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I. Introduction

Over the course of the past year, the New Mexico legislature and governmental agencies continued to create public policy that positions New Mexico to be a national leader in the responsible, environmentally sound, and ethical production of hydrocarbons.

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II. Legislative and Regulatory Developments

A. State Legislative Developments

Oil and Gas Act Reform Bill Stalls in Committee

On February 13, 2023, state Senator Leo Jaramillo sponsored Senate Bill 418, seeking to reform and amend the New Mexico Oil and Gas Act (the "Act").[1] The Bill, if passed, would have expanded the powers of the Oil Conservation Division ("OCD") to regulate the oil and gas industry based on protecting health and the environment; promoting the public interest, health, safety and general welfare; and promoting the fair treatment and meaningful involvement of the public, including environmental justice communities.[2] Currently under the Act, the OCD is only permitted to regulate the industry in order to prevent waste and to protect correlative rights.[3]

The Bill passed by a vote of 6–3 in the Senate Conservation Commission[4] before ultimately stalling in the subsequent Senate Judiciary Committee.[5] In addition to expanding the powers of the OCD, SB 418 would have also removed the $250,000 cap on well remediation bonding for oil and gas operators, expanded the membership of the Oil Conservation Commission to include resident members from oilfield communities, and also block oil and gas industry professionals from serving on the commission for one year.[6]

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1. https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=418&year=23 (last visited Aug. 10, 2023).

2. https://www.nmlegis.gov/Sessions/23%20Regular/bills/senate/SB0418.pdf, at 14 (last visited Aug. 10, 2023).

3. N.M. STAT. ANN. § 70-2-11.

4. Adrian Hedden*, Bill tightening oil and gas rules in New Mexico passes committee, opposed by industry* (March 3, 2023) https://www.currentargus.com/story/news/2023/03/03/bill-tougher-oil-gas-rules-new-mexico-senate-committee-energy-environment-fossil-fuel-climate-change/69958664007/ (last visited Aug. 10, 2023).

5. Adrian Hedden*, Pollution bills struggle in New Mexico legislature. Here's what passed and failed* (March 21, 2023) https://www.currentargus.com/story/news/2023/03/21/pollution-oil-gas-bill-new-mexico-legislature-house-senate-energy-environment-nuclear-climate-chang/70016993007/ (last visited Aug. 10, 2023).

6. *Id.*

B. State Regulatory Developments

Regulations Aim to Curtail Ozone Precursor Pollutants

The New Mexico Environment Department's ("NMED") rules regulating Ozone Precursor Pollutants went into effect on August 5, 2022.[7] The purpose of the rules is to "establish emission standards for volatile organic compounds ('VOC') and oxides of nitrogen ('NOx') for oil and gas production, processing, compression, and transmission sources."[8] According to a press release from the office of Governor Michelle Lujan Graham, the rule will reduce emissions of VOC and NOx compounds by 260 million pounds annually, and will reduce methane emissions by over 851 million pounds annually.[9] The rules apply to areas within the state that have ozone concentrations that exceed ninety-five percent, Chaves, Dona Ana, Eddy, Lea, Rio Arriba, Sandoval, San Juan, and Valencia counties, being the counties with the largest concentration oil and gas exploration and production in the state.[10]

The rules are intended to compliment the Energy, Minerals and Natural Resources Department rules that went into effect last year which limit venting and flaring, and seek to embrace innovation and cutting-edge technology to convert air emissions to electricity, rather than engaging in the wasteful practice of flaring.[11] A guide published by the NMED states that as of the effective date, the rule requires operators to: (1) operate/maintain equipment consistent with manufacturer specs, maintain good engineering and maintenance practices in a manner to reduce emissions; (2) conduct sensory lease detection and repair efforts; and (3) calculate the potential to emit PTE for equipment like tanks, compressors, pig launching and receiving, and glycol dehydrators.[12]

7. N.M. Code R. § 20.2.50.5; *See generally,* N.M. Code R. § 20.2.50.1–50.128.

8. N.M. Code R. § 20.2.50.6.

9. New Mexico's nationally leading oil and gas emissions rule becomes law, July 28, 2022, https://www.governor.state.nm.us/2022/07/28/new-mexicos-nationally-leading-oil-and-gas-emissions-rule-becomes-law/ (last visited Aug. 16, 2023).

10. N.M. Code R. § 20.2.50.2.

11. *See supra* note 10.

12. A Guide to the Oil and Gas Air Emission Rule, September 6, 2022, https://www.env.nm.gov/air-quality/wp-content/uploads/sites/2/2022/09/2022-09-13-EPD-AQB-Oil-and-Gas-Rule-InfoGraphic-final.pdf (last visited Aug. 16, 2023).

Executive Order by Commissioner of Public Lands Bans Oil and Gas Leasing on State Lands Within One Mile of Schools

On June 1, 2023, the Commissioner of Public Lands, Stephanie Garcia Richard, issued an executive order directing that state trust lands located within one mile of a school or other educational institution shall not be leased for new oil and gas purposes until further order.[13] Under the order, other educational institutions are identified as day care centers, pre-schools, and sports facilities used by students.[14] In addition to the leasing moratorium, the State Land Office Commercial Resources Division and Oil, Gas and Minerals Division were ordered to identify all oil and gas leases, business leases, and rights-of-way located within one mile of a school or educational institution, and to assess their compliance with their respective terms and provisions, "including the requirement to plug inactive wells, remediate spills, and adhere to relevant air quality standards."[15] According to an Associate Press analysis of Oil Conservation Division and State Land Office data, out of more than 13,000 oil and gas leases on state trust lands, close to 100 oil and gas wells are located within a mile of at least one school.[16]

Commissioner of Public Lands Adopts Cultural Properties Protection Rule

Effective December 1, 2022, the Commissioner of Public Lands adopted the Cultural Properties Protection Rule in order to "proactively identify archaeological sites and other cultural resources on state trust lands and protect them before they are damaged."[17] Under the rule, persons shall not, "disturb, dislodge, damage, destroy, or remove any cultural properties on state trust lands."[18] Prior to disturbing the surface, the rule requires lessees of state trust lands to search the New Mexico cultural resources information

13. Executive Order No. 2023-001, Moratorium on New Oil and Gas Leasing Within One Mile of Schools, June 1, 2023, https://www.nmstatelands.org/wp-content/uploads/2023/06/Leasing-Buffer-EO-Docs.pdf (last visited Aug. 15, 2023).

14. *Id*.

15. *Id.*

16. Susan Montoya Bryan, *New Mexico imposes oil and gas moratorium on state land near schools* (June 1, 2023), https://apnews.com/article/new-mexico-oil-gas-moratorium-schools-pollution-e68db29ad2c2c184b6e7949cbce3fbe2 (last visited Aug. 15, 2023).

17. Land Commissioner Adopts Cultural Properties Protection Rule, October 18, 2022, https://www.nmstatelands.org/2022/10/18/land-commissioner-adopts-cultural-properties-protection-rule/ (last visited Aug. 16, 2023); *See also* N.M. Code R. § 19.2.24.1–.24.12.

18. N.M. Code R. § 19.2.24.8.

system (NMCRIS) and records maintained by the archaeological records management section (ARMS) of the historic preservation division of the New Mexico department of cultural affairs.[19]

If a party conducts surface operations prior to obtaining a survey, or does not comply with applicable avoidance and mitigation measures, the party will be required to conduct an archaeological damage assessment at its own expense, and is liable for damages "in the amount equal to the cost of restoration, stabilization, and interpretation of the damaged cultural property."[20] Additionally, the commissioner may recover an amount equal to twice the cost of restoration, stabilization, and interpretation of the damaged cultural property.[21] The commissioner may also institute a civil action against any person violating the rule, and may refer a criminal violation of the Cultural Properties Act to the New Mexico attorney general or district attorney.[22] However, the rule does provide for important exceptions, including repairs and maintenance to existing surface activities, "such as fences and water tanks that do not require additional surface disturbance."[23]

U.S. Department of Interior Prohibits Oil and Gas Leasing Within Ten Miles of Chaco Culture National Historical Park for 20 Years

On June 2, 2023, the U.S. Secretary of the Interior, Deb Haaland, issued a Public Land Order "to protect the cultural and historic resources surrounding Chaco Culture National Historical Park from new oil and gas leasing and mining claims."[24] The order withdraws 336,404.42 acres of public lands within a ten-mile radius of the park for 20 years, subject to existing leases.[25] The order does not apply to private, state, or Tribal lands, and during the 20-year withdrawal period, "production from existing wells could continue, additional wells could be drilled on existing leases, and

19. N.M. Code R. § 19.2.24.1, .8.

20. N.M. Code R. § 19.2.24.12(B).

21. *Id.*

22. N.M. Code R. § 19.2.24.12(C), (D) (citing, N.M. STAT. ANN. §18-6-9, 9.1, 9.3).

23. About the New Cultural Properties Protection Rule, https://www.nmstatelands.org/divisions/cultural-resources-office/culturalproperties/ (last visited Aug. 16, 2023); *See also,* N.M. Code R. § 19.2.24.10.

24. Biden-Harris Administration Protects Chao Region, Tribal Cultural Sites from Development, June 2, 2023, https://www.doi.gov/pressreleases/biden-harris-administration-protects-chaco-region-tribal-cultural-sites-development (last visited Aug.15, 2023).

25. *Id*; *See also*, Public Land Order No. 7923, https://www.doi.gov/sites/doi.gov/files/plo-chaco-fr-notice-6.2.23-508.pdf (last visited Aug. 15, 2023).

Navajo Nation allottees can continue to lease their minerals."[26] The order follows a prior two-year leasing moratorium that was issued in January of 2022, and the Bureau of Land Management has not issued a lease within a ten-mile radius of the park for approximately ten years.[27] The order states that the purpose of the withdrawal is "to protect these public lands and the greater connected landscape with a rich Puebloan, Tribal Nation, and cultural legacy in the New Mexico counties of San Juan, Sandoval, and McKinley for a period of 20 years."[28]

III. Judicial Developments

A. Federal Court Cases

Environmental Challenge to BLM Permit Approvals Remanded to District Court

Plaintiff Citizen Groups[29] argued that eighty-one environmental assessments ("EAs") conducted by the Bureau of Land Management ("BLM") in conjunction with applications for permits to drill ("APDs") violated the National Environmental Policy Act because the BLM: "(1) improperly predetermined the outcome of the EA Addendum and (2) failed to take a hard look at the environmental impacts of the APD approvals related to greenhouse gas ("GHG") emissions, water resources, and air quality."[30] At the district court level, an order was issued affirming that APD approvals and dismissing the Citizen Groups' claims. In doing so, the court concluded that: (1) the claims were not ripe as to several APDs because they were not yet approved by the BLM; (2) the claims were moot as to expired or abandoned APDs; (3) the BLM did not improperly predetermine the findings of the EA Addendum; (4) it was appropriate to supplement the EAs and the administrative record with the EA Addendum; and (5) the BLM adequately considered the environmental impacts as required by NEPA in the EA Addendum.[31]

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26. *Id.*

27. *Id.*

28. Public Land Order No. 7923, https://www.doi.gov/sites/doi.gov/files/plo-chaco-fr-notice-6.2.23-508.pdf (last visited Aug. 15, 2023).

29. Plaintiff Citizen Groups is comprised of Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians.

30. Diné Citizens Against Ruining Our Environment v. Haaland, 59 F.4th 1016, 1024 (10th Cir. 2023).

31. *Id*. at 1028.

The Tenth Circuit first addressed whether the BLM unlawfully predetermined the outcome of the EA Addendum. Citizens Groups argued that the BLM violated NEPA because it approved the APDs prior to preparing the EA Addendum and it did not vacate, suspend, or withdraw those approvals while gathering additional information about the environmental impact of the actions.[32] The BLM countered by arguing that its supplemental environmental analysis was conducted in good faith, and that it was prepared to revoke the APD approvals if the supplementary analysis showed that was necessary.[33] The court sided with the BLM, stating that it did not unlawfully predetermine by conducting the supplementary analysis without first vacating the APDs because the BLM did not, "*irreversibly and irretrievably* commit[ ] itself to a plan of action that [wa]s dependent upon the NEPA environmental analysis producing a certain outcome."[34]

The court next addressed whether the BLM acted arbitrarily and capriciously by failing to take a hard look at the environmental impacts of the APD approvals.[35] With respect to taking a hard look at the impacts of GHG emissions, Citizen Groups argued that the BLM erred in calculating the amount of direct and indirect emissions and that the BLM used a low value for the global warming potential of methane.[36] The court agreed that the BLM arbitrarily and capriciously calculated the impact of GHG emissions because it used one-year of direct methane emissions to represent the estimated emissions over the twenty year lifespan of the wells.[37] Conversely, the court did not agree with Citizen Groups' argument that the BLM acted arbitrarily and capriciously by using a 100-year time horizon to calculate the global warming potential of methane rather than a twenty-year time horizon.[38] Turning to the cumulative impacts of the GHG emissions, the court ruled that the BLM acted arbitrarily and capriciously and failed to take a hard look at the cumulative impacts because it only described the general projections of environmental impacts that may be related to climate change, and did not determine cumulative impact of the subject APDs.

32. *Id*. at 1030.

33. *Id.*

34. *Id*. at 1033, (quoting Forest Guardians v. U.S. Fish & Wildlife Serv., 611 F.3d 692, 714 (10th Cir. 2010)) (emphasis in original).

35. See *Id.* at 1034-1047.

36. *Id.* at 1035.

37. *Id.* at 1037.

38. *Id.*

Further, the BLM did not explain why it did not use the carbon budget method for measuring the impact, as suggested by the Citizens Groups.[39]

Finally, the court turned to Citizens Groups claim that the BLM did not take a hard look at the APDs impact on air quality and human health. The court first held that the BLM took a hard look at air pollution because they analyzed the direct and cumulative impacts of the wells concluded that the levels for criteria pollutants would not exceed the attainment levels established by the EPA and New Mexico.[40] On the other hand, the court held that the BLM failed to take a hard look at the impacts of hazardous air pollutants ("HAPs") because it concluded that the APDs would not pose a risk to human health because there would be no long-term exposure to elevated levels of toxic air pollutants.[41] The court concluded that, with more than 3,000 San Juan basin wells expected to be drilled in the coming years, that each well emitting HAPs for an estimated ninety days would cause long-term exposure that the BLM failed to analyze.[42]

Upon concluding that the "BLM acted arbitrarily and capriciously by failing to take a hard look at (1) the direct, indirect, and cumulative environmental impacts of GHG emissions from the APDs; and (2) the cumulative HAP emissions and the associated environmental and health impacts," the court remanded the case, directing the district court to determine the appropriate remedy, including whether or not to vacate the APDs, and "to apply the test for injunctive relief in the first instance if it determines vacatur is not warranted."[43]

Landowner Sampling Its Own Soil Is Not Improper Discovery Entitled to a Protective Order

Plaintiff was contracted by landowners Bryce and Jamie Peterson in order to file suit against the Defendants for failing to properly maintain their oil and gas facilities, which resulted in chronic leaks of hydrocarbons

39. *Id.* at 1043 ("The carbon budget derives from science suggesting the total amount of GHGs that are emitted is the key factor to determine how much global warming occurs. The carbon budget is a finite amount of total GHGs that may be emitted worldwide, without exceeding acceptable levels of global warming. According to the IPCC, the carbon budget remaining in 2011 was below 1,000 GtCO212 for a 66% probability of limiting warming to 2° Celsius above pre-industrial levels. By 2016, the remaining budget had been reduced to 850 GtCO2").

40. *Id.* at 1046 (the BLM concluded that the air quality would not exceed the National Ambient Air Quality Standards or New Mexico Ambient Air Quality Standards).

41. *Id.* at 1047.

42. *Id*.

43. *Id*. at 1050.

onto their property.[44] Defendants filed a motion complaining that the Plaintiff engaged in unauthorized "expert discovery" by testing soil at well facilities "in violation of the discovery moratorium," and prior to conferring as required by Fed. R. Civ. P. 26(f).[45] Plaintiff responded by stating that: (1) it was not conducting discovery because no information was being sought from Defendants; (2) it was simply preparing its case by gathering evidence; and (3) it was not destroying evidence.[46]

The court began its analysis by noting that it was aware of no authority that enables a district court to issue a protective order to prohibit a party's informal investigations before discovery has commenced, and "[b]ecause discovery in the case has not formally commenced, the Court concludes that the plain language of Rule 26(c) does not provide authority for a protective order."[47] The court next reasoned that even if it could issue a protective order, it would still conclude that Plaintiff did not conduct improper discovery. The court was not persuaded by Defendants' argument that Plaintiff was seeking information from Defendant because Plaintiff, not Defendants, own the surface rights of the land and the soil being sampled.[48] In denying Defendants motion, the court also noted that the testing was not one-sided because Plaintiff offered to split the sample with Defendants and that Defendants would otherwise be entitled to the test results through formal discovery.[49]

44. Zia Land and Water Conservation, LLC v. EOR Operating Company, 2022 WL 17978840, at 1 (D.N.M. 2022).

45. *Id.* (quoting Doc. 41).

46. *Id*.

47. *Id*. at 2 (citing In re: Bofi Holding Inc. Securities Litigation, 318 F.R.D. 129, 133 (S.D. Cal. 2016)).

48. *Id*. at 2-3.

49. *Id.* at 4.