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Via U.S. Mail

Ms. Florene Davidson
New Mexico Oil Conservation Division
1220 South Saint Francis Dr.
Santa Fe, NM 87505

RE: **Case No. 14784**; *Application of the New Mexico Oil and Gas Association for Amendment of Certain Provisions of Title 19, Chapter 15 of the New Mexico Administrative Code Concerning Pits, Closed-Loop Systems, Below Grade Tanks, Sumps and Other Alternative Methods Related to the Foregoing and Amending Other Rules to Conforming Changes Statewide.*

Case No. 14785; *Application of the Independent Petroleum Association of New Mexico for Amendment of Certain Provisions of Title 19, Chapter 15 of the New Mexico Administrative Code Concerning Pits, Closed-Loop Systems, Below Grade Tanks, Sumps and Other Alternative Methods Related to the Foregoing and Amending, Statewide and Amendment of Title 19, Chapter 15, Part 39.8(B) of the New Mexico Administrative Code Concerning Pits and Sierra and Otero Counties.*

NEW MEXICO LULAC'S COMMENTS IN OPPOSITION TO APPLICATIONS

I. INTRODUCTION

These comments are in response to the Independent Petroleum Association of New Mexico's (IPANM) and New Mexico Oil and Gas Association's (NMOGA) applications for rulemaking submitted to the Oil Conservation Division of the Energy, Minerals and Natural Resources Department of New Mexico (NMOCD). The petitions for rulemaking are set for a hearing beginning on May 14, 2012. NM LULAC previously submitted comments in opposition to the proposed amendments in January, 2012 for a hearing that was set for January 23, 2012. NM LULAC reasserts its stance in opposition to the rulemaking applications filed by NMOGA and IPANM. The petitioners' political jockeying and efforts to control and manipulate this public process has only worked

All for One and One for All

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against them. NM LULAC remains in support of the NM Pit Rule because it serves the New Mexican environment and its citizens, works in the best interest of the New Mexican oil and gas industry, and creates jobs for our members and citizens. NM LULAC supports the Pit Rule as currently written, and provides these comments to highlight the deficiencies of the IPANM and NMOGA's applications and the harmful effects that would result from adoption of their proposed amendments.

II. BACKGROUND

New Mexico took a critical step forward in protection of its citizens, water and land resources when NMOCD passed the Pit Rule in 2008.¹ Before passage of the Pit Rule, oil & gas operators could much more easily dump waste directly into pits at production sites, leaving toxic pollutants to seep into our irreplaceable water supply. Each abandoned pit left a scar on the land and an operator or landowner liable for cleanup and damages. In 2008 alone, more than 400 self reported cases of ground water contamination were caused by these pits. Over eighteen (18) months of rulemaking and nineteen (19) days of hearings, NMOCD considered the concerns of industry experts, community members, environmental advocates and industry stakeholder companies. The result of these comprehensive efforts was a rule that provided a level of protection for the common water resources of all New Mexicans, including LULAC New Mexico's members and the rural Hispanic community. The Pit Rule was attacked by some operators' misleading claims that the rule makes exploration and production of oil and gas unprofitable. The truth is that commodity prices, not the Pit Rule, are responsible for fluctuating levels of oil & gas activity. After the Pit Rule was implemented, the industry continued to thrive and rig counts continued to rise until the price of oil dropped. Nonetheless, the disingenuous claims of economic harm by some operators led to weakening the original protections of the Pit Rule and to risking harm to New Mexico's valuable natural resources.

¹ See Rule 19.15.17 NMAC.

Today the Pit Rule represents New Mexico's increasing level of sophistication and commitment to prevent careless oil & gas waste dumping from harming its residents. This new attack on the Pit Rule and on New Mexico's irreplaceable resources is an attempt to maximize a few operators' profits at the expense of the entire state. Clearly, no one escapes the economic loss brought about by the pollution of our soils and waters. For these compelling reasons, LULAC New Mexico passed a resolution in support of the existing Pit Rule.² NM LULAC opposes the proposed changes offered by the petitioners, and respectfully requests that their applications be denied.

III. DEFICIENCIES OF APPLICATIONS FOR RULEMAKING

Abandoning environmentally protective provisions of the Pit Rule would be a step backwards for New Mexico. NMOCD should dismiss the petitioners' applications because the applications fail to adequately address fundamental, threshold issues that would justify any changes to the rules. Petitioners have failed to show that the Pit Rule is sufficiently economically burdensome on the oil and gas industry to result in making drilling and production uneconomical. Petitioners have failed to show that the existing Pit Rule is not protective of the environment.

First, petitioners have failed to show that the Pit Rule is economically damaging or unduly impairs landowner rights. Each petitioner merely provides conclusory statements that the Pit Rule is an "unnecessary impediment" and "regulatory burden" on oil and gas development that "impair[s] correlative rights" of mineral owners. The reality is that environmental contamination is costly. An ounce of prevention is worth a pound of cure. The Pit Rule justifiably allocates reasonable costs to operators at the time of production. Without the rule, each operator would have increased liability for damage to land, surface and groundwater and human health. Additionally, the resources of New Mexico would be at risk of contamination that requires clean up that is far more expensive than the cost of responsible compliance with the Pit Rule. Even though there is no evidence that the Pit Rule negatively affects jobs and production and exploration

² See League of United Latin American Citizens' Resolution dated May 1, 2011.

activity in New Mexico, some operators have sought to avoid paying the cost to operate responsibly by attacking the Pit Rule. These few operators would increase their short-term profits at the cost of our land and water. New Mexico deserves better.

Second, petitioners have failed to provide evidence that the Pit Rule does not protect the environment. Petitioners' claimed that the Pit Rule is "unnecessary" and that the Pit Rule "does not ... prevent waste or protect ground water, human health and the environment." To the contrary, the Pit Rule was proven to prevent waste, protect ground water, and protect human health and the environment through eighteen (18) months of rulemaking and nineteen (19) days of hearings. NMOCD considered the concerns of industry experts, community members, environmental advocates and industry stakeholder companies. The resulting existing rules are critical for protection of ground water, human health and the environment. They should not be amended or struck down without ample support.

IV. HARMFUL EFFECTS OF APPLICANTS' PROPOSED CHANGES

The petitioners cannot show that the proposed changes to the rules are more protective of the environment than the existing rules. They simply cannot demonstrate this with science. "*As effective*" will be their argument. Such justification is insufficient to amend existing rules. In reality, the proposed changes are a proliferation of less-stringent disposal requirements that will lead to more pollution and more litigation in New Mexico – a cost-cutting measure at the expense of New Mexican's shared natural resources.

The petitioners have proposed changes to allow higher concentrations of chemicals of concern, such as BTEX, TPH and organics. These concentrations would clearly violate the federal Safe Drinking Water Act limits, and New Mexico's own public water supply limits. In addition, a new definition of "low chloride" fluids would allow for such non-potable waters to be disposed of without the Pit Rule's existing regulatory protections. NM LULAC understands and appreciates that drinking water standards are not controlling under the Commission's rules. However, allowing more concentrated wastes

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to be disposed of in a more loosely regulated manner, makes no sense. The existing Pit Rule provides additional protections to water resources than the proposed changes, and therefore should be maintained.

The proposed changes would allow a new type of offsite, multi-well pit. NM LULAC asserts that these types of pits would effectively work as de facto commercial disposal sites, without being permitted as commercial disposal facilities by the Commission. Limited waste from one or a small group of wells on one lease disposed of at the location of the wells is and has been the standard. Such disposal activities have been vastly improved by the existing Pit Rule. To allow operators to act as pseudo-commercial disposal facilities, taking waste from offsite, from multiple wells, and for extended periods of time, without meeting all the siting and permitting requirements of commercial facilities, is outrageous. This proposed change should be denied.

The proposed changes would revise chloride drilling fluids limit to an extremely high 15,000 mg/kg. Other states require treatment or injection of drilling fluids that exceed 3,000 mg/kg. Pit disposal of drilling fluids with the proposed high limits can only lead to further surface and groundwater contamination in New Mexico. NM LULAC supports a chloride limitation of 3,000 mg/kg for any surface disposal or pit disposal.

The petitioners propose to write-out the use of closed loop systems. The petitioners cannot justify why closed loop systems should not be used, other than their own convenience and cost. The proposed changes do not address why use of closed loop systems is not environmentally protective. Again, the petitioners have no evidence that compliance with the Pit Rule makes drilling uneconomical. NM LULAC asserts that environmental regulations do not exist for the convenience of operators. They exist to protect human health and the environment. They may not be avoided merely because compliance results in less profit. The threshold issue of economics – whether drilling has in fact not occurred because of the Pit Rule's existence has not, and cannot be, be

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met by the petitioners. An argument that profits are smaller is insufficient to revise the rules.

The petitioners have proposed many changes to specific siting rules, such as depth to groundwater of 25 feet instead of 50 feet. The existing protective measures are supported by substantial scientific data to give baseline protective assumptions to both industry and regulators. Site specific data, another area that petitioners propose to do away with, is then used to devise a site-appropriate plan for safe disposal. Geology, hydrogeology and topography are not uniform across our state. Having a professional actually visit a proposed location (not just look at a generalized publication that can be decades old), perform a site assessment and investigation, and design engineered protective barriers is standard best management practices in today's world. The existing depth to groundwater and site specific analysis requirements in the Pit Rule should not be changed.

The petitioners have proposed less protective distance limitations to surface waters. A proposal to reduce the distance to existing surface waters by two-thirds is unsupported. Waste containing significant amounts of chlorides, TPH, benzene, metals, organics, etc. should be located away from water courses.³ Without a showing by the petitioners that distance requirements should be lessened by two-thirds (300' to 100') is more protective of the environment, these changes should be denied.

The petitioners have proposed new definitions of "groundwater" and "watercourse." The new definitions work to declare that some surface water and groundwater are not deserving of being protected from pollution. In these days of drought, population increases and higher food prices, all water in New Mexico must be protected. To make it legal and acceptable to pollute any water, when there are protective rules that attempt

³ The proposed changes to the definition of "watercourse," "groundwater," "wetlands," and "visible" are wholly unsupported. Waters of the state and wetlands are well-established definitions in federal and state law. "Visible," as proposed to be defined, is ridiculously speculative and subjective. Altering established regulatory definitions in the proposed way without substantial peer review and scientific support is unreasonable.

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to prevent pollution now in place, is the worst kind of law. NM LULAC asserts that all the waters in the state must be protected by consistently applying regulations.

The petitioners have proposed to allow for four months (120 days), instead of the existing requirement of 30 days, to empty temporary pits. This proposed change puts poor or lazy management practices into rule. If operators cannot do their work in 30 days, is it because they have so many wells to drill that they have put environmental issues on the backburner? NM LULAC asserts that the proposed change requires submission of sufficient technical information to the Commission regarding why this change is necessary. Convenience and cost are not sufficient.

The petitioners have failed to acknowledge that lessening environmental protections can result in increasing operator's economic liability. Unlike in the past, surface owners do not want waste buried on site anymore. In addition to often having smaller tracts of land, surface owners do not always share in the mineral wealth. Rural surface owners also do not want the liability that comes with waste disposal. The petitioners desire to find their own lands and dispose of their own waste, with as little government intrusion as possible. That theory does not work with municipal waste in our state. It should not be allowed in the area of oil and gas waste.

V. CONCLUSION

NMOCD is charged with administering the Water Quality Act, which requires adopting standards that "shall at a minimum protect the public health or welfare [and] enhance the quality of water."⁴ The applications for rulemaking and proposed changes would do the opposite. Not only do they fail to justify changing the Pit Rule in the first place, the proposed revisions are unmistakably harmful to New Mexico's environment and therefore, to its people. NM LULAC respectfully requests that NMOCD uphold its charge to protect the environment and enhance the quality of water by denying the

⁴ NMSA 70-2-12(B)(22); NMSA 74-6-4.

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IPANM and NMOGA's applications for rulemaking. Once our clean water is gone, it's gone forever.

Sincerely,

A handwritten signature in black ink, appearing to read "Froy Salinas", with a large circular flourish on the left side.

Froy Salinas
Environmental Chair, NM LULAC

** The League of United Latin American Citizens (LULAC) is the oldest and largest Latino civil rights organization in the United States. Formed in Corpus Christi, Texas in 1929, LULAC strives to this day to advance the economic condition, educational attainment, political influence, health, and civil rights of Hispanic Americans through community-based programs operating at more than 700 LULAC councils nationwide.