

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

2007 APR 10 PM 3 45

**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

REPLY IN SUPPORT OF MOTION TO DISMISS

The Oil Conservation Division (OCD) files this reply in support of its motion to dismiss the application of Harvey E. Yates Company (HEYCO) for an exemption to the pit permitting requirements of 19.15.2.50.A NMAC. Now that the motion has been briefed, it is clear what HEYCO is requesting. It is also clear that the Oil Conservation Commission (Commission) cannot give HEYCO what it requests. HEYCO's application must be dismissed.

HEYCO is faced with a quandary. It wants to have a pit at the site of its proposed BRU #6 well. Rule 50 [19.15.2.50 NMAC] sets up a statewide permitting process for pits. Rule 21.B [19.15.1.21.B NMAC] prohibits the OCD from issuing permits under Rule 50 for pits to be located in selected areas of Sierra and Otero Counties. And the BRU #6 is located in an area of Otero County subject to Rule 21.B..

HEYCO could have addressed the issue head-on, and asked the Commission for an exception to Rule 21.B's prohibition. It would have been a difficult argument to make. HEYCO would first need to persuade the Commission that it had the authority to grant an exception to Rule 21.B, which does not expressly provide for an exception. HEYCO would then need to persuade the Commission that its proposed pit would address the concerns that led to Rule 21.B. If the Commission agreed that it could grant an exception to Rule 21.B's prohibition, and that an exception was warranted, it could then tailor a permit to address the various concerns that led to Rule 21.B.

Those concerns are serious. Rule 21.B was adopted in response to Executive Order 2004-005, which recognized the significance of the Chihuahuan Desert eco-region, particularly the remnant desert grasslands of the Otero Mesa and Nutt areas of Otero and Sierra Counties, and instructed the OCD to propose a rule "to prohibit pits associated with any oil and gas drilling at Otero Mesa." OCD Ex. 3 in Case 13269. The OCD proposed Rule 21, which it characterized at the rulemaking hearing as prohibiting pits in the area covered by the rule (Case 13269, Tr. p. 40). The Commission heard two days of testimony, including why the fragile eco-system in the defined area required special protections, why the protections provided by Rule 50 were not sufficient to protect this area (Case 13269, Tr. pp. 47-62), and the danger posed by the cumulative effect of oil and gas development in the area (Case 13269, Tr. pp. 223 and 312). The majority of the Commission concluded that there was a special need for the protection of wildlife in the selected areas, that pits present particular dangers to wildlife and those dangers were not adequately addressed in Rule 50, that excavations to create pits disturb the soil in ways that will render restoration of the pre-existing grassland habitat impracticable, that closed-loop systems provide a practical alternative and have numerous environmental advantages over pits, including

a lesser propensity to leak, greater ease of removal for off-site disposition of wastes, and less danger to wildlife. Order R-12172, p. 12.

Perhaps because it would be too difficult to show that its pit would address the concerns that gave rise to Rule 21.B, HEYCO took a different approach. Instead of addressing Rule 21.B and its concerns directly, HEYCO chose to make an end-run around Rule 21.B, and ask that its pit be exempt from permit requirements entirely. After all, HEYCO reasoned, if its pit does not require a permit, then Rule 21.B's statement that "the division shall not issue permits under [Rule 50] for pits located in the selected areas" will not apply. HEYCO cites Rule 50.A, which states that discharge into or construction of any pit is prohibited absent possession of a permit or "unless the division grants an exemption pursuant to Subsection G of 19.15.2.50 NMAC." Rule 50.G provides, in relevant part, that the "division may grant 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."

As the OCD argued in its motion to dismiss, Rule 21 is a specific rule prohibiting pits in a specially defined area, and that specific rule controls over the more general provisions of Rule 50. Moreover, Rule 50.G was not intended to allow pits to be exempt from permitting, but to allow exceptions to specific requirements of the rule, such as the liner requirements and the fencing and netting requirements. The OCD will not repeat its arguments here. But it will pose a third issue for the Commission to decide: if the Commission determines that an operator may use Rule 50.G to seek an exemption from the requirement that a pit be permitted, what showing must the operator make?

The showing that HEYCO is offering is insufficient. HEYCO describes the location of its pit and the geologic and hydrologic conditions at the site, describes how it intends to construct and use the pit, and how it intends to close the pit. The information HEYCO provides would be useful if HEYCO were seeking an exemption from a specific requirement of Rule 50, such as the liner requirement. But none of the information HEYCO provides goes to show why the well should be taken out of the state permitting system altogether. As the Commission stated in the order adopting Rule 50, "Basically the Division's proposals would subject all pits to permitting and closure requirements, and expand to statewide applicability most of the restrictive provisions applicable in the major producing areas under existing orders." Order R-11847, p. 3. The Commission concluded that "a general permitting requirement applicable all pits is necessary to enable the Division to manage the hazards associated with pits and to conform New Mexico to national standards." Order R-11847. In addition, "specific permitting of pits, including drilling and workover pits, will enable the Division to have reliable information regarding the nature and location of pits, and to consider site-specific factors in applying its guidelines." Order R-11847, p. 7. It makes no sense to establish a statewide permitting requirement applicable to all pits to enable the OCD to have reliable information about the nature and location of each pit in the state, and then "exempt" individual pits from that requirement. It would be particularly ironic to exempt a well from the permitting requirements when the well is located in an area that the Commission has determined deserves special protections. And HEYCO has given the Commission no reason to exempt its pit from the permitting system.

In its promises to construct, use and close the pit in certain ways, HEYCO is missing the point. If it gets what it is asking for – an exemption from the pit permit requirements – it is questionable whether the construction, use and closure requirements of Rule 50 will apply to the pit at all. And the Commission will certainly have no power to hold HEYCO to the specific description of the pit in its application (a 17,000 acre footprint; containing only local ground water, produced water, wellbore cuttings, and drilling mud additives lined with 12.mil. plastic; in

use for a maximum of 180 days; site to be re-claimed and re-vegetated, etc.). There will be no permit to contain any of those specifications. And the Commission will have no power to impose additional restrictions, such as fencing and netting to prevent access by wildlife – an issue of significant concern in the adoption of Rule 21.B.

CONCLUSION

Rule 50 created a statewide system to put all pits under standard permitting requirements, so that the OCD could track and manage pits and the hazards associated with pits. HEYCO is asking to take the pit for the BRU #6 well out of that statewide system, so that the pit will not be subject to permit requirements. HEYCO has offered no justification for taking this well out of the system. The Commission should dismiss HEYCO's application.

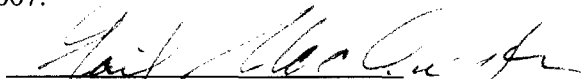
RESPECTFULLY SUBMITTED, this
10th day of April 2007 by



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CERTIFICATE OF SERVICE

I certify that I faxed and e-mailed a copy of this reply to Modrall, Sperling, Roehl, Harris & Sisk, P.A, attorneys for HEYCO, at 505 848-9701 and eed@modrall.com this 10th day of April 2007.


Gail MacQuesten