

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

2017 NOV -8 P 3:47

**APPLICATION OF MESQUITE SWD, INC.  
TO AMEND APPROVALS FOR  
SALT WATER DISPOSAL WELLS IN  
LEA AND EDDY COUNTIES.**

**CASE NO. 15654  
ORDER NO. R-14392**

**LEGAL BRIEF ADDRESSING DIVISION'S RELIANCE ON BLM EMAIL**

Applicant Mesquite SWD, Inc. ("Mesquite") provides the Oil Conservation Commission with this legal brief addressing the impropriety of the Oil Conservation Division's ("OCD") reliance on an email received from the United States Department of the Interior Bureau of Land Management ("BLM") in reaching its decision in the above-referenced matter, where no witness from the BLM provided testimony at the hearing held on March 30, 2017.

**A. The BLM Email**

Paragraph 6 of the OCD's Order of the Division, dated July 21, 2017 ("Order"), states,

The Division requested the Bureau of Land Management (BLM) to either appear at the hearing or to provide a written response to this application that would be incorporated in the case file. The BLM provided the following written comments: (a) the larger diameter tubing would increase the probability of improper installation and the loss of beneficial use of the well; and (b) the enlarged capacity of disposal with larger tubing will increase formation pressures with concern for formation fracture pressures to be exceeded.

The record available indicates that on March 9, 2017, Phillip Goetz, EMNRD, sent an email to Paul Swartz and James Glover of BLM,

requesting the BLM consider this tubing configuration and provide comment on such well construction for disposal permits. Any comments should be sent in correspondence addressed to the Director and should be submitted no later than the 23rd. Please forward me a PDF copy of any document that the BLM wishes to be made part of the case record.

Swartz appears to have forwarded Goetz's email on the same day to others within the BLM, stating "Would you BLM engineers have thoughts on this? Seems to me the weight due to depth and inability of fishing parted tubing with an overshot (much stronger than an internal catch) would scare operators off."

On March 24, 2017, Swartz responded to Goetz ("BLM email"), stating,

While BLM regulations do not address tubing size, 4 ½" tubing ran in 7 5/8" casing is a prudent condition. The closest BLM guidance is for a minimum of 0.42" centered clearance of casing in open hole. The 5 ½" casing inside 7 5/8" casing is rather tight 0.41" using flush joint 5 ½". Moving tubing (at Devonian depths) inside casing that can be expected to be corkscrewed (no drilled hole is vertical) with little centered clearance may encounter substantial difficulty with the loss of beneficial use of the wellbore.

The loss of resistance to flow through increasing tubing I.D. delivers increased wellhead pressure to the formation. There is a concern that for some combinations fracture pressure of a formation will be exceeded. Continual pressure monitoring at the formation is being accomplished for some gas plan residual disposal wells.

The BLM email was not shared with Mesquite prior to being cited in the OCD's Order.

The BLM email was not discussed on the record at the OCD hearing, nor was it offered or admitted as an exhibit.

#### B. OCD Regulations

The OCD regulations provide that evidence may be excluded if it is not identified in a pre-hearing statement. *See* 19.15.4.13.B(2) NMAC ("The commission may exclude . . . exhibits the party did not file and serve with the pre-hearing statement, unless the party offers such evidence solely for rebuttal or makes a satisfactory showing of good cause for failure to disclose

the . . . exhibit.”). It is undisputable that the BLM email was not identified as an exhibit by a party.

The OCD’s regulations do allow for judicial notice of certain materials, but the judicial notice provisions do not apply here. “The commission or division examiner may take administrative notice of the authenticity of documents copied from the division’s files.” 19.15.4.17.A NMAC. The OCD may take judicial notice *only* of the authenticity of documents from its files. The regulations do not permit the OCD to take judicial notice of the content or veracity of the documents from its files. The OCD did more than take judicial notice of the BLM Email’s authenticity by citing and summarizing the email in the Order. Doing so is a violation of the OCD’s own regulations.

The OCD’s regulations prohibit ex parte communications about issues pending before the OCD. 19.15.4.26.A NMAC provides:

In an adjudicatory proceeding, except for filed pleadings, at no time after a party files an application for hearing shall a party, interested participant or participant’s representative advocate a position with respect to the issues the application involves to a commissioner or the division examiner appointed to hear the case unless the other parties of record to the proceedings have an opportunity to be present.

While it is not clear whether the BLM would be defined as an “interested participant” as the term is not defined in the OCD’s regulations, this provision demonstrates that the OCD prohibits ex parte communications and is required to ensure all parties of record are informed of all information the OCD is considering in making a ruling on an application.

By considering and relying on the BLM Email in the Order, the OCD violated its regulations. The BLM Email should be excluded from the record the Commission considers in this matter.

### C. Evidentiary Rules

The rules of evidence are not controlling but may be used as guides in this proceeding. *See* 19.15.4.17.A NMAC. Rule 11-614(A) provides the court may call a witness, and “[e]ach party is entitled to cross-examine the witness.” *See Sanchez v. Sanchez*, 1973-NMSC-068, ¶ 6, 84 N.M. 498, 50 P.2d 443 (“It was error to deny plaintiff the right to cross-examine the witness, since the trial court obviously did receive and consider a written report from this . . . , and this report may possibly have had an effect upon the court’s decision on the other principal issues litigated.”).

The BLM Email is hearsay. *See* Rule 11-801(C) NMRA (Hearsay “means a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”). Hearsay is not admissible unless an exception applies, and no such exception is applicable here. *See* Rule 11-802, 11-803, 11-804 NMRA. The Order incorrectly relied on inadmissible hearsay.

An administrative decision may not rely solely on inadmissible hearsay. *See Tallman v. ABF*, 1988-NMCA-091, ¶ 9, 108 N.M. 124, 767 P.2d 363 (“If the only support found is inadmissible hearsay, then we may set aside the agency's finding or decision.”). This is known as the legal residuum rule, which “requires that an administrative action be supported by some evidence that would be admissible in a trial.” *Bransford v. N.M. Tax. & Rev. Dep’t, Motor Vehicle Div.*, 1998-NMCA-077, ¶ 18, 125 N.M. 285, 960 P.2d 827. In the OCD’s decision, the only evidence supporting the decision not to amend the applications was the BLM’s email, which is inadmissible hearsay.

D. OCD Practice & Procedure

The OCD's initial email to the BLM states, "Any comments should be sent in correspondence addressed to the Director and should be submitted no later than the 23rd. Please forward me a PDF copy of any document that the BLM wishes to be made part of the case record." The BLM email fails to comply with this request on two grounds: (1) The BLM's email was not addressed to the OCD Director, David Catanach, and was submitted on March 24, the day after the deadline provided in the email. The failure of the BLM to comply with the direction that comments be addressed to the OCD Director is persuasive that the comments did not comply with the OCD's procedure.

In Case No. 15720, Application of Black River Water Management Company, LLC to Amend Administrative Order SWD-1627 for a Salt Water Disposal Well, Eddy County, New Mexico, Order No. R-14427, correspondence within the EMNRD requests comments on Matador's application regarding 5" tubing for the case file, and states, "The hearing examiner needs to rely on what was presented at hearing as evidence, so the letter without an appearance would not be evidence, but we could use it to ask questions of the witnesses[.]" An attachment of this email, retrieved from OCD Image, Case No. 15720, is attached as Exhibit A. This email supports the argument that OCD's practice and procedure is not to rely on *ex parte* communications but only to rely on evidence or testimony presented at a hearing.

E. Conclusion

The BLM Email was improperly considered by the OCD in the Order, and should be stricken from the record.

Respectfully submitted,

**MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.**

By:

A handwritten signature in black ink, appearing to read "Earl E. DeBrine, Jr.", followed by the word "for" in a cursive script.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on counsel of record by e-mail on November 8, 2017.

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**Jones, William V, EMNRD**

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**From:** Jones, William V, EMNRD  
**Sent:** Thursday, June 1, 2017 1:50 PM  
**To:** Byrd, Robert, EMNRD; Brown, Maxey G, EMNRD  
**Cc:** Podany, Raymond, EMNRD; Whitaker, Mark A, EMNRD  
**Subject:** Proposed 5" tubing in 7" casing

Proposed SWD:

[http://ocdimage.emnrd.state.nm.us/Imaging/FileStore/artesia/wf/303437/30015438070000\\_1\\_wf.pdf](http://ocdimage.emnrd.state.nm.us/Imaging/FileStore/artesia/wf/303437/30015438070000_1_wf.pdf)

Case 15720:

[http://ocdimage.emnrd.state.nm.us/Imaging/FileStore/santafeadmin/cf/308363/15720\\_1\\_cf.pdf](http://ocdimage.emnrd.state.nm.us/Imaging/FileStore/santafeadmin/cf/308363/15720_1_cf.pdf)

Hello Bob and Maxey and Ray and Mark,

Would you please look at this proposal in Eddy County which is on the docket for next Thursday and let me know what your thoughts are on installing 5" tubing (no details on what type) into 7" 32# casing to 13700 feet?

If you strongly oppose this, would be good to call me before 5pm today and we could get you setup to make an appearance in this case.  
I would like your thoughts on it anyway.

If you don't want to make a formal appearance, then I suggest, you please write a small one page letter to the Case file (send to Florene Davidson of Santa Fe) stating your thoughts on this.

The hearing examiner needs to rely on what was presented at hearing as evidence, so the letter without an appearance would not be evidence, but we could use it to ask questions of the witnesses –

..... so if anyone strongly opposes this, please speak up.

Thank You,  
Will

William V. Jones, P.E.  
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Engineering and District IV – Santa Fe  
505-419-1995 work cell  
<http://www.emnrd.state.nm.us/OCD/about.html>