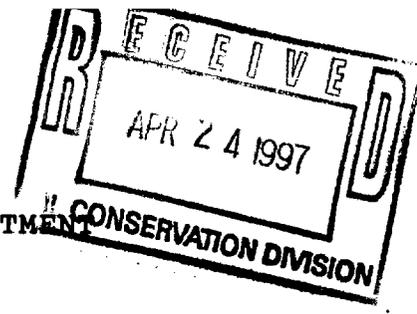


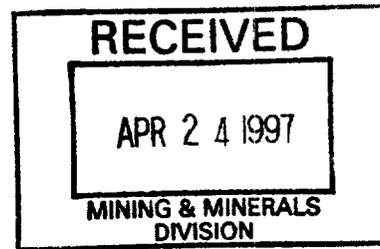
STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION



IN THE MATTER OF THE HEARINGS
CALLED BY THE OIL CONSERVATION
COMMISSION FOR THE PURPOSE
OF CONSIDERING:

CASE NO. 11635
Order No. R-10767

APPLICATION OF THE NEW MEXICO
OIL CONSERVATION DIVISION
TO ENACT A NEW RULE ESTABLISHING
METHODS AND STANDARDS FOR THE
PREVENTION AND ABATEMENT OF
WATER POLLUTION ASSOCIATED
WITH OPERATIONS IN THE OIL AND
GAS INDUSTRY.



APPLICANTS' PROPOSED
CORRECTED AND ADDITIONAL FINDINGS OF FACT

Applicants El Paso Natural Gas Company, Giant Industries
Arizona, Inc., Marathon Oil Company, and PNM Gas Services
(collectively "the Applicants"), pursuant to the Oil Conservation
Commission's request at the April 10, 1997 rehearing, hereby
submit the following proposed corrected and additional findings
of fact in this matter.

1. Corrected Finding No. 8--The Applicants propose that
Finding No. 8 be corrected to read as follows:

(8) The Committee recommends that the
Commission adopt Rule 19 that addresses
methods and standards for the prevention and
abatement of water pollution associated with
operations in the oil and gas industry by
incorporating the same provisions as those in
relevant portions of the WQCC Regulations.
In addition, the Committee recommends that no
distinction be made between oil and gas
industry activities described at Section 70-
2-12.B(21) NMSA, as amended, ("B(21)
activities") and oil and gas activities

described at Section 70-2-12.B(22) NMSA 1978, as amended, ("B(22) activities") and that Rule 19 apply equally to both B(21) and B(22) activities.

Discussion: The Applicants' proposed corrected Finding No. 8 is a combination of the current Finding No. 8 and the Applicants' requested new finding in the Applicants' Motion for Correction of Findings and, in the Alternative, Application for Rehearing (March 5, 1997) at 3. The proposed corrected finding retains most of the introductory language in current Finding No. 8, deletes the discussion in paragraphs a through h of that finding on how the goals identified in the introductory language will be accomplished, and adds language from the Applicants' requested new finding identifying the Committee's recommendation that no distinction be made between activities under NMSA 1978, § 70-2-12.B(21) ("B(21) activities") and § 70-2-12.B(22) ("B(22) activities").¹ The Applicants believe that the corrected finding

¹NMSA 1978, §§ 70-2-12.B(21) & (22) provide:

B. . . . [T]he division is authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated in this subsection:

. . .

(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

more precisely states the Rule 116 Committee's ("Committee") recommendation, as reflected in the October 21, 1996 Committee Report ("Committee Report"), attached to the Report as Committee Exhibit 1, and the Committee Chairman's testimony during the October 29, 1996 hearing, than does current Finding No. 8. See Tr. 13-14 and 38, quoted infra at 4-5.

As discussed in the Motion for Correction of Findings and at the April 10, 1997 rehearing, current Finding No. 8 is taken almost verbatim from a statement of the Committee's objectives recited at pages 9 and 10 of the Committee Report. The recited objectives refer to the January 12, 1996 version of draft corrective action requirements, rather than the Committee's proposed requirements.² The Committee's proposed rule, which was adopted by the Commission, reflects the Committee's recommendation that the proposed rule make no distinction between corrective actions for B(21) and B(22) activities and

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 as provided in Subsection E of Section 74-6-4 NMSA 1978.

²The Committee's proposed version of Rule 116.D provided:

D. CORRECTIVE ACTION: The responsible person must complete Division approved corrective action for unauthorized releases which endanger public health or the environment. Releases will be addressed in accordance with a remediation plan submitted to and approved by the Division or with an Abatement Plan submitted in accordance with Rule 19 (19 NMAC 15.A.19).

specifically provides that such corrective actions would be subject to the Commission's requirements. As the Committee's Chairman testified:

The Committee spent a lot of effort trying to decide if we should recommend to you a different way to handle the upstream [B(21)] versus downstream [B(22)] activities. Ultimately, we decided to have the same system for both, [the] same system of rules and notices and regulations, if you will.

So despite the fact the committee spent an awful lot of time working its way through this maze of jurisdictional and regulatory issues, we have ultimately come to the conclusion that in a comprehensive solution, the best solution we can think of for you is to treat those [B(21) and B(22) activities] as one group. (Tr. at 13-14.)

. . . .

But at this point, we find no useful purpose served by trying to create any kind of differences between B.(21) and B.(22) regulations, if you will, insofar as it deals with water pollution. (Tr. at 38.)

Therefore, current Finding No. 8, which implies that B(22) activities will remain under the WQCC regulations, does not accurately reflect the Committee's recommendation, as represented in the Chairman's testimony. The Applicants' corrected Finding No. 8 more accurately reflects those recommendations and should be adopted by this Commission.

2. Additional Finding No. 8a--The Applicants propose that a new finding, Finding No. 8a, be added as follows:

(8a) The Commission believes that the Committee's draft rule provides an effective mechanism for the abatement of water pollution associated with operations in the

oil and gas industry. Further, the Commission believes that there should be no distinction in abatement requirements between B(21) and B(22) activities. However, the Commission recognizes that until additional regulations are adopted, abatement pursuant to discharge plans approved under the WQCC Regulations must remain under those regulations. Finally, the Commission believes that the Committee's draft rule properly allocates responsibility for abatement for B(22) activities between the Oil and Gas Act (releases reported under Rule 116) and the Water Quality Act (releases subject to abatement under § 3109.E of the WQCC Regulations).

Discussion: The Applicants' proposed new Finding No. 8a describes the Applicants' preferred resolution of the B(22) activities debate. The Applicants have proposed that all abatement³ for B(22) activities be included in Rule 19, except those subject to abatement under § 3109.E of the WQCC Regulations;⁴ the OCD's Environmental Bureau ("Bureau") has

³Currently, the WQCC regulations have a ground water pollution prevention component (the discharge plan program under Subpart III) and a corrective action or abatement component (§§ 1203 and 3109.E of the WQCC regulations). The Applicants' proposal does not affect the prevention program.

⁴20 NMAC 6.2.3109.E provides in pertinent part:

E. If data . . . indicates . . . that the [ground water] standards of [20 NMAC 6.2.3103] are being or will be exceeded, or a toxic pollutant as defined in [20 NMAC 6.2.1101] is present, in ground water at any place of withdrawal for present or reasonably foreseeable future use . . . due to the discharge . . . :

1. the secretary may require a discharger to modify a discharge plan within the shortest reasonable time so as . . . to provide that any exceeding of standards in

proposed that all abatement for B(22) activities remain under the WQCC Regulations.⁵

As discussed at the April 10, 1997 hearing, the Applicants and the Bureau agree that corrective actions for all B(21) activities should be regulated by new Rule 19 and amended Rule

ground water at any place of withdrawal for present or reasonably foreseeable future use . . . due to the discharge . . . will be abated or prevented. If the secretary requires that a discharge plan be modified to abate water pollution:

a. the abatement shall be consistent with the requirements and provisions of [20 NMAC 6.2.4101, 4103, 4106.C, 4106.E, 4107 and 4112]; and

b. the discharger may request of the secretary approval to carry out the abatement under [the WQCC abatement regulations], in lieu of modifying the discharge plan. . . .

4. If a discharge plan expires or is terminated for any reason, the secretary may require the discharger to submit an abatement plan pursuant to Sections 4104 and 4106.A of this Part.

⁵In addition to § 3109.E, abatement actions are triggered by 20 NMAC 6.2.1203, the WQCC's spill reporting and corrective action regulation. Section 1203.A requires that unauthorized discharges "of oil or other water contaminant" from any facility be reported to NMED (or other constituent agency, including OCD) and that "[a]s soon as possible after learning of such a discharge, the owner/operator of the facility shall take such corrective actions as are necessary or appropriate to contain and remove or mitigate the damage caused by the discharge." By its express terms, the reporting and corrective action requirements of § 1203 do not apply to discharges reported under Rule 116. 20 NMAC 6.2.1203.A.4 ("any facility which is subject to OCC or OCD discharge notification and reporting requirements need not additionally comply with the notification and reporting requirements [of § 1203].")

116.⁶ Further, the Applicants and the Bureau agree that corrective actions for B(22) activities conducted pursuant to a discharge plan modified under § 3109.E of the WQCC regulations should remain under those regulations until this Commission adopts regulations for discharges from those activities. Therefore, the only dispute between the Applicants and the Bureau is coverage for corrective actions at B(22) facilities that are not conducted pursuant to a discharge plan under § 3109.E.

The Applicants recommend that such corrective actions be subject to amended Rule 116 and new Rule 19; the Bureau recommends that these actions remain under the WQCC regulations. The Applicants' recommendation is consistent with the Committee's recommendation, amended Rule 116 as adopted by the Commission,⁷

⁶In fact, there is some question whether abatement for B(21) activities was subject to the WQCC regulations prior to this Commission's adoption of amended Rule 116 and new Rule 19. NMSA 1978, § 74-6-12.G ("[t]he Water Quality Act does not apply to any activity or condition subject to the authority of the [OCC] under the Oil and Gas Act, Section 70-2-12 NMSA 1978, and other laws conferring power on the [OCC] to prevent or abate water pollution"); compare NMSA 1978, § 70-2-12.B(21) (no reference to Water Quality Act authority) with § 70-2-12.B(22) (reference to Water Quality Act authority).

⁷Amended Rule 116.A (1) provides:

(1) The Division shall be notified of any unauthorized release occurring during the drilling, producing, storing, disposing, injecting, transporting, servicing or processing of crude oil, natural gases, produced water, condensate or oil field waste including Regulated NORM, or other oil field related chemicals, contaminants or mixture thereof, in the State of New Mexico in accordance with the requirements of this Rule.

and § 1203.A.4 of the WQCC regulations; the Bureau's recommendation is not. Therefore, the Applicants' recommendation should be adopted by this Commission and the Bureau's recommendation rejected.

As discussed above, the Committee recommended that the Commission's water pollution abatement requirements apply to both B(21) and B(22) activities. While that recommendation did not differentiate between actions being conducted pursuant to a discharge plan and other such actions, the Applicants understand that the Committee's recommendation did not contemplate moving the discharge plan program for oil and gas facilities from Water Quality Act jurisdiction to Oil and Gas Act jurisdiction. Since adoption of the Applicants' recommendation would require that unauthorized releases from B(22) activities be abated under the Commission's regulations, except those subject to abatement under § 3109.E of the WQCC regulations, the Applicants' recommendation is consistent with the Committee's recommendation; the Bureau's recommendation is not consistent with that recommendation.

Finally, adoption of the Bureau's recommendation would require this Commission to amend either Rule 116.A or 116.D, or both. As adopted, Rule 116 requires that all unauthorized releases at B(22) facilities be reported to OCD, Rule 116.A, and that corrective action for such releases be conducted under a remediation plan approved by OCD under Rule 116 or an abatement

(Emphasis added.)

plan under Rule 19, Rule 116.D. The rule does not provide an exception for corrective action conducted under the WQCC regulations. Thus, in order to effectuate the Bureau's recommendation, Rule 116.A must be amended to delete the reporting requirements for B(22) activities (making such reporting and corrective action subject to § 1203 of the WQCC regulations) or Rule 116.D must be amended to allow corrective actions for B(22) activities to be subject to WQCC abatement regulations, or both. Therefore, adoption of the Bureau's recommendation will require this Commission to undertake a new rulemaking to amend Rule 116.

On the other hand, adoption of the Applicants' recommendation does not require any amendments to Commission rules. As explained above, Rule 116 requires unauthorized releases from B(22) activities to be reported to OCD and abated in accordance with an OCD-approved remediation plan under Rule 116 or abatement plan under Rule 19. The Applicants' recommendation makes such releases and corrective actions for B(22) activities subject to the Commission's regulations, i.e., Rules 19 and 116.

Therefore, the Applicants' recommendation is consistent with Rule 116.A & D, as adopted by the Commission and will not require additional rulemaking to implement. The Bureau's recommendation is not consistent with Rule 116, as adopted by the Commission, and will require additional rulemaking to implement. Thus, this

Commission should adopt the Applicants' recommendation and reject the Bureau's recommendation.

3. **New Finding No. 15**--The Applicants propose that a new finding, Finding No. 15, be added as follows:

15. El Paso Natural Gas Company, Giant Industries Arizona, Inc, Marathon, and PNM (Applicants) requested, and were granted, reconsideration concerning whether the termination of an exemption under Rule 19.D(2) is reviewable by an OCD Examiner and ultimately by the Commission. The Applicants and OCD agreed that such actions were impliedly reviewable and that Rule 19.M(1) should be revised to specifically list decisions under Rule 19.D(2) as reviewable.

The Commission agrees that such a revision is appropriate and consistent with Rule 19 and that a reference to Rule 19.D(2) should be added Rule 19.M(1).

Discussion: The Applicants' proposed that a reference to Rule 19.D(2) be added to the list of OCD decisions in Rule 19.M(1) that are reviewable by an OCD examiner and, ultimately, by the Commission. Rule 19.D(2) provides the procedure for the OCD's termination of exemptions from the abatement plan requirements. The rule states:

(2) If the Director determines that abatement of water pollution subject to Paragraph D(1) will not meet the standards of [Rule 19.B(2) and B(3)], or that additional action is necessary to protect health, welfare, environment or property, the Director may notify a responsible person, by certified mail, to submit an abatement plan pursuant to [Rule 19.C and E(1)]. . . . In any appeal of the Director's determination under this Paragraph, the Director shall have the burden of proof.

(Emphasis added.) Thus, Rule 19.D(2) clearly contemplates that the OCD Director's decision under that paragraph would be reviewable.

However, Rules 19.M(1) & (2), which identify the Director's decisions under Rule 19 that may be reviewed by an OCD examiner and, ultimately, by the Commission, does not list a determination under Rule 19.D(2). Rules 19.M(1) & (2) provide:

(1) If the Director determines that (i) an abatement plan is required pursuant to [Rule 116.D], (ii) approves or provides notice of deficiency of a proposed abatement plan, technical infeasibility demonstration or abatement completion report, or (iii) modifies or terminates an approved abatement plan, he shall provide written notice of such action

(2) Any person who participated in the action before the Director and who is adversely affected by the action listed in Subparagraph (1) above may file a petition requesting a hearing before a Division Examiner.

(Emphasis added.)

At the April 10, 1997 hearing, the OCD staff agreed that decisions under Rule 19.D(2) were intended to be reviewable by an OCD examiner, and ultimately, by the Commission and that Rule 19.M(1) should be amended to list Rule 19.D(2). There was no opposition to the amendment. Therefore, this Commission should

incorporate Rule 19.D(2) in the list of reviewable decisions in Rule 19.M(1) and adopt the Applicants' proposed new Finding No. 15 to reflect that decision.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Applicants' Proposed Corrected and Additional Findings of Fact was hand-delivered or sent by first class mail on this 24th day of April, 1997 to the following persons:

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