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NEW MEXICO

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I. STATE CASES

The New Mexico appellate courts issued no opinions relating to oil and gas in the past year.

II. STATE REGULATIONS

The Oil Conservation Commission (the “OCC” or “Commission”) promulgated amendments to 19.15.5 NMAC, effective February 25, 2020, to implement enforcement authority provided to the Oil Conservation Division (the “Division”) by the New Mexico state legislature in House Bill 546. This bill provided the Division with authority to assess administrative, civil penalties for violations of New

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Mexico's Oil and Gas Act (the "Act").¹ Penalties may be assessed at \$2,500 per day for each violation, with a higher cap of \$10,000 per day for a violation posing a risk to public health or safety, causing significant environmental harm, or continuing beyond the time specified in a notice of violation or stipulated order.² The Division caps penalties at \$200,000 per violation. A court must issue a penalty in excess of \$200,000.³ An amendment to 19.15.5 NMAC implemented the rule provisions.

The Division may seek to enforce the provisions of the Act, or a provision of any rule, order, permit, or authorization issued thereunder, by issuing a temporary cessation order, issuing a notice of violation, or commencing an action in district court.⁴ The Division may seek sanctions accordingly in the form of a civil penalty; modification, suspension, cancellation, or termination of a permit or authorization; plugging and abandonment; remediation and restoration; forfeiture of financial insurance; shutting in a well; or any other remedy authorized by law.⁵ The rule details the procedures to be followed in enforcement, including hearings before the Division on temporary cessation orders and notices of violation.

Subsequently and without rulemaking, the Division issued guidance regarding the civil penalty calculation method along with a spreadsheet calculator and sample calculation.⁶ (the "Notice"). The Notice explains that the calculation of a penalty consists of four steps: "(1) determining the Base Penalty; (2) determining the number of days of violation; (3) applying the statutory and other relevant factors; and (4) adjusting the penalty to comply with the statutory limits."⁷ The Notice discusses each step in detail.⁸ Appendix A to the Notice provides base penalty amounts for various circumstances.⁹ Appendix

1. See Oil Conservation Commission, Order on Proposed Amendments to the Commission's Rules on Compliance and Enforcement (Jan. 16, 2020), <http://www.emnrd.state.nm.us/OCD/documents/OCCFinalOrder-January162020.pdf> [<https://perma.cc/BJ3X-TZP2>]; See also H.B. 546, 54th Leg., 1st Sess. (N.M. 2019).

2. N.M. ADMIN. CODE § 19-15-5-10(D) (2020).

3. *Id.*

4. N.M. ADMIN. CODE § 19-15-5-10(A) (2020).

5. N.M. ADMIN. CODE § 19-15-5-10(B) (2020).

6. State of N.M. Energy, Minerals, and Nat. Res. Dep't, Notice, Civil Penalty Calculation Method, Version 2020-01 (May 6, 2020), <http://www.emnrd.state.nm.us/OCD/documents/NoticeofCivilPenaltyCalculationMethod-Version2020-01-May62020.pdf> [<https://perma.cc/GQP8-Q73D>].

7. *Id.* at 2.

8. See *id.* at 2–4.

9. *Id.* at 6–10.

B indicates the impacts of the adjustment factors.¹⁰ A sample civil penalty calculation worksheet is also attached to the Notice.

On September 3, 2020, the OCC promulgated amendments to Rules 19.15.2, 19.15.16, and 19.15.34 NMAC to implement legislative changes made in 2019 to agency authority to regulate produced water.¹¹ House Bill 546 limited the Division and the Commission's authority over produced water to the "exploration, drilling, production, treatment, or refinement of oil or gas, including disposal by injection."¹² House Bill 546 transferred authority to regulate produced water outside of the oil and gas industry to the Water Quality Control Commission and the New Mexico Environment Department (the "NMED"). Produced water outside of the oil and gas industry includes water used in road construction, maintenance, or other construction, in the generation of electricity, or in other industrial processes.¹³ Generally, the rule changes included amendments to reconcile the definition of "produced water" with the definition found in the Act; to add language requiring a water use report that provides the "portion" of potable, non-potable, or recycled produced water used in fracturing a well; and to conform regulatory language to the legislative changes in House Bill 546 concerning produced water.¹⁴

Under the order, the effective date of the amendments to Commission regulations is dependent on whether a rehearing application is filed pursuant to NMSA 1978, section 70-2-25 or if no rehearing application has been filed by September 23, 2020.¹⁵ In any event, however, the effective date will be no sooner than the date on which the final rule is published in the New Mexico Register, which has not yet occurred.

The NMED will propose rules relating to its authority over produced water after research is completed through the New Mexico

10. *Id.* at 11.

11. *See* HB 546, 2019 Reg. Sess. at 1–2 (N.M. 2019).

12. N.M. Oil Conservation Comm'n Order No. R-21343-A at 1, ¶ 2 (Sept. 3, 2020) (quoting N.M. STAT. ANN. § 70-2-12(B)(15) (West 2019)).

13. N.M. Oil Conservation Comm'n Order No. R-21343-A at 1, ¶ 2 (Sept. 3, 2020).

14. *Id.* at 2, ¶ 6.

15. *See* N.M. ENERGY, MINERALS & NATURAL RES. DEP'T, Order No. R-21343-A, at 11, PROPOSED AMENDMENTS TO THE COMMISSION'S RULES ON PRODUCED WATER (2020), <http://www.emnrd.state.nm.us/OCD/documents/2020.9.3OrderforPWRulesSigned.pdf> [<https://perma.cc/A3HW-NMZX>].

Produced Water Research Consortium, which is a collaboration between NMED and New Mexico State University.¹⁶

The State Land Office promulgated an emergency amendment to 19.2.100.71 NMAC, to provide for temporary shut-in of oil wells due to the severe reduction in the price of oil, effective April 22, 2020. A lessee shutting in an oil well must notify the commissioner of public lands within thirty days of the shut-in and pay an annual shut-in royalty within ninety days of the date the well has been shut in and before the anniversary of each such date.¹⁷ This emergency rule was to expire within thirty days unless the commissioner commenced proceedings to adopt the rule through the normal rulemaking process.¹⁸

The rule was subsequently amended again to provide that it should remain effective for one year from August 11, 2020, unless extended by the commissioner after a hearing or terminated sooner by a subsequent regulation of the commissioner after finding that the price of oil was no longer severely reduced.¹⁹ This later amendment provided additional parameters, for example prohibiting shut-in of a well when a lessee has caused expenditures from the state lands restoration and remediation fund²⁰ and providing for expiration of a lease maintained by production from a well that has been shut-in, unless there is production within ninety days after the temporary shut-in rule has terminated, with limited exception.²¹

III. FEDERAL CASES

A. WildEarth Guardians v. Bernhardt²²

This is another case in which an environmental group challenged the adequacy of the Bureau of Land Management's ("BLM") process in issuing leases for oil and gas development. The plaintiff contended

16. See *New Mexico Produced Water: NM Produced Water Research Consortium*, N.M. ENVTL. DEP'T, <https://www.env.nm.gov/new-mexico-produced-water/nmsu-mou/> NMSU [<https://perma.cc/YE7Q-Y2A6>]; see also *Advancing Scientific and Technological Solutions in Treatment and Reuse of Produced Water*, NM STATE, <https://nmpwrc.nmsu.edu/> [<https://perma.cc/5TPM-CNXU>].

17. N.M. CODE R. § 19.2.100.71(C) (2020).

18. N.M. CODE R. § 19.2.100.71(B); see XXXI N.M. Reg. 333 (May 5, 2020).

19. N.M. CODE R. § 19.2.100.71(B)(1).

20. § 19.2.100.71(E).

21. § 19.2.100.71(G); see XXXI N.M. Reg. 697 (Aug. 11, 2020).

22. *WildEarth Guardians v. Bernhardt*, No. 1:19-cv-00505-RB-SCY, 2020 WL 4784821 at *1 (D.N.M. Aug. 18, 2020).

that the BLM failed to account for the cumulative environmental effects of existing, regional development and to consider these leases within the context of the “broader global climate crisis.”²³ The district court denied the plaintiff’s request to vacate the BLM’s leasing authorizations. The court expressly stated that the plaintiff sought to change the status quo and that a change in the status quo must come from policymakers and not the court.²⁴ In accordance with the Administrative Procedure Act, the court “largely defer[red]” to BLM’s decision-making, noting that the National Environmental Policy Act (“NEPA”) did not require BLM to perform specific tests to measure environmental impact.²⁵

The plaintiff challenged leases covering almost 70,000 acres in southeastern New Mexico. The BLM issued the leasing authorizations under its September and December 2017 lease sales and its September 2018 lease sale.²⁶ The plaintiff argued that the leasing authorizations should be vacated because the BLM failed to include climate change data in its analysis of environmental impacts.²⁷ After review of similar cases, including a similar case relating to the northwestern region of New Mexico²⁸, the court determined that the issue raised by the plaintiff here was one of first impression.²⁹ The court concluded that NEPA does not require BLM “to perform a particular analysis or subscribe to a particular methodology.”³⁰ The court observed that the BLM explained how it analyzed impacts within the context of regional and national GHG emissions to meet NEPA’s requirement to consider cumulative impacts.³¹ Even though BLM did not quantify the specific impact on climate change, the court found that this analysis satisfied NEPA.³²

The court also concluded that NEPA did not require BLM to evaluate the lease sales by applying the Social Cost Carbon Protocol

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at *3.

27. *See id.* at *7–9.

28. *See id.* at *9 (discussing *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1248 (D.N.M. 2018)).

29. *Id.*

30. *Id.*

31. *Id.* at *9–10 (noting that BLM’s analysis indicated “additional GHG emissions would account for approximately 0.0028 percent of GHG emissions nationally, 2.2 percent of GHG emissions in New Mexico, and about 7.3 percent of GHG emissions in the Permian Basin.”).

32. *Id.* at *10.

methodology, which was developed by the Interagency Working Group on Social Cost of Carbon.³³ The court further concluded that BLM adequately considered the impact of the lease sales on air quality, including ozone levels, in light of BLM's Air Resource Technical Reports.³⁴ In addition, the court concluded that BLM took a hard look at impacts on water quantity and quality.³⁵

The plaintiff also raised various procedural issues. After careful consideration, the court ruled that: (1) BLM was not required to prepare an Environmental Impact Statement; (2) the plaintiff had standing to challenge an information memorandum ("IM") regarding the BLM process for considering leases; and (3) the IM was not a "final agency action . . . because it did not affect legal rights and obligations."³⁶ With respect to the latter, the court struck language from the IM that suggested public participation was discretionary and reminded BLM that the NEPA, the Federal Land Policy and Management Act, and their companion regulations require public participation in the process.³⁷

The federal defendants in this case filed a motion for clarification on September 16, 2020, asking the court to clarify its comments relating to public participation. In particular, the federal defendants asked the court to clarify that it "intended only to set aside the discretionary term 'may'" in the internal memorandum and did not intend to enjoin future leasing decisions that were not before the court.³⁸

B. Wage-Related Cases

Class actions have been initiated in federal court against oil and gas companies alleging violations of the federal and state law on wages. There have been no decisions on the merits of these cases. However, their proceedings should be followed, and companies may want to consider whether their practices could be implicated by the allegations in these matters. Pending matters include the following cases:

33. *Id.* at *10–11; see *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1190 (D. Colo. 2014).

34. *WildEarth Guardians*, 2020 WL 4784821, at *11–13.

35. *Id.* at *13–15.

36. *Id.* at *15–16, *19–20.

37. *Id.* at *22.

38. Federal Def.'s Mot. for Clarification at 5, No. 1:19-cv-505-RB-SCY, Doc. 44 (D.N.M. Sept. 16, 2020).

- *Bock v. Salt Creek Midstream LLC* (holding that an arbitration agreement between workers for construction of a pipeline and their employer staffing company did not preclude class action against midstream company who contracted with the staffing company to supply workers in lawsuit alleging misclassification of inspectors as exempt under federal and state wage-and-hour laws)).³⁹
- *Felps v. Mewbourne Oil Co.* (holding that the defendant’s oral and written settlement communications with putative class members were confusing and misleading, potentially having a chilling effect on participation in the lawsuit alleging misclassification of lease operators as exempt under the Fair Labor Standards Act, and that narrowly tailored remedial measures were therefore necessary).⁴⁰
- *Rodriguez v. Peak Pressure Control, LLC I* (holding that New Mexico’s Minimum Wage Act (“MWA”) applies to employment performed in New Mexico, without regard to the residence of the employee or the employer, and that the administrative exemption to the MWA does not apply to the named plaintiff’s employment as a pressure control operator).⁴¹
- *Rodriguez v. Peak Pressure Control, LLC II* (certifying a class in which the named plaintiff alleges that the defendant misclassified certain workers as exempt from the requirements of the New Mexico Minimum Wage Act and improperly required them to work more than 40 hours per week without overtime pay).⁴²
- *Martin v. Tap Resources, LLC* (denying the defendant’s partial motion to dismiss in class action to recover unpaid overtime wages under the Fair Labor Standards Act and the New Mexico Minimum Wage Act based on alleged misclassification of drilling consultants as day-rate independent contractors).⁴³

39. No. 19-1163 WJ/GJF, 2020 WL 3989646, at *24 (D.N.M. July 15, 2020).

40. No. 18-811 MV/GJF, 2020 WL 4001869, at *8 (D.N.M. July 15, 2020).

41. No. 2:17-cv-00576-JCH-JFR, 2020 WL 3000414, at *3-6 (D.N.M. June 4, 2020).

42. No. 2:17-cv-00576-JCH-JFR, 2020 WL 3000415, at *18 (D.N.M. June 4, 2020).

43. No. 20 CV 00170 WJ-CG, 2020 WL 2129598, at *6 (D.N.M. May 5, 2020).