

**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**

**APPLICATION OF NEW MEXICO OIL CONSERVATION
DIVISION TO ADOPT 19.15.27 NMAC AND 19.15.28 NMAC,
AND TO AMEND 19.15.7 NMAC, 19.15.18 NMAC, AND
19.15.19 NMAC; STATEWIDE**

CASE No. 21528

**NEW MEXICO OIL CONSERVATION DIVISION'S
CLOSING ARGUMENT**

The New Mexico Oil Conservation Division (“OCD”) strongly supports the final proposed rules filed on January 20, 2021 (“Proposed Rules”). *See* OCD Exhibits 2C and 3C. The Proposed Rules fulfill Governor Michelle Lujan Grisham’s commitment to reducing methane emissions and the Oil Conservation Commission’s (“Commission”) longstanding effort to prevent the waste of natural gas during the exploration, production, and processing of the state’s liquid mineral resources. The Proposed Rules properly reflect the Commission’s duties to conserve oil and gas through judicious supervision, prevent waste, and protect correlative rights. 1978 NMSA, §§ 70-2-6 and 70-2-22(A).

I. THE PROPOSED RULES SATISFY THE GOVERNOR’S EXECUTIVE ORDER AND FULFILL THE COMMISSION’S LONGSTANDING OBJECTIVE TO PREVENT THE VENTING AND FLARING OF NATURAL GAS.

Governor Lujan Grisham’s executive order directed the Energy, Minerals and Natural Resources Department, acting through the Commission and OCD, to enact enforceable rules “to prevent waste from new and existing sources” in the oil and gas sector. In developing the rules, the Governor called for the Department to engage state and federal agencies, stakeholders, and communities, and use sound science, creative engineering, and innovative technological solutions.

The Proposed Rules satisfy the Governor’s mandate. Witnesses for the New Mexico Oil and Gas Association (“NMOGA”), Climate Advocates, Environmental Defense Fund (“EDF”), and State

Land Office (“SLO”) testified that OCD’s rulemaking process was among the most collaborative that they had experienced. The Proposed Rules establish performance standards that allow operators to engage their creative and innovative technical experts to solve the complex problems involved in reducing the waste of natural gas. The Proposed Rules also contain strong compliance provisions that allow OCD to use its discretion and judgment to fairly and efficiently achieve the Commission’s objectives.

The Proposed Rules also fulfill the Commission’s clear and longstanding desire to reduce the incidence and intensity of venting and flaring. In 1969, and again in 1972, the Commission adopted orders and rules to prohibit venting and flaring. Unfortunately, these orders and rules were not tight enough. Some operators obtained permission to vent and flare for years, candidly acknowledging that they lacked takeaway capacity. Other operators simply did not report their venting or flaring, acquired wells and then stopped reporting on them, or year after year, filed reports with inaccurate data. The Proposed Rules address these problems and achieve the Commission’s original intent by tightening the requirements and imposing meaningful penalties for noncompliance.

II. THE PROPOSED RULES ARE RULES OF GENERAL APPLICABILITY THAT APPROPRIATELY BALANCE THE RELEVANT INTERESTS.

The Proposed Rules are rules of general applicability that reflect the state’s interest in the conservation of oil and gas. NMOGA’s witnesses explained their commitment to the prudent operation of oil and gas facilities, but the Proposed Rules must be written for all operators, and as NMOGA’s witnesses acknowledged, some operators do not act prudently. For this reason, the Proposed Rules are carefully constructed to accommodate the reasonable needs of prudent operators while avoiding the creation of loopholes and exceptions that allow imprudent operators to subvert the Commission’s objectives. The Proposed Rules also must be detailed enough for operators to understand their obligations and the consequences of non-compliance, but sufficiently flexible for

OCD to accommodate unusual or exceptional circumstances. As the state agency charged with supervising the conservation of oil and gas, OCD must be able to implement and enforce the rules in a manner that respects the Commission's intent to prevent waste and protect correlative rights without raising unreasonable obstacles to development and technical innovation.

III. THE COMMISSION HAS THE STATUTORY DUTY AND AUTHORITY TO REGULATE THE PRODUCTION AND DISPOSITION OF NATURAL GAS.

The Oil and Gas Act expressly charges the Commission with the duty to prevent surface waste, which is defined as “the unnecessary or excessive surface loss or destruction without beneficial use, however caused, of natural gas of any type or in any form....” 1978 NMSA, §§ 70-2-3(B). To fulfill this duty, the Act authorizes the Commission to “make and enforce rules, regulations and orders, and *to do whatever may be reasonably necessary to carry out the purposes of this act, whether or not indicated or specified in any section hereof.*” 1978 NMSA, §§ 70-2-11 (italics added).

The loss or destruction of natural gas is unnecessary, excessive or not beneficial use if technology exists to capture it. For example, for low pressure equipment and practices such as uncontrolled storage tanks, manual liquids unloading, downhole maintenance, thief hatches, and pneumatic controllers, the Commission heard testimony from several witnesses that technologies are available and currently in use to capture and route the natural gas to a sales pipeline.

OCD's witnesses acknowledged that some loss or destruction of natural gas may be necessary, not excessive, or beneficial use, and OCD accordingly proposed to exempt certain equipment and practices from the prohibition on venting and flaring. Nonetheless, the Commission still may require operators to report and account for this natural gas because it is “reasonably necessary” to carry out the Commission's duty to prevent waste. The Commission needs this information to understand the volumes of natural gas being vented and flared from these equipment and practices and, as new technologies are developed, to determine whether such volumes should be considered to be waste.

Moreover, the Proposed Rules establish a comprehensive regulatory framework to prevent waste, and each of its provisions must be considered in context with the entire rule and the Commission's objectives, regardless whether the natural gas is considered waste at a particular point in time.

The Act also authorizes the Commission to prioritize flaring over venting in order to protect public health and the environment. The Commission may "regulate the disposition of nondomestic waste [from the exploration, development, production, transport, and treatment of crude oil and natural gas] to protect public health and the environment." NMSA 1978, 70-2-11 & 12. The Commission previously relied on this authority to regulate the release of natural gas (19.15.29.7 NMAC) and to prioritize flaring over venting (19.15.18.12(F) NMAC). The testimony established – and no party disputed - that flaring is more protective than venting of public health and the environment.

IV. THE PARTIES GENERALLY AGREE WITH THE PROPOSED RULES.

The parties generally agreed on the structure and content of the Proposed Rules, and no party disputed the following major elements:

- the process for establishing the baseline natural gas capture rate;
- the 98% reporting area natural gas capture requirement;
- the minimum required annual increments;
- the requirement to prepare natural gas management plans;
- the general duty to minimize the waste of natural gas;
- the prohibition on venting and flaring due to inadequate takeaway capacity;
- the specification of performance standards for flares and other equipment;
- the requirement to meter or estimate venting and flaring with appropriate equipment and methods;
- the requirement to report volumes of vented and flared natural gas;

- the ALARM incentives;
- the accounting methods;
- OCD's authority to require third party verification; and
- OCD's proposed compliance tools and processes.

V. THE PROPOSED RULES ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND REPRESENT SOUND POLICY FOR THE STATE OF NEW MEXICO.

When the parties disagree on a specific provision in the Proposed Rules, OCD's position is supported by substantial evidence and represents the better policy. OCD explained its opposition to other parties' modifications in rebuttal testimony and in OCD Exhibits 4C (Part 27) and 4D (Part 28). In the following discussion, OCD focuses on the disputed provisions most important to the Commission's adoption of comprehensive and effective rules.

A. LOW PRESSURE EQUIPMENT AND PRACTICES

OCD proposes to require operators to report vented and flared natural gas for certain types of low pressure equipment and practices, such as uncontrolled storage tanks, manual liquids unloading, downhole maintenance, thief hatches, and pneumatic controllers. Some of this natural gas is waste because, as observed above, operators can employ existing technologies to capture the natural gas. For instance, storage tanks can be controlled with readily available technology and equipped with automatic gauges to minimize the frequency that thief hatches must be opened for manual measurement, and operators can use automated lift equipment rather than manual unloading to remove liquids from wells.

Nonetheless, NMOGA opposes reporting *all* natural gas from these equipment and practices on the ground that *some* of the natural gas is released during normal operation and should not be considered waste. OCD acknowledged that a small portion of this natural gas may not be waste, for example, opening a thief hatch for a buyer who requires manual measurement pursuant to its contract.

However, NMOGA did not show that this natural gas constitute all - or even a significant fraction - of the natural gas released from these equipment and practices.

NMOGA also argues that natural gas released from these equipment and practices are too difficult to measure or estimate. The evidence showed that it is technically feasible to measure and estimate this natural gas with reasonable accuracy, and in fact, operators already measure and estimate this natural gas for a range of enforceable requirements, including air quality permits and federal reporting rules.

Perhaps more importantly, NMOGA admits that the natural gas released from these equipment and practices may be significant. Given this possibility, it is critical that operators report this natural gas so that OCD can set the appropriate baseline natural gas capture rates, determine compliance with natural gas capture requirements, and evaluate whether operators are complying with their general duty to minimize the waste of natural gas. Stated more starkly, if operators do not report these possibly significant volumes of natural gas, the Proposed Rules will not work as intended.

NMOGA also opposes accounting for the natural gas released from these equipment and practices in the 2% allowed by the natural gas capture requirement on the ground that some of the natural gas is not waste. The 2% allowance is intended to cover *all* vented and flared natural gas, not just natural gas that is waste. OCD never intended to allow operators to vent and flare 2% of their produced natural gas *plus* some unknown but possibly significant amount of natural gas from these equipment and practices.

To the extent that operators must count some natural gas that is not waste toward the 2% allowance, the Commission is authorized to require it if “reasonably necessary to carry out the purposes of this act.” The evidence showed that it can be difficult to distinguish between the waste and non-waste of natural gas from these equipment and practices, and that the portion constituting waste is potentially significant. Accordingly, the Commission can determine that it is reasonably

necessary for operators to report and count *all* natural gas released from these equipment and practices toward the 2% allowance.¹ Moreover, the Commission can find that requiring operators to report and count this vented and flared natural gas toward the 2% allowance will incentivize operators to improve their methods for measuring, estimating, and reducing the natural gas released from these equipment and practices.

B. REPORTING FORMS

OCD proposes that operators use a new form designated “C-115B” to submit monthly reports for the volumes of natural gas vented and flared from their wells and facilities. OCD needs the new form in order to properly implement the Proposed Rules. For each well or multi-well facility in the state, the C-115B identifies the volumes of vented and flared natural gas in each reporting category. This data then is processed by OCD’s database to generate the volumetric and gas capture percentage values for each operator. Because operators use the C-115B to report on a well or facility basis, OCD and operators are able to identify waste hot spots and develop solutions to prevent the waste.

Despite the C-115B’s centrality to implementation of the Proposed Rules, NMOGA proposes to use the existing Form C-115. This form is poorly suited to the purpose. The C-115 is designed to report oil and gas production for use by the State Land Office to collect state royalties and the New Mexico Taxation and Revenue Department to collect severance taxes. It cannot be reconfigured to report the data required by the Proposed Rules without significant changes in government databases and business processes. Moreover, the C-115 provides production data for “taxable properties”, which can include hundreds of wells and facilities. Reporting the data by taxable property would obscure the sources of vented and flared natural gas, preventing operators from reducing the waste. Some

¹ Notably, OCD proposed to minimize the impact of this requirement by excluding some types of venting and flaring. OCD Exhibit 4A at 78-79.

operators may already have accounting systems built to process the C-115, but trying to change that form to report data for the Proposed Rules poses a serious risk to the state's financial systems.

C. ROYALTY OWNER REPORTING

OCD and SLO present compelling evidence that mineral interest owners who know about natural gas waste will pressure operators to change their production practices. Operators already report production data to mineral interest owners, so the extension of this reporting to venting and flaring data should not be onerous. The mineral interest owners have correlative rights in the mineral estate, and therefore, have the right to know whether they are being compensated for all produced minerals. Indeed, the Commission has a duty to protect these rights. Notably, other states such as North Dakota and Colorado have adopted similar requirements.

D. EMERGENCIES

OCD proposes to exempt emergencies from the 98% natural gas capture requirement. 19.15.27(B)(1) NMAC. "Emergency" is defined as "a temporary, infrequent, and unavoidable event in which the loss of natural gas is uncontrollable or necessary to avoid a risk of an immediate and substantial adverse impact on safety, public health, or the environment", and is subject to several tightly-written exceptions modeled on the BLM definition which already applies on federal and tribal lands. 19.15.27.7(H) NMAC.

NMOGA proposes several changes to this definition and the exceptions, all of which would create loopholes that could be exploited by imprudent operators. First, NMOGA proposes to delete the word "substantial" from the definition, which would allow an operator to claim that any event is an emergency. Second, NMOGA proposes to delete the phrase "exceeds the sales contract volume of gas" from paragraph (2), which would allow an operator to contract for less takeaway capacity than it reasonably needs, and then vent or flare the rest without fear of consequence. Third, NMOGA proposes to change four hours to eight hours in paragraph (4), even though its witnesses have no data

to warrant the change, and one witness conceded that three of the (only) four emergencies that she knew about had been fixed in less than eight hours. Fourth, NMOGA proposes to delete the phrase “recurring equipment failure” from paragraph (5), which would allow operators to claim emergency for bad management and equipment decisions. Finally, NMOGA proposes to add the phrase "at one site for similar causes" and delete the phrase "division determines that the operator could not have reasonably anticipated the current event" from paragraph (6), which would allow operators to claim emergency for more events while depriving OCD of the ability to review those events on a case-by-case basis to determine whether they were caused by inadequate or deficient equipment or practices.

E. APD AUTO-DENIAL

OCD proposes to deny or conditionally approve an APD for an operator that is not meeting its natural gas capture requirement, and to prohibit that operator from spudding a new well until it returns to compliance. NMOGA agrees with these compliance measures, but Climate Advocates propose that when an operator is not meeting its natural gas capture requirement, the APD should be automatically denied.

OCD believes that APD auto-denial undermines the agency’s enforcement discretion and disrupts the orderly planning and development of the state’s oil and gas. OCD must be allowed the discretion to use the right tool to enforce the Proposed Rules. If an operator is out of compliance, the agency can condition the APD to require the operator to take actions, such as shutting in wells, until it returns to compliance. The agency’s choice of tool is important, because the wrong tool – such as APD auto-denial – can have serious unintended consequences on planning and investment decisions which are not relevant to the environmental protection statutes cited by Climate Advocates. Moreover, Climate Advocates’ proposal implicitly denies OCD the judicially-recognized presumption that agency personnel will act professionally and ethically in the conduct of their duties, including the implementation and enforcement of their rules.

VI. CONCLUSION

The Commission has the statutory duty and authority to adopt the Proposed Rules, which were prepared at the direction of Governor Lujan Grisham. The Proposed Rules fulfill the commitment of prior Commissions to prevent the waste of natural gas, are reasonable and balanced, and are generally supported by the parties. To the extent that the parties propose modifications to the Proposed Rules, OCD's position is supported by substantial evidence and represents the better policy, and those modifications should be rejected. Accordingly, OCD respectfully requests that the Commission adopt the Proposed Rules as presented in OCD Exhibits 2C (Part 27) and 3C (Part 28) filed on January 20, 2021 and modified by OCD's *Notice of Additional Changes to Final Proposed Rule for Part 27* filed today, and the related changes in Parts 7, 18, and 19 filed with OCD's application on October 15, 2020.

Respectfully submitted,



Eric Ames
Assistant General Counsel
New Mexico Energy Minerals and Natural
Resources Department
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3463
eric.ames@state.nm.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was mailed electronically on February 5, 2021 to:

Michael H. Feldewert, Esq.
Adam Rankin, Esq.
Kaitlin Luck, Esq.
Holland & Hart
P.O. Box 2208
Santa Fe, New Mexico 87504
mfeldewert@hollandhart.com
agrarkin@hollandhart.com
kaluck@hollandhart.com

Attorneys for New Mexico Oil & Gas Association

Tannis Fox, Esq.
Erik Schlenker-Goodrich, Esq.
Western Environmental Law Center
208 Paseo del Pueblo Sur, #602
Taos, New Mexico 87571
fox@westernlaw.org
eriksg@westernlaw.org

Attorneys for Center for Civic Policy, Conservation Voters New Mexico, Dine C.A.R.E., Earthworks, Natural Resources Defense Council, San Juan Citizens Alliance, Sierra Club, and 350 New Mexico

David Baake, Esq.
2131 North Main Street
Las Cruces, New Mexico 88001
david@baakelaw.com

Attorney for Sierra Club

Elizabeth Paranhos, Esq.
deLone Law Inc.
1555 Jennine Place
Boulder, CO 80304
303 442-0610
elizabethparanhos@delonelaw.com

Attorney for Environmental Defense Fund

Ari Biernoff
General Counsel
New Mexico State Land Office
P.O. Box 1148
310 Old Santa Fe Trail
Santa Fe, NM 87504
abiernoff@slo.state.nm.us

Attorney for Commissioner of Public Lands and New Mexico State Land Office

A handwritten signature in black ink, appearing to read "E.A.", positioned above a horizontal line.

Eric Ames