

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 8

NUMBER 2

NEW MEXICO



*Blake C. Jones**

I. Introduction

In a year during which New Mexico saw the Biden Administration postpone federal oil and gas lease sales in order to conduct environmental analysis,¹ and a slew of lease challenges filed by environmental groups, the

* Blake C. Jones is a member of the Energy Transactions practice group at Steptoe & Johnson PLLC. He advises exploration and production companies through all phases of acquisitions and divestitures and regularly manages large title due diligence projects for his clients. He is a graduate of The Ohio State University (BA), and Capital University (JD). Mr. Jones is licensed in New Mexico, Ohio, and Texas.

1. Adrian Hedden, *Biden 'constraining' oil and gas, industry says, as New Mexico land sale delayed again*, New Mexico Oil & Gas Association (June 22, 2022), <https://www.nmogas.org/news/industry-says-as-new-mexico-land-sale-delayed-again>.

state took proactive measures to protect the environment and became a national example of how to responsibly produce oil and gas during the energy transition.

II. Legislative and Regulatory Developments

A. State Regulatory Developments

1. Venting and Flaring of Natural Gas Prohibited

New Mexico enacted regulations prohibiting the venting or flaring of natural gas except as specifically authorized in the regulations. Operators are also required to flare, rather than vent, natural gas except when flaring is technically infeasible or would pose a safety risk.² Operators are only permitted to flare or vent natural gas during an emergency or malfunction³ or during the following activities unless prohibited by state or federal law:

- (a) repair and maintenance, including blowing down and depressurizing equipment to perform repair or maintenance;
- (b) normal operation of a gas-activated pneumatic controller or pump;
- (c) normal operation of dehydration units and amine treatment units;
- (d) normal operation of compressors, compressor engines, and turbines;
- (e) normal operation of valves, flanges, and connectors that are not the result of inadequate equipment design or maintenance;
- (f) normal operation of a storage tank or other low-pressure production vessel, but not including venting from a thief hatch that is not properly closed or maintained on an established schedule;
- (g) gauging or sampling a storage tank or other low-pressure vessel;
- (h) loading out liquids from a storage tank or other low-pressure vessel to a transport vehicle;
- (i) normal operations of valves, flanges or connectors that are not the result of inadequate equipment design or maintenance;
- (j) blow down to repair a gathering pipeline;
- (k) pigging a gathering pipeline;
- (l) purging a gathering pipeline; or
- (m) commissioning of pipelines,

[nmoga.org/biden_constraining_oil_and_gas_industry_says_as_new_mexico_land_sale_delayed_again](https://www.nmoga.org/biden_constraining_oil_and_gas_industry_says_as_new_mexico_land_sale_delayed_again) (last visited Aug. 6, 2022).

2. NMAC § 19.15.28.8(A).

3. NMAC § 19.15.28.8(B)(1).

equipment, or facilities only for as long as necessary to purge introduced impurities from the pipeline or equipment.⁴

The regulations include performance standards that require operators to implement an operations plan to minimize the waste of natural gas, including procedures implemented to reduce leaks and releases.⁵ Operators are also required to conduct weekly audio, visual and olfactory (“AVO”) inspections of compressors, dehydrators, and treatment facilities,⁶ and annual monitoring of the entire length of the gathering pipeline using an AVO technique.⁷ Under the regulations, operators are also required to measure and report the volumes of vented and flared natural gas.⁸ Operators must notify the Oil Conservation Division (“OCD”) if venting or flaring exceeds 50 MCF and results from an emergency or malfunction that lasts eight hours or more within a 24 hour period.⁹ The OCD must be notified by filing a form C-129 within 15 days for volumes between 50 MCF and 500 MCF, and within 24 hours for volumes exceeding 500 MFC.¹⁰

2. 98% Gas Capture Rule Goes into Effect

On February 22, 2022, statewide natural gas capture regulations went into effect that require operators of natural gas gathering systems to capture no less than ninety-eight percent (98%) of gathered natural gas by December 31, 2026.¹¹ The Oil Conservation Division (“OCD”) calculated and published operators baseline natural gas capture rate based on the operator’s fourth quarter 2021 and first quarter 2022 quarterly reports, and in each year between 2022 and 2026, operators are required to increase its annual percentage of captured natural gas based on the following formula: “(baseline loss rate minus two percent) divided by five, except that for 2022 only, an operator’s percentage of natural gas captured shall not be less than seventy-five percent of the annual gas capture percentage increase (2022 baseline loss rate minus two percent divided by five times 0.75), and the balance shall be captured in 2023.”¹² If an operator’s baseline capture rate is

4. NMAC § 19.15.28.8(B)(2).

5. NMAC § 19.15.28.8(C)(1).

6. NMAC § 19.15.28.8(C)(4).

7. NMAC § 19.15.28.8(C)(5).

8. *See* NMAC § 19.15.28.8(E),(F).

9. *See* NMAC § 19.15.28.8(F)(1)(a).

10. NMAC § 19.15.28.8(F)(1)(a)(i),(ii).

11. *See* NMAC § 19.15.28.10.

12. NMAC § 19.15.28.10(A).

less than sixty percent (60%), it must submit a plan to meet the minimum required annual capture percentage increase.¹³

Operators must submit an annual report certifying compliance with the gas capture requirements no later than February 28.¹⁴ Operators shall determine compliance with the gas capture rule requirements by deducting advanced leak and repair monitoring technology (“ALARM”) technology credits approved pursuant to the regulations from the aggregate volume of lost gas for each month during the preceding year, deducting the aggregate volume of lost gas from the volume of gathered natural gas for each month during the preceding year, and dividing that volume by the aggregated volume of natural gas gathered for each month during the preceding year.¹⁵ Operators using an OCD-approved ALARM technology may apply for credits if it discovers a leak and satisfies the repair and reporting requirements set forth in the regulations.¹⁶

III. Judicial Developments

A. Federal Court Cases

1. Oil and Gas Operations in a State Not Sufficient to Support Exercise of General Jurisdiction over Operator

Plaintiff employees brought a putative class action against Defendant XTO Energy, Inc., alleging that Defendant violated the Fair Labor Standards Act (“FLSA”) and the New Mexico Minimum Wage Act (“NMMWA”) by failing to pay overtime for work performed beyond forty hours per week.¹⁷ Plaintiffs brought a collective action under the FLSA on behalf of Safety Consultants who worked for Defendant anywhere in the United States, and a separate action for their NMMWA claims on behalf of Safety Consultants who worked for Defendant in the state of New Mexico.¹⁸ Defendant then moved to dismiss the case for lack of personal jurisdiction pursuant to Rule 12(b)(2).¹⁹

Plaintiffs argued that general jurisdiction over Defendant in New Mexico was proper “because XTO's significant contacts with, and business

13. NMAC § 19.15.28.10(A)(2).

14. NMAC § 19.15.28.10(B).

15. *Id.*

16. NMAC § 19.15.28.10(B)(1).

17. *Bone v. XTO Energy, Inc.*, 561 F. Supp. 3d 1132, 1133 (D.N.M. 2021).

18. *Id.* at 1134-35.

19. *Id.* (the court declined to rule on a Rule 12(b)(6) motion to dismiss until the jurisdictional matters are resolved).

operations in, New Mexico are systematic and continuous such that it is essentially at home in New Mexico.”²⁰ Plaintiffs also cited to Defendant’s website which identified fourteen states in which Defendant operates, including New Mexico. The court held that Plaintiff did not demonstrate how “Defendant’s connection to New Mexico is particularly strong or whether they believe Defendant is ‘at home’ in over a quarter of this country.”²¹ The court also refused to consider the conclusory allegations regarding Defendant’s contacts with New Mexico.²²

Next, the court analyzed specific jurisdiction by applying the 2017 Supreme Court ruling in *Bristol-Myers*, which “left two options for nationwide mass actions against a defendant: bring the full mass action in a state with general jurisdiction over the defendant, or bring a smaller mass action in every state with only in-state plaintiffs.”²³ The court first rejected Plaintiffs’ argument that *Bristol-Myers* only applies to state court jurisdiction, stating “when a federal statute does not authorize nationwide service of process—as the FLSA does not—and parties are not joined under Rule 14 or Rule 19, then federal courts follow the rules of a state court in their state.”²⁴

Because the New Mexico long-arm statute stretches as far as the Fourteenth Amendment permits, the court then analyzed the Fourth Amendment issue central to *Bristol-Myers*.²⁵ The court first noted that federal district courts are split as to whether *Bristol-Myers* applies to collective actions under the FLSA, and sided with the courts applying *Bristol-Myers* because “[m]ass and collective actions treat all members as parties who must each meet jurisdictional requirements, but class actions differ because they are representative in nature.”²⁶ Accordingly, because the court did not have personal jurisdiction over Defendant, Plaintiffs have two choices under *Bristol-Myers*, proceed as a collective composed solely of New Mexico plaintiffs, or transfer the entire case to Delaware, Defendant’s

20. *Id.* at 1136 (quoting Doc. 25 ¶¶ 15, 18).

21. *Id.*

22. *Id.* (citing *Strobel v. Rusch*, 364 F. Supp. 3d 1270, 1278 (D.N.M. 2019)) (when ruling on a Rule 12(b)(2) motion, courts need not accept conclusory allegations).

23. *Id.* at 1135 (citing *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1784 (2017)).

24. *Id.* at 1136 (citing *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 396 (6th Cir. 2021); *Aviles v. Kunkle*, 978 F.2d 201, 204 (5th Cir. 1992)).

25. *Id.* at 1137 (citing *Tercero v. Roman Cath. Diocese of Norwich*, 132 N.M. 312, 48 P.3d 50, 54 (2002)).

26. *Id.*

state of incorporation, where they may be subject to general jurisdiction over all claims from the nationwide collective.²⁷ As a result of the holding, oil and gas operators are not subject to general or specific jurisdiction due to merely conducting operations in New Mexico.

2. Environmental Group Denied TRO and Preliminary Injunction Against All Future Horizontal Drilling in the Mancos Shale

In *Diné Citizens Against Ruining Our Environment v. Bernhardt*, Plaintiff environmentalist groups filed suit against the United States Department of the Interior, the Bureau of Land Management (“BLM”), and other federal defendants, seeking a temporary restraining order and preliminary injunction to enjoin oil and gas development in the Mancos Shale.²⁸ The court identified the two primary issues central to the motion as being: (1) whether the court will allow the BLM to supplement its initial environmental assessment (“EA”), or limit its review to its original National Environmental Policy Act (“NEPA”) documentation; and (2) whether plaintiffs satisfy the requirements of the preliminary injunction analysis under applicable law, which requires plaintiffs establish that they are likely to succeed under the merits.²⁹

For the court to ignore the BLM’s supplemented EA documentation, it would have to determine that the BLM predetermined the EAs prior to supplementation.³⁰ The court found that the BLM did not predetermine its decision to grant applications for permits to drill (“APD”) in the Mancos Shale because: (1) the EAs were only deficient as to one consideration in their analysis: cumulative impacts on water resources; and (2) the BLM was not “irrevocably or “irretrievably” committed to issuing APDs in the Mancos Shale, as it reopened review of EAs and APDs, and conducted good faith environmental analysis.³¹ The court further reasoned that supplementation of the EAs was appropriate because the EA addendum was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”³²

27. *Id.* at 1138.

28. *Diné Citizens Against Ruining Our Env’t v. Bernhardt*, 2021 WL 3370899, at *2 (D.N.M. 2021).

29. *Id.* at *7.

30. *Id.* at *6, *9 (citing *Sierra Club, Inc. v. Bostick*, 539 Fed. Appx. 885, 893 (10th Cir. 2013)) (“[a] predetermination analysis is also helpful to courts when determining a party’s remedy or whether a federal agency will be allowed to supplement its NEPA documentation.”).

31. *Id.* at *10.

32. *Id.* at *13.

The court next turned to whether the Plaintiffs satisfied the four requirements of the preliminary injunction test: “(1) that Plaintiffs will suffer irreparable harm unless the injunction issues, (2) that the balance of equities tips in Plaintiffs’ favor, (3) that issuance of the injunction is in the public interest, and (4) that there is a substantial likelihood of success on the merits by Plaintiffs.”³³ The court held that Plaintiffs only satisfied the immediate and irreparable harm requirement, as the Plaintiffs, “pointed to a number of ways in which even properly functioning directionally drilled and fracked wells produce environmental harms.”³⁴ The Plaintiffs failed to show that their alleged harms outweighed the harms the BLM and operator-lessees would face, and the court specifically noted that “economic harm can outweigh environmental harm.”³⁵ Next, the court found that the preliminary injunction would be contrary to public interest because employment opportunities in the petroleum industry, funding for state medical and educational endeavors, and taxable income would all be affected by a preliminary injunction.³⁶

Turning to its analysis of whether Plaintiffs have a substantial likelihood of success on the merits, the court conducted a thorough factual analysis of the APD impacts to: (1) water resources (2) air quality and health; and (3) greenhouse gas emissions alleged by plaintiffs.³⁷ The court concluded that Plaintiffs failed to prove that the BLM’s grant of APDs was arbitrary and capricious under 5 U.S.C. § 706(2)(A), or that BLM failed to take a hard look at the environmental impact such drilling activity would impose on the local environment under the NEPA.³⁸ As a result, the court dismissed the case with prejudice because it conducted a detailed merits analysis, and no further analysis would change the court’s disposition.³⁹

33. *Id.* at *15 (citing, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 19, 129 S. Ct. 365 (2008)).

34. *Id.*

35. *Id.* (citing, *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545, 107 S. Ct. 1396 (1987)).

36. *Id.* at *17.

37. *See id.* at *20–30.

38. *Id.* at *30.

39. *Id.* at *31.

*B. State Court Cases**1. Fracking Proppant Is Not a Chemical Entitled to Deduction Under the Gross Receipts and Compensating Tax Act*

Halliburton Energy Services, Inc. (the “Taxpayer”) appealed a decision and order of the chief administrative hearing officer (“AHO”) that upheld the New Mexico Taxation and Revenue Department’s (“Department”) assessment of the Gross Receipts and Compensating Tax Act (the “Act”), NMSA 1978, § 7-9-1 to 119.⁴⁰ The Taxpayer argued that (1) the AHO erred in determining that it was not entitled to deductions for the sale of chemicals used in the fracking process pursuant to Section 7-9-65 of the Act; (2) the AHO’s interpretation of “lots” in said Section was improper; and (3) the AHO erred in holding curable resin coated (CRC) proppant is not a chemical.⁴¹

The court first held that the Taxpayer’s sales for fracking do not qualify for the deduction in Section 7-9-65, which permits deductions for:

*[r]eceipts from selling chemicals or reagents to any mining, milling or oil company for use in processing ores or oil in a mill, smelter or refinery or in acidizing oil wells, and receipts from selling chemicals or reagents in lots in excess of eighteen tons Receipts from selling explosives, blasting powder or dynamite may not be deducted from gross receipts.*⁴²

The Taxpayer argued that it sold the proppants, and did not use the products during the performance of a service as defined by the Act, thereby entitling it to the deduction. The court disagreed, holding that the deduction in the Act applies to a standalone sale of chemicals, and not the sale of chemicals used in a service.⁴³ Because the Taxpayer was not entitled to a deduction under the Act, the court did not address Taxpayer’s argument that the AHO’s interpretation of “lots” in Section 7-9-65 was legal error.⁴⁴ Strictly construing the Act in favor of the Department, the court next held that CRC proppant is not a “chemical” for purposes of Section 7-9-65, accepting the AHO’s conclusion that CRC proppant is not a chemical under the plain

40. Halliburton Energy Servs., Inc. v. New Mexico Tax’n & Revenue Dep’t, 2022 WL 456822, at *1 (taxpayer was denied claims for gross receipts tax refunds in the amount of approximately \$84 million between 2015 and 2017).

41. *Id.*

42. *Id.* at *3 (emphasis in original).

43. *Id.* at *4.

44. *Id.* at *6.

language of 3.2.223.7(B) NMAC, which defines ‘chemical’ as ‘a substance used for producing a chemical reaction.’”⁴⁵

45. *Id.* at *7.