

BEFORE THE ENERGY AND CARBON MANAGEMENT COMMISSION
OF THE STATE OF COLORADO

IN THE MATTER OF THE APPLICATION OF VERDAD) CAUSE NO. 1
RESOURCES, LLC FOR A VARIANCE FROM THE PIT)
CLOSURE AND RECLAMATION REQUIREMENTS IN) DOCKET NO. 210900149
RULES 911, 1003 AND 1004 WITH RESPECT TO THE)
HEMBERGER 26-34-8-60 FRESHWATER PIT, WELD) TYPE: VARIANCE
COUNTY, COLORADO)
) ORDER NO. 1-317

REPORT OF THE COMMISSION

The Commission heard this matter on August 2, 2023, at the Colorado Energy and Carbon Management Commission (the “Commission” or “ECMC”), 1120 Lincoln St., Suite 801, Denver, Colorado, upon application for an order approving a Rule 502 variance from Rules 911, 1003 (except 1003.e.(2) and 1003.f) and 1004 (except 1004.c.(4), 1004.c.(5), and 1004.e) for a freshwater pit (the “Hemberger Pond”) at the Hemberger 26-34-8-60 location (Location No. 425541, Facility No. 431409) (the “Hemberger Location”) in Weld County at the following property:

Township 8 North, Range 60 West, 6th P.M.
Section 26: SW $\frac{1}{4}$ SE $\frac{1}{4}$

FINDINGS

The Commission finds as follows:

1. Verdad Resources, LLC (Operator No. 10651) (“Verdad”), as applicant herein, is an interested party in the subject matter of the above-referenced proceeding.
2. Due notice of the time, place, and purpose of the proceeding has been given in all respects as required bylaw.
3. The Commission has jurisdiction over the subject matter embraced in said notice, and of the parties interested therein, and jurisdiction to promulgate the hereinafter prescribed order pursuant to the Colorado Oil and Gas Conservation Act.
4. Pursuant to C.R.S. § 34-60-106(12), the Commission promulgated its 1000-Series Rules to govern reclamation of the land and soil affected by oil and gas operations. See Rule 1001.a. Generally, the Commission’s reclamation regulations require the surface of land affected by oil and gas operations to “be restored as nearly as practicable to its condition at the commencement of drilling operations.” *Id.*
5. Rule 1001.c provides that the Commission “shall not require compliance with” the reclamation requirements of Rule 1004 (except Rules 1004.c.(4) and 1004.c.(5)) “if the operator can demonstrate . . . both that compliance with such rules is not necessary to protect the public health, safety and welfare, including prevention of significant adverse environmental impacts, and that the operator has entered into an agreement with the surface owner regarding topsoil protection and reclamation of the land.” Prior to final reclamation approval, the operator “shall either comply with the rules or obtain a variance.” Rule 1001.c.

6. Rule 911 addresses the closure of oil and gas facilities. Operators must close all pits in accordance with Form 27. Rule 911.a. Further, operators must backfill and reclaim pits and dispose of pit liners. Rules 911.c.(1) and (3).

7. Rule 1003 governs interim reclamation. All pits must be backfilled and reclaimed. Rule 1003.a, 1003.d. Generally, “[a]ll disturbed areas affected by drilling or subsequent operations, except areas reasonably needed for production operations or for subsequent drilling operations to be commenced within twelve (12) months, shall be reclaimed as early and as nearly as practicable to their original condition or their final land use as designated by the surface owner.” Rule 1003.b. All compacted areas must be cross ripped. Rule 1003.c. All disturbed areas shall be restored and revegetated as soon as practicable. Rule 1003.e.

8. Rule 1004 addresses final reclamation of well sites and associated production facilities. All pits must be backfilled and reclaimed. Rule 1004.a. The operator must comply with the Rule 900 series to reclaim a pit. Rule 1004.b. The release of financial assurance will not occur until the Director observes “no significant unrestored subsidence” over two growing seasons. Rule 1004.c.(1). Rule 1004.c.(2) requires disturbed areas to be “built on, compacted, covered, paved or otherwise stabilized in such a way as to minimize erosion.” Final reclamation is not complete until “all disturbed areas have either built upon, compacted, covered, paved, or otherwise stabilized.” Rule 1004.d.

9. Rule 502.a provides that “[r]equests for variances to any of the Commission’s Rules or orders will be filed with the Commission.”

10. Rule 502.c provides that an applicant requesting a variance from the Commission pursuant to Rule 502.a must show:

- A. It has made a good faith effort to comply, or is unable to comply, with the specific requirements contained in the Commission’s Rule or order from which it seeks a variance, including, without limitation, securing a waiver or an exception, if any;
- B. The requested variance will not violate the basic intent of the Act;
- C. The requested variance is necessary to avoid an undue hardship;
- D. Granting the variance will result in no net adverse impact to public health, safety, welfare, the environment, or wildlife resources; and
- E. The requested variance contains reasonable conditions of approval or other mitigation measures to avoid, minimize, or mitigate adverse impacts to public health, safety, welfare, the environment, and wildlife resources.

11. On September 10, 2021, amended October 16, 2021, Verdad, through counsel, filed a verified application (“Application”) pursuant to Rule 503.g.(9) for a variance from the reclamation requirements of Rules 1003 and 1004 because the surface owner, Clyde and Janice Hemberger Living Trust (“Surface Owner”) desired to retain the Hemberger Pond.

12. On October 25, 2021, the ECMC Permitting Group approved the Application, stating that the Permitting Group “has no concerns with this application.”

13. Verdad noticed its Application as required by the Commission's rules.
14. On May 2, 2023, Verdad filed a second amended Application, pursuant to the ECMC Reclamation Staff's request to include Rule 911 in the Application.
15. On June 21, 2023, Director Murphy submitted her recommendation on the Application. Director Murphy recommended approval of the variance; however, the Director determined that the variance was not "ministerial in nature, in that it results in a potentially permanent impact that will have to be managed by the landowner and local relevant government." Accordingly, a hearing before the ECMC was held.
16. The Commission has not received any petitions pursuant to Rule 507. Therefore, the Application is uncontested.
17. The Application requests a variance from the reclamation requirements of Rules 911, 1003 (except 1003.e.(2) and 1003.f) and 1004 (except 1004.c.(4), 1004.c.(5), and 1004.e) for the Hemberger Pond. The Hemberger Pond was constructed in May 2014 by Carrizo Niobrara Inc. and Carrizo Oil and Gas, Inc. (collectively, "Carrizo"). In 2016, the Commission entered into a compliance agreement with Carrizo to provide for a delay in the interim reclamation of the Hemberger Pond. Verdad acquired the Hemberger Pond in September 2017. It is a freshwater pit that Verdad intended to use for drilling operations at the Hemberger Location. Verdad's business objectives subsequently changed, and it postponed drilling operations at the Hemberger Location. Instead, Verdad entered into an agreement with Bison Oil & Gas, LLC for their use of the Hemberger Pond as a freshwater source for nearby drilling operations.
18. As provided in Exhibit D to the Application, the Surface Owner and Verdad entered into an agreement to retain the Hemberger Pond (the "Surface Owner Agreement"). This Surface Owner Agreement provides that if the Hemberger Pond is approved to remain in operation, it will be conveyed to Taproot Energy Partners and Taproot Rockies Midstream, LLC (collectively, "Taproot") and used to provide freshwater for energy development. The Surface Owner Agreement requires Taproot to properly maintain the Hemberger Pond and confirms Taproot will be responsible for all necessary remediation, in a manner and to a standard that is comparable to Rules 911, 1003 and 1004. The Hemberger Pond provides essential compensation for the Surface Owner's family and the Surface Owner requests the reclamation requirements for the Hemberger Pond be waived so the Hemberger Pond may continue to operate.
19. The Division of Water Resources has determined that the Hemberger Pond is non-jurisdictional in size and that its continued operation will not require approval from the Division. See Exhibit I to the Application. The Division Engineer has assigned the Hemberger Pond "a Low Hazard rating" given that the flow path would "result in no loss of life or significant property damage." *Id.*
20. The Weld County Planning Department has likewise determined that the continued operation of the Hemberger Pond does not constitute a land use change that requires approval from the County. See Exhibit J to the Application.
21. The Hemberger Pond is not within a No-Surface Occupancy Habitat, national wetlands area, or Public Water System Protection area. Since construction of the Hemberger Pond, the area was subsequently designated a Pronghorn Winter Concentration Habitat. But that does not mean the Hemberger Pond must be removed under the revised Rules. The Final

Statement of Basis and Purpose from the Mission Change rulemakings notes that the revised Rules were intended “to be applied prospective[ly]—applying to new operations after January 15, 2021 [subject to exceptions that do not apply here].” Statement of Basis, Specific Statutory Authority, and Purpose, Docket No. 200600155, 800/900/1200 Mission Change, Cumulative Impacts, and Alternative Location Analysis Rulemaking (“Mission Change SBP”) at 16.

22. The Hemberger Pond will be properly maintained in accordance with the terms of the Surface Owner Agreement, ensuring the surrounding environment will be protected. In light of the seasonal nature of the recent CPW designation, the Agreement to fully reclaim the Hemberger Pond once operations cease, and the Division of Water Resources and Weld County Planning Department’s analyses, retaining the Hemberger Pond will not threaten the public health, safety, welfare, environment or wildlife resources.

23. Based on the Application, Surface Owner Agreement, and other written filings, the Commission concludes the Application satisfies the requirements of Rule 502.c because:

- A. Verdad “has made a good faith effort to comply” with Rules 911, 1003 and 1004. Rule 502.c.(1). Carrizo and Verdad have completed all other reclamation at the Hemberger Location as required by Rules 911, 1003 and 1004. Verdad previously sought to extend the delay in interim reclamation and agreed to conditions recommended by the ECMC Staff for this purpose. Verdad has also entered into a Surface Owner Agreement providing for full reclamation of the Hemberger Pond when use of the pond ceases.
- B. Verdad’s requested variance will not violate the basic intent of the Oil and Gas Conservation Act. See Rule 502.c.(2). Deference to the surface owner’s wishes regarding continued use of their property is consistent with multiple provisions of the Act recognizing the significant role the surface owner should play regarding the reclamation of and operations on his or her land. See, e.g., C.R.S. § 34-60-106(3.5) (directing that land restoration occur “in accordance with the owner of the surface of the lands”); C.R.S. § 34-60-127(1)(a) (requiring that oil and gas operations “accommodate[] the surface owner” in conducting oil and gas operations). In addition, reclamation of the Hemberger Pond at this time would needlessly disturb the existing landscape, in contravention of C.R.S. § 34-60-106(2.5) (directing the Commission to “protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources”). Such activities would generate current environmental impacts such as surface disturbance, traffic, air emissions, noise, and other potential nuisances without any commensurate benefits.
- C. The variance is necessary to avoid undue hardship, namely, the loss of a productive use of the Surface Owner’s Land and a continuous revenue stream. See Rule 502.c.(3). The Hemberger Pond provides essential compensation for the Surface Owner’s family and the sudden loss of this revenue source would be detrimental.
- D. The variance will not result in a “net adverse impact to public health, safety, welfare, the environment, or wildlife resources.” See Rule 502.c.(4). Regarding public health, safety, and welfare, the Hemberger Pond is

located in a rural area and keeping it in place will have no adverse effects on the public. Regarding the environment and wildlife resources, there will be no net adverse impact because the Hemberger Pond has never stored produced water or other exploration and production waste, it has always stored freshwater. It is about one-quarter mile from the nearest surface water and about three-quarters of a mile from the nearest water well. The Hemberger Pond is lined with a geomembrane, and the shallowest groundwater is more than 60 feet below ground. Wildlife resources are protected by a four-strand perimeter fence around the Hemberger Pond, and migrating waterfowl periodically use the Hemberger Pond to rest and drink freshwater. Further, the Surface Owner Agreement ensures that when use of the Hemberger Pond later ceases the Pond will be reclaimed in a manner and to a standard that is comparable to Rules 911, 1003 and 1004. Last, the variance is subject to reasonable conditions of approval and mitigation measures as described below.

- E. Pursuant to Rule 502.c.(5), the variance contains reasonable conditions of approval and mitigation measures to avoid, minimize, or mitigate adverse impacts to public health, safety, welfare, the environment, and wildlife resources. The Surface Owner Agreement provides that the Hemberger Pond will be reclaimed and reseeded to the original condition and all disturbed areas have been restored to as near their pre-construction condition as reasonably practicable.

24. Verdad agrees to be bound by oral order of the Commission.

25. Based on the facts stated in the verified Application, the Surface Owner Agreement, and other materials submitted by Verdad, and no petitions having been received, the Commission finds that Verdad has satisfied Rule 502.c and that the requested variance to Rules 911, 1003 (except 1003.e.(2) and 1003.f) and 1004 (except 1004.c.(4), 1004.c.(5), and 1004.e) is warranted for the Hemberger Pond.

ORDER

NOW, THEREFORE, IT IS ORDERED, that:

1. The Application for a Rule 502 variance from the reclamation requirements of Rules 911, 1003 (except 1003.e.(2) and 1003.f) and 1004 (except 1004.c.(4), 1004.c.(5), and 1004.e) Rules 1003 and 1004 for the Hemberger Pond that the Surface Owner wants to retain in Weld County, Colorado is GRANTED.

2. The provisions contained in this Order shall become effective immediately.

3. Within 30 days of this Order, Applicant will submit a Form 4 documenting the variance relief to the Location 425541 file. The Form 4 will include the Order number, all Rules from which relief was granted, and a summary of the relief granted.

4. The Commission expressly reserves its right, after notice and hearing, to alter, amend or repeal any and/or all of the above orders.

5. Under the State Administrative Procedure Act, the Commission considers this Order to be final agency action for purposes of judicial review within 35 days after the date this Order is mailed by the Commission.

6. An application for reconsideration by the Commission of this Order is not required prior to the filing for judicial review.

ENTERED this 3rd day of August, 2023 as of August 2, 2023.

ENERGY AND CARBON MANAGEMENT COMMISSION
OF THE STATE OF COLORADO

By _____


Mimi C. Larsen, Commission Secretary