William Brancard

New Mexico Energy, Minerals and Natural Resources Department

Santa Fe, NM

Regulation of Oil and Gas Activities under the Oil and Gas Act and the Water Quality Act

- The Oil Conservation Division of the Energy, Minerals and Natural Resources Department (OCD) has authority to regulate environmental impacts of oil and gas activities under both the Oil and Gas Act and the Water Quality Act.

- The Oil and Gas Act gives broad authority to OCD to regulate wastes from oil and gas activities. Section 70-2-12 NMSA 1978 .

- The Water Quality Act establishes OCD as a "constituent agency" with authority to permit facilities that may discharge pollutants to groundwater.

- Recently, OCD has initiated a process to determine whether facilities should be regulated under both laws.

Oil and Gas Act

Among the powers granted to OCD under Section 70-2-12 NMSA 1978 are the authority:

- (15) to regulate the disposition of water produced or used in connection with the drilling for or producing of oil or gas or both and to direct surface or subsurface disposal of the water…in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the state engineer
- (21) to regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment; and
- (22) to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment, including administering the Water Quality Act as provided in Subsection E of Section 74-6-4 NMSA 1978

Oil and Gas Rules

OCD implements rules covering various facilities and impacts:

- Hydrogen sulfide gas, 19.15.11 NMAC
- Pits, below grade tanks, sumps, 19.15.17 NMAC
- Plugging and abandonment of wells, 19.15.25 NMAC
- Produced water, 19.15.34 NMAC
- Waste Disposal, 19.15.35 NMAC
- Surface Waste Management Facilities, 19.15.36 NMAC

Water Quality Act

- The Water Quality Act requires a permit for the discharge of any water contaminant to be issued by a "constituent agency". Section 74-6-5(A). Water Quality Control Commission (WQCC) rules mandate that "no person shall cause or allow effluent or leachate to discharge so that it may move directly of indirectly into ground water unless he is discharging pursuant to a discharge permit". 20.6.2.3104 NMAC.
- Under the Water Quality Act, there are 8 "constituent agencies", including the Environment Department and the Oil Conservation Commission. Section 74-6-2(K). The WQCC determined that OCD will administer and enforce WQCC rules pertaining to surface and groundwater discharges at "oil and natural gas production sites, oil refineries, natural gas processing plants, geothermal installations, carbon dioxide facilities, natural gas transmission lines and discharges associated with the activities of the oil field service industry."

New Permitting Guidance

- In May 2011, OCD issued new guidance on whether it will apply the Water Quality Act or the oil and Gas Act to various types of oil and gas facilities. OCD is taking a stricter view of its authority under the Water Quality Act and will examine currently permitted facilities to determine if they "intentionally discharge or allow the discharge of a water contaminant in the form of effluent or leachate so that it may move directly of indirectly into ground water".

New Permitting Guidance

- OCD will review Water Quality Act permits as they come up for renewal.
- Existing permittees were asked to complete a questionnaire to determine if a discharge permit is still required
- OCD to decide activities covered by discharge permit or by other OCD rules
- Results: 151 permits reviewed: only 9 facilities still need WQCC discharge plans

CERCLA 108(b) Rulemaking

- CERCLA requires EPA to adopt financial responsibility requirements for facilities that create the greatest risks for releases of hazardous substances
- EPA failed to act on requirement until sued
- EPA now focusing on hard rock mines as highest risk
- EPA's proposal could conflict with state regulation of hard rock mining industry

CERCLA Financial Responsibility

- CERCLA 108(b):
- (1) Beginning not earlier than five years after the date of enactment of this Act, the President shall promulgate requirements …that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Not later than three years after the date of enactment of the Act, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners and operators which the President determines present the highest level of risk of injury.

CERCLA Financial Responsibility

- EPA fails to either adopt regulations or identify classes of facilities
- Environmental groups file suit in 2008: Sierra Club v. Johnson (N.D. Cal.)
- District Court orders EPA to issue priority notice
- July 2009: EPA publishes a notice identifying the hard rock mining industry as the highest priority for financial assurance. 74 FR 37213.
- Since then, EPA has published notices identifying other classes of facilities as further priorities but has not proposed financial responsibility rules

CERCLA Financial Responsibility

Issues:

- EPA determined risk based largely on historic contamination at hard rock mines
- EPA largely ignored current regulation of hard rock mines by federal and state agencies
- EPA also ignored financial responsibility currently required by other agencies
- CERCLA financial responsibility could preempt state financial responsibility requirements

CERCLA Financial Responsibility

- Preemption: CERCLA 114
- (d) Except as provided in this title, no owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this title shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility. Evidence of compliance with the financial responsibility requirements of this title shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such vessel or facility.