations relating to exploration, development, production or storage of crude oil or natural gas described in subsection B.(21). Spills and leaks related to those activities may only be regulated under OCD Rule 116 and not under the WQCC Spill Regulation or the WQCC Abatement Regulations.

(6) OCD Adoption of Cleanup Standards Under the Oil and Gas Act

As described above, the OCD has authority to adopt regulations for the prevention and abatement of water pollution associated with the oil and gas facilities specified in

Memorandum to W. Thomas Kellahin
November 9, 1995
Page 7

§ 70-2-12.B.(21) and (22) of the Oil and Gas Act. WQCC Regulations do not apply to the facilities specified in § 70-2-12.B.(21), which are mainly "upstream." The OCD, however, may have the option, but would not be required, to apply WQCC Regulations on a case-by-case basis to facilities specified in § 70-2-12.B.(22), which are mainly "downstream."

The Rule 116 Change Committee and ultimately the OCC are free to consider any requirements of the WQCC Abatement Regulations as appropriate for inclusion in OCD Rule 116. Just as the OCD is not required to impose the WQCC Spill Regulation or the WQCC Abatement Regulations in any particular situation, the OCC is not required to adopt any provisions of those WQCC Regulations in revisions to OCD Rule 116.

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