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

APPLICATION OF OVERFLOW ENERGY, LLC FOR APPROVAL OF A SALT WATER DISPOSAL WELL, EDDY COUNTY, NEW MEXICO

CASE NO. 20964

MARATHON OIL PERMIAN LLC'S RESPONSE TO APPLICANT'S MOTION TO STRIKE SUPPLEMENTAL INFORMATION FOR THE RECORD

Marathon Oil Permian LLC ("Marathon") hereby responds to Applicant, Overflow Energy LLC's ("Overflow"), motion to strike supplemental information for the record as follows:

INTRODUCTION

The above-captioned matter was heard by the Division or December 12, 2019. Prior to the hearing, on December 5, 2019, the Overflow filed its prehearing statement in this matter. Overflow's prehearing statement did not mention that it would be presenting testimony from a seismologist or otherwise indicate that it would present a fault slip analysis at hearing. In fact, the expert who initially prepared Overflow's fault slip probability analysis did not appear at the hearing and was not made available for questions. Case No. 20964, Transcript, p. 20:1-12.

Marathon Oil Permian LLC ("Marathon") appeared at the hearing through counsel and raised several questions related to Overflow's fault slip analysis. Following the hearing, Marathon's geologist reviewed Overflow's fault slip analysis and found significant questions and errors, which felt compelled to raise with the Division by filing a Supplemental Information for the Record. On March 19, 2020, Overflow filed a Motion to Strike Marathon's Supplemental Information for the Record. As discussed below, Overflow's arguments are unavailing and fail to establish that the Division should turn a blind eye to the induced seismicity concerns uncovered by Marathon.

RESPONSE TO OVERFLOW'S ARGUMENTS

Applications for Salt Water Disposal Wells ("SWD" or "SWDs") substantively differ from other types of applications filed before the Division. *See* Oil Conservation Division, Underground Injection Control Program Manual (Fed. 2004). The SWD permitting program is subject to certain public health and safety considerations mandated by the New Mexico Oil and Gas Act (NMSA 1978, Sections 70-2-1 *et seq*.), the New Mexico Water Quality Act (NMSA 1978, Sections 74-6-1 *et seq.*), the Safe Water Drinking Act ("SDWA") of 1974, and the U.S. Environmental Protection Agency ("EPA"). Together, these authorities have caused the Division to liberally consider public health and safety concerns associated with SWD applications – including, but not limited to, the concern of induced seismicity. *See, e.g.*, Division Order R-14392 (July 21, 2017) (considering an e-mail provided by the Bureau of Land Management that was not presented on the record during the Division hearing in that matter).

In this matter, Marathon submitted an affidavit in its Supplemental Information for the Record which concerns an SWD Application filed by Overflow in Case No. 20964. This affidavit points out that Overflow's application presents induces seismicity concerns. Such information, should (and historically has been) liberally be considered by the agency. Indeed, Marathon's affidavit highlights that Overflow failed to use ***recognized industry standards*** when it completed its fault slip potential analysis. Mr. Jon Buening, a geologist at Marathon, ran the fault slip analysis using the current maximum horizontal stress direction applied from the Lund Snee and Zoback (2018) publication – the leading publication on this matter. When these standard in-puts are incorporated in the fault slip analysis, there is a fault slip potential for a fault of concern that equals 0.69 by the year 2045. This result is concerning and should be reported to the Division. Moreover,

this same analysis could and should be run independently by Division staff members, and additional information may be requested (as needed).

Indeed, separate and apart from the agency's rulemaking authorities, the Oil and Gas Act states that:

> The oil conservation division of the energy, minerals and natural resources department may:
>
> (1) collect data;
> (2) make investigations and inspections;
> (3) examine properties, leases, papers, books and records;
> (4) examine, check, test and gauge oil and gas wells, tanks, plants, refineries and all means and modes of transportation and equipment;
> (5) hold hearings;
> (6) provide for the keeping of records and the making of reports and for the checking of the accuracy of the records and reports;

NMSA 1978, § 70-2-12.A. Thus, the Division is not without authority to examine papers, make investigation or request additional information, as necessary.

In the context of induced seismicity concerns, the Division has liberally employed informal requirements which are not promulgated within the agency's rues. As pointed out in a January 8, 2020 report issued by the Groundwater Protection Council, entitled State of New Mexico Class II UIC Program Peer Review Report ("Groundwater Protection Council Report"), the Division:

- "typically uses a 0.5-mile radius AOR but has instituted a one-mile AOR for large- capacity wells injecting in the Silurian-Devonian sequence as a result of the potential for induced seismicity. The OCD has established 1.5-mile minimum spacing requirements for wells injecting more than 20,000 barrels of water per day." Groundwater Protection Council Report, p. 12.
- Prohibits "injection into zones below the Silurian sequence (hence, eliminating injection into or at the contact of the Pre-Cambrian basement)". *Id.*
- "Requir[es] additional reservoir information as part of applications for permit including static bottom-hole pressure data, injection surveys and step-rate tests". *Id*. at p. 13.
- And, engages in "[c]oordination with the NMBGMR that maps faults and monitors seismic activity, although there is no formal Memorandum of Agreement (MOA) or similar arrangement with them". *Id.*

- The Division also indicates that it liberally considers and responds to citizen complaints regarding UIC wells and applications. *Id*. at p. 15.[1]

As a result, it is clear that the Division does not typically take a legalistic position when analyzing induced seismicity concerns. Here too, the Division should not take a legalistic stance when considering the content of Marathon's affidavit.

In lieu of addressing Marathon's induced seismicity concerns, Overflow seeks to exclude this Marathon's filing and demands that this information not be considered by the agency. Overflow's request fails to comport with the spirt of the law and the Division's responsibilities under the UIC program. In fact, it cannot be disputed that the Division has engaged in a long-history of accepting supplemental filings after a matter is taken under advisement.

Under Rule 19.15.4.19 NMAC, Hearing Examiners are given broad authority to conduct hearings. This authority is limited only when the Director specifically orders certain limitations. *Id*. Rule 19.15.4.14 NMAC further explains that hearings before a division examiner are to be conducted without rigid formality and that the examiner may designated when an "interested party's un-sworn comments and observations are relevant and, if relevant, include the comments and observations in the record." Likewise, Rule 19.15.4.17 NMAC mandates that the rules of evidence are not strictly applied. Pursuant to these provisions, the Division has engaged in a repetitive practice of accepting supplemental filings after cases are taken under advisement.

Here, Marathon filed a supplemental filing to address the above-noted induced seismicity concerns. Marathon asks that the Division consider its filing and conduct its own analysis. Doing so is allowed under the Division's rules and comports with rights specifically authorized under

[1] In the event the Division determines that it lacks authority to consider the content of Marathon's application, such information clearly could and should be considered in the context of a citizen complaint.

Section 70-2-12.A of the Oil and Gas Act to engage in investigations, collect data and examine papers.

Finally, the acceptance of Marathon's affidavit does not cause due process concerns because Overflow is afforded with the opportunity to seek *de novo* review. In Case No. 15654, a very similar situation occurred. In that case, Division Order R-14392 considered information provided in an email from the Bureau of Land Management, which was not presented on the record. The applicant filed a motion with the Commission asking that this information not be considered due to due process concerns and the inability to cross-examine the witness. The Commission, upon the advice of Commission counsel, ruled on that motion and found that no due process concerns existed because the matter could be heard *de novo* (Case No. 15656, Nov. 9, 2017 Hearing, Transcript pp. 6:16 – 7:23) – meaning essentially that the applicant had "an opportunity to be heard in a meaningful time and in a meaningful manner" by the Commission. *See State, ex rel. CYFD v. Maria C.*, 2004-NMCA-083, ¶ 26. This same *de novo* process is obviously available to Overflow. Likewise, Marathon has the right and ability to request a *de novo* hearing in the event its affidavit is not considered.

BASED ON THE ABOVE, Marathon respectfully asks that the Division consider the contents of it Supplemental Information for the Record, filed February 27, 2020, or engage in its own investigation in these matters.

Respectfully submitted,

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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 electronic mail on March 27, 2020:

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Respectfully submitted,

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