

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

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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. 14784

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 OTHER RULES TO CONFORMING CHANGES, STATEWIDE.

CASE NO. 14785

THE OIL CONSERVATION DIVISION'S PROPOSED
PARTIAL ORDER OF THE COMMISSION
WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

BY THE COMMISSION:

This case came before the Oil Conservation Commission (Commission) for hearing beginning at 9:00 a.m. on May 14, 2012 and concluded on August 28, 2012 at Santa Fe, New Mexico.

Now on this 17th day of September, the Commission, having considered the testimony and evidence presented

FINDS THAT:

- (1) Due public notice has been given and that the Commission has jurisdiction over this rulemaking.
- (2) The New Mexico Oil and Gas Association (NMOGA) filed an application on September 30, 2011 to amend 19.15.17 NMAC, Pits, Closed-Loop Systems, Below-Grade Tanks and Sumps.
- (3) The Independent Petroleum Association of New Mexico (IPANM) filed an application on November 29, 2011 to also amend 19.15.17 NMAC.

(4) The Oil Conservation Division (OCD) filed its final set of modifications to the proposed applications on April 27, 2012.

(5) By Order R-13506(B) the Commission consolidated the applications.

(6) 19.15.17.7. Definitions. During the course of the hearing NMOGA witness, Jerry Fanning, testified that a below-grade tank means a vessel with *greater than a 5 gallon capacity*, excluding sumps and pressurized pipeline drip traps, installed within an excavation or buried below the surrounding ground surface's elevation. Below-grade tanks do not include an above ground storage tank that is located above or at the surrounding ground surface's elevation and is surrounded by berms. (Emphasis added. Transcript Vol. 2 pg. 338 lns. 1-22)

(7) 19.15.17.7. Definitions. Closed-loop system means a system that uses above ground steel tanks for the management of drilling or workover fluids. (OCD Exhibit 2 pg. 1)

(8) 19.15.17.7. Definitions. Confined ground water means water contained within soil or rock below the land surface that is saturated with water where there are layers of impermeable material both above and below and the water is under pressure so that when penetrated by a well, the ground water will rise. (OCD Exhibit 2 pg. 1)

(9) 19.15.17.7. Definitions. Continuously flowing watercourse means a river, stream or creek that is named or delineated by a solid blue line on a USGS quadrangle map having a scale factor of 1:24,000 and that typically has water flowing during the majority of days of the year. This does not include ephemeral washes, arroyos, and similar depressions that do not have flowing water during the majority of the days of the year. (OCD Exhibit 2 pg. 2) The OCD proposed the previous stated definition for continuously flowing watercourse because it assists the OCD in protecting surface water. (Transcript pg. 1834)

(10) 19.15.17.7. Definitions. Floodplain means US Army Corps of Engineers or FEMA documented 100-year floodplain. (OCD Exhibit 2 pg. 2) This definition has been proposed because it is clear and specific. (Transcript pg. 79)

(11) 19.15.17.7. Definitions. Life form ratio means the relative percentage of regionally native species in each of the following classifications: shrubs, forbs, and grasses. (Transcript pg. 943)

(12) 19.15.17.7. Definitions. Measurable means a layer of oil greater than a sheen that is measurable by color cutting or other acceptable method. (OCD Exhibit 2 pg. 2)

(13) 19.15.17.7. Definitions. Multi-well fluid management pit means a pit used for the storage, treatment, and recycling of stimulation fluids and flow-back water during the drilling and completion of multiple wells. Multi-well fluid management pits are not governed under the Surface Waste Management Rule 19.15.36 NMAC and may not be used for the disposal of drilling or completion waste. Multi-well fluid management pits may be located either onsite or offsite of a well drilling location and may remain in use until all wells identified in the pit permit are completed. Any fresh water containment structure, such as a pond, pit, or other impoundment, is not included in this definition. (OCD Exhibit 2 pg. 2) Multi-well fluid management pits are intended to be a fluid storage pond to enable operators to have an opportunity to store large quantities of water, predominantly produced water or water that's recycled, in order to stimulate numerous wells and have a reliable source of water. (Transcript pg. 230)

(14) 19.15.17.7. Definitions. Playa lake means a level or nearly level area that occupies the lowest part of a completely closed basin and that is covered with water at irregular intervals, forming a temporary lake. (OCD Exhibit 2 pg. 2) This definition is the same as used in 19.15.2.7(P)4 NMAC.

(15) 19.15.17.7. Definitions. Restore means to return a site to its former condition, in the manner and to the extent required by 19.15.17.13(F) NMAC. By defining "restore" the Division has more certainty that operators will be clear as to what is expected of them. (OCD Exhibit 2 pg. 3 and Transcript Vol. 8 pg. 1844)

(16) 19.15.17.7. Definitions. Significant watercourse means a watercourse with a defined bed and bank either named or identified by a dashed blue line on a USGS 7.5 minute quadrangle map or the next lower order tributary with a defined bed and bank of such watercourse. (OCD Exhibit 2 pg. 3) The OCD proposed the previous stated definition for continuously flowing watercourse because it assists the OCD in protecting surface water. (Transcript pg. 1834)

(17) 19.15.17.7. Definitions. Sump means a collection device with a capacity less than or equal to 500 gallons, which remains predominantly empty, and serves as a drain or receptacle for de minimis releases on an intermittent basis and is not used to store, treat, dispose of or evaporate products or wastes. Buckets, pails, drip pans or similar vessels that are not in contact with the ground surface are not sumps. (OCD Exhibit 2 pg. 3) This proposed definition is clear

and therefore OCD would be able to effectively enforce rules pertaining to sumps. (Transcript pg. 1829)

(18) 19.15.17.7. Definitions. Temporary pit means a pit, including a drilling or workover pit, which is constructed with the intent that the pit will hold liquids for less than six months and will be closed in less than one year. Temporary pits may be used for one or more wells and located either onsite or offsite of a well drilling location. Any fresh water containment structure, such as a pond, pit, or other impoundment, is not a temporary pit. (OCD Exhibit 2 pg. 3)

(19) 19.15.17.7. Definitions. Unconfined ground water means ground water whose upper water surface (water table) is at atmospheric pressure and is able to rise and fall. (OCD Exhibit 2 pg. 3)

(20) 19.15.17.7. Definitions. Visible when used with respect to oil on the surface of a pit means any sheen on the pit liquid surface. (OCD Exhibit 2 pg. 3) Brandon Powell, on behalf of the OCD, stated NMOGA's and IPANM's recommended 30% criteria would be hard to enforce because there is no standardized testing and, therefore, would also be at the discretion of the inspector in the field as to what they feel is 30%. Additionally, any wind in the area could push any oil to one side of the pit or the other and stack it upon itself, which would reduce the 30% area. (Transcript pg. 1830 lns. 8-18)

(21) 19.15.17.8 Permit or Registration Required. Registration of below-grade tanks with the appropriate division district office should be required in order to identify the owner of the tank. Registration would also allow OCD to review whether closure was proper. Finally, registration would allow for the OCD to efficiently resolve the back log of below-grade tank permitting. (Transcript pg. 1832 lns. 3-15 and pg. 1841 lns. 7-16)

(22) 19.15.17.9 Notification Required. An operator shall use a form C-101, form C-103, or applicable BLM form to notify the appropriate division district office of construction or use of a closed-loop system. A closed-loop system shall use appropriate engineering principles and practices and follow applicable manufacturers' requirements or the equivalent thereto. (OCD Exhibit 2 pg. 4) By requiring notification the OCD will know what equipment is located at the site and will lessen the permitting burden placed upon operators. Most operators already construct closed-loop systems using appropriate engineering standards, by including this as a requirement formalizes the practice. This requirement can be effectively enforced by the OCD. (Transcript pgs. 1882-1884; 1885 lns. 1-6)

(23) 19.15.17.9 Notification Required. A closed-loop system shall use appropriate engineering principles and practices and follow applicable manufacturers' requirements or the equivalent. (OCD Exhibit 2 pg. 4) This language assures the Division that the equipment used on-site is properly engineered. The Division would be able to effectively enforce this requirement. (Transcript Vol. 8 pgs. 1884 -1885)

(24) 19.15.17.9 Permit Application and Registration. An operator may use, with approval by the appropriate division district office, standardized plans for temporary pits, below grade tanks, and multi-well fluid management pits, and other plans which will remain approved until a subsequent plan is either required by the appropriate division district office or is submitted by the operator and approved by the appropriate division district office. (OCD Exhibit 2, pgs. 6&7) Standardized plans go through a stringent review process to make sure there is compliance with all rules. Standardized plans are easier for OCD field inspectors to work with, which allows for effective enforcement of the rules. (Transcript pg. 1831 lns. 8-18)

(25) 19.15.17.10 Siting Requirements. The Division reviewed siting requirements for effective enforcement and administrative feasibility only. The Division offered the following modifications for ease of administration which allows for effective enforcement. If the Commission chooses to adopt new Siting Requirements, the Division respectfully requests its modifications be adopted.

An operator shall not locate a below grade tank (a) within 100 feet of a continuously flowing watercourse or any other significant watercourse or lakebed, sinkhole, or playa lake (measured from the ordinary high-water mark), unless the appropriate division district office approves an alternative distance based upon the operator's demonstration that surface and unconfined ground water will be protected; (b) within 100 feet of a private, domestic fresh water well or spring used for public or livestock consumption; (c) within 100 feet of a wetland; (d) where depth to unconfined ground water is less than 10 feet below the bottom of the tank; (e) within 300 feet from an occupied permanent residence, school, hospital, institution, or church in existence at the time of initial application; (f) within incorporated municipal boundaries or within a defined municipal well head protection area, as defined by 19.15.2.7 NMAC covered under a municipal ordinance adopted pursuant to NMSA 1978, Section 3-27-3, as amended, unless the municipality specifically approves; (g) within the area overlying a subsurface mine, unless the appropriate division district office specifically approves the proposed location based

upon the operator's demonstration that the below-grade tank's construction and use will not compromise the subsurface integrity; or (h) within an unstable area, unless the operator demonstrates that it has incorporated engineering measures into the design to ensure that the below-grade tank's integrity is not compromised. (OCD Exhibit 2 pgs. 10 & 11). The OCD proposed this modification for clarity and protection of human health and the environment. This modification could effectively be enforced. (Transcript pg. 1834 lns. 12-21)

(26) 19.15.17.10 Siting Requirements. Siting Requirements for temporary pits, multi-well fluid management pits, below-grade tanks and wastes. The Commission should adopt siting requirements which include specific distances from continuously flowing watercourses or other significant watercourse or lakebeds, sinkholes or playa lakes (measured from the ordinary high water mark). (OCD Exhibit 2 pgs. 9, 10, 11)

(27) 19.15.17.10 Siting Requirements. An operator shall not locate material excavated from a pit's construction within a specific distance from a continuously flowing watercourse or a flowing significant watercourse. (OCD Exhibit 2 pg. 10)

(28) 19.15.17.10 Siting Requirements. The Division reviewed the siting requirements for effective enforcement and administrative feasibility only. The Division offered the following modifications for ease of administration which allows for effective enforcement. If the Commission chooses to adopt new Siting Requirements, the Division respectfully requests its modifications be adopted.

An operator shall not locate a below grade tank:

(a) within 100 feet of a continuously flowing watercourse or any other significant watercourse or lakebed, sinkhole or playa lake (measured from the ordinary high-water mark), unless the appropriate division district office approves an alternative distance based upon the operator's demonstration that surface and unconfined ground water will be protected;

(b) within 100 feet of a private, domestic fresh water well or spring used for public or livestock consumption;

(c) within 100 feet of a wetland; or

(d) where depth to unconfined ground water is less than 10 feet below the bottom of the tank;

(e) within 300 feet from an occupied permanent residence, school, hospital, institution or church in existence at the time of initial application.

(f) within incorporated municipal boundaries or within a defined municipal well head protection area, as defined by 19.15.2.7 NMAC covered under a municipal ordinance adopted pursuant to NMSA 1978, Section 3-27-3, as amended, unless the municipality specifically approves

(g) within the area overlying a subsurface mine, unless the appropriate division district office specifically approves the proposed location based upon the operator's demonstration that the below-grade tank's construction and use will not compromise the subsurface integrity; or

(h) Within an unstable area, unless the operator demonstrates that it has incorporated engineering measures into the design to ensure that the below-grade tank's integrity is not compromised. (OCD Exhibit 2 pgs. 10-11)

(29) 19.15.17.11 Design and Construction Specifications. An operator shall fence or enclose a pit or below-grade tank. (OCD Exhibit 2 pg. 13)

(30) 19.15.17.11 Design and Construction Specifications: Fencing. The appropriate division district office *may* approve alternatives to these requirements if the operator demonstrates that the alternatives provide equivalent or better protections to livestock, wildlife or human safety. (Emphasis added. OCD Exhibit 2 pg. 14)

(31) 19.15.17.11 Design and Construction Specifications. The operator shall equip below-grade tanks with a properly operating automatic high-level shut-off control device or automatic call-out system notifying the operator of a potential over flow and manual controls. (OCD Exhibit 2 pg. 18 and Transcript pgs. 206 & 207 lns. 1 – 18) An alarm alone is insufficient because there may not be a person present to hear the alarm and respond. (Transcript Vol 8 pg 1885) A call-back alarm system or a remotely monitored alarm system would allow for an operator to quickly address a potential overflow of a below-grade tank. (Transcript Vol. 8 pg. 1886)

(32) 19.15.17.12 Operational Requirements. If any pit liner's integrity is compromised above the liquid's surface then the operator shall repair the damage or replace the liner within 48 hours of discovery or seek a variance from the appropriate division district office. (OCD Exhibit 2 pg. 22) If an operator repairs a liner within the 48 hours there is a decreased opportunity for the tear to increase due to wind or other pressures. The modification does not require the operator to repair the liner within 48 hours; it does require that if the operator does not repair

within 48 hours then the operator needs to contact the district or seek a variance. This ensures the protection of the environment. (Transcript Vol. 8 pg. 1835)

(33) 19.15.17.12 Operational Requirements. Below-grade tanks. The operator shall inspect the below-grade tank for leakage and damage at least monthly. This is a necessary requirement because if signs of damage are present it is an indication that a release may occur in the near future or an unseen release could be occurring. (OCD Exhibit 2 and Transcript Vol. 8 pg. 1836)

(33) 19.15.17.12 Operational Requirements. Below-grade tanks. If upon visual inspection in the area beneath the tank there are any areas that are wet, discolored or showing other evidence of a possible release, the operator shall test the sample of the soil and shall report as required on a Form C 141 pursuant to 19.15.29. (IPANM May 15th Modifications pg. 24) This is a necessary requirement because if there is wet or discolored soil, there is evidence of a release and a release is reported pursuant to Rule 19.15.29, otherwise known as the Spill Rule. This is clear and concise language which the Division could effectively enforce. (Transcript Vol. 8 pgs. 1836-1837)

(34) 19.15.17.13 Closure and Site Reclamation Requirements. The Division reviewed the closure and site reclamation requirements for effective enforcement and administrative feasibility only. The Division offered the following modifications for ease of administration which allows for effective enforcement. If the Commission chooses to adopt new Closure and Site Reclamation Requirements, the Division respectfully requests its modifications be adopted.

A. Closure of permanent pits, temporary pits, multi-well fluid management pits, drying pads and tanks associated with closed-loop systems, and below-grade tanks where the waste will be disposed at a division-approved facility, including but not limited to facilities permitted pursuant to 19.15.36 NMAC.

(1) Prior to commencing closure, an operator shall obtain approval of the closure plan submitted with the permit application or registration pursuant to 19.15.17.9 NMAC.

(2) The operator shall close a permanent pit, temporary pit, multi-well fluid management pit, drying pad and tank associated with a closed-loop system, and below-grade tank by excavating and / or removing all contents and, if applicable, synthetic liners. The contents and, if applicable, synthetic liners will be transferred to a division-approved facility, including but not limited to facilities permitted pursuant to 19.15.36 NMAC.

(3) The operator of a multi-well fluid management pit is not required to sample under the liner system if leaks are not detected by the leak-detection system during the use of the pit and no visual evidence is present at the time the liner is removed. In all other circumstances, the operator shall test the soils beneath a pit, drying pad and tank associated with a closed-loop system or below grade tank as follows:

(a) A five point composite sample shall be taken under the liner, or below grade tank and the sample shall be analyzed for the constituents in Table I of

19.15.17.13.NMAC.

(b) If the results exceed any of the parameters listed in Table I of 19.15.17.13 NMAC, the division may require additional delineation upon review of the results and the operator must receive approval before proceeding with complete closure.

(c) If the results do not exceed any of the parameters in Table I of 19.15.17.13 NMAC, then the operator can proceed to backfill the pit, pad, or excavation associated with the below grade tank with non-waste containing earthen material. Recontouring and revegetation of closed pits, drying pads and below-grade tanks is addressed in Section F of 19.15.17.13 NMAC.

B. Closure of temporary pits and drying pads and tanks associated with closed-loop systems where the waste will be disposed of in place in an existing temporary pit or in a nearby division-approved temporary pit or a burial trench. The design and construction of a temporary pit and burial trench shall be in accordance with 19.15.17.11 NMAC. Nearby temporary pits and burial trenches are not 19.15.36 NMAC facilities.

(1) Prior to commencing closure of a temporary pit or a drying pad and tank associated with a closed-loop system, an operator shall submit and obtain approval of the closure plan.

(2) The operator shall demonstrate and comply with the siting criteria in Subsection C of 19.15.17.10 NMAC and the closure requirements under Subsection B of 19.15.17.13 NMAC.

(3) The operator shall first remove all free liquids reasonably achievable from the temporary pit or drying pad and tank associated with a closed-loop system and dispose of the liquids at a division-approved facility, including but not limited to facilities permitted pursuant to 19.15.36 NMAC.

(4) When closing a temporary pit the operator shall stabilize or solidify the remaining temporary pit contents to a capacity sufficient to support the final cover of the temporary pit. When transferring the waste contents from a drying pad and tank associated with a closed-loop system into a temporary pit or burial trench, the operator shall stabilize or solidify the waste contents to a capacity sufficient to support the final cover of the temporary pit or burial trench. The operator shall not mix the contents with soil or other material at a mixing ratio of greater than 3:1, soil or other material to contents. The waste mixture must pass the paint filter liquids test (EPA SW-846, Method 9095).

(5) After solidifying or stabilizing the waste, the operator shall collect, at a minimum, a five point composite of the contents of the temporary pit or drying pad and tank associated with a closed-loop system to demonstrate that the stabilized waste does not exceed the criteria in Table II of 19.15.17.13 NMAC.

(6) If the contents from a temporary pit or drying pad and tank associated with a closed loop system do not exceed any of the constituent concentrations shown in Table II of 19.15.17.13 NMAC the operator can either proceed to dispose of wastes in an existing temporary pit or construct a burial trench for disposal of these wastes. Both the temporary pit and the burial trench must be designed and constructed in accordance with the requirements specified in Subsections F and K of 19.15.17.11 NMAC.

(7) If the contents from the temporary pit or drying pad and tank associated with a closed-loop system, after mixing with soil or non-waste material at a maximum ratio of 3:1, exceed any of the constituent concentrations shown in Table II of 19.15.17.13 NMAC, then closure must proceed in accordance with subsection A of 19.15.17.13 NMAC.

(8) Upon achieving all applicable constituent concentrations as set forth in Table II of 19.15.17.13 NMAC and waste stabilization requirements of Subsection B.4 of 19.15.17.13 NMAC, the operator shall cover the temporary pit or burial trench with non-waste containing earthen materials and construct a soil cover prescribed by the Division in paragraph 2 of Subsection F of 19.15.17.13 NMAC.

(9) If the operator has removed the wastes and the liner pursuant to this subsection, the operator shall test the soils beneath the temporary pit as follows:

(a) A five point composite sample shall be taken and analyzed for the constituents in Table I of 19.15.17.13 NMAC.

(b) If the results exceed any of the parameters listed in Table I of 19.15.17.13 NMAC, the division may require additional delineation upon review of the results and the operator must receive approval before proceeding with complete closure.

(c) If the results do not exceed any of the parameters in Table I of 19.15.17.13 NMAC, then the operator can proceed to backfill the pit, pad, or excavation with non-waste containing earthen material. (OCD Exhibit 2 pgs. 26 – 28)

(35) 19.15.17.13 Closure Identification.

(1) The operator shall cause a licensed surveyor to survey the area of closure and certify said location on a form C-102.

(2) A person shall not build permanent structures over an in place disposal.

(3) The operator shall file a deed notice identifying the exact location of the in place disposal with the county clerk in the county where the in place disposal occurs. (OCD Exhibit 2 pg. 36)

The Division requests that the location be reported on a form C-102 because it will allow for the location to be accurately identified and filed with the Division. Filing on a C-102 will allow the Division to easily locate the closure site if there is an issue in the future. Permanent structures should not be allowed because if contaminants are identified the structure may be endangered. The deed notice is necessary in order to put current and future landowners on notice of what is located on the property. (Transcript Vol. 8 pgs. 1838-1839)

(36) 19.15.17.13 Timing requirements for closure. An operator shall close a pit, drying pad associated with a closed-loop system or below-grade tank within the following time periods *or by an earlier date that the appropriate division district office requires because of imminent danger to fresh water, public health or the environment.*

This requirement allows the Division to retain their ability to protect and to effectively enforce the rule. (Emphasis added. Transcript Vol. 8 pg. 1839)

(37) 19.15.17.14 Emergency Actions. The operator shall construct a pit during an emergency.

This does not hamper an operator from constructing a pit if an emergency arises. An operator is not allowed to construct a contingency pit for emergencies. (Transcript Vol. 8 pg. 1887)

(38) 19.15.17.15 Exceptions and Variances.

A. Definitions

1. "Exception" means authorization from the environmental bureau in the division's Santa Fe office to depart from the requirements of 19.15.17 NMAC.

2. "Variance" means authorization from the appropriate division district office to depart from the requirements of 19.15.17 NMAC.

B. Variances.

1. Except as provided below in subparagraph C, an operator may apply to the appropriate division district office for a variance to any of the provisions of 19.15.17 NMAC.

2. If an operator demonstrates to the appropriate division district office that the requested variance provides equal or better protection to fresh water, public health and safety, livestock and the environment, the appropriate division district office shall approve the variance within 60 days.

3. If the appropriate division district office denies the requested variance or fails to grant or deny the requested variance in writing within 60 days of the filing of the request for a variance, then the operator may file an application for hearing with the division clerk. In addition to the information required by Subsection A of 19.15.4.8 NMAC, the application shall include:

a. proof of notification to the surface owner of the location of the requested variance;

b. a statement in detail explaining why the applicant wants to vary from the requirement of 19.15.17 NMAC, and

c. a statement in detail explaining why the applicant believes that the variance will protect fresh water, public health and safety, livestock and the environment.

4. The division clerk will set the application for hearing as soon as practicable.

C. Exceptions.

1. An operator may apply to the environmental bureau in the division's Santa Fe office for an exception to any of the permanent pit requirements of 19.15.17 NMAC.

2. The operator shall give notice of any request for an exception to the surface owner of the location of the requested exception and to such other persons as the division may require.

3. If the operator demonstrates to the environmental bureau in the division's Santa Fe office that the requested exception provides equal or better protection to fresh water, public health and safety, livestock and the environment, the environmental bureau in the division's Santa Fe office shall approve the exception within 60 days.

4. If any person with standing to contest the requested exception files a comment or request for hearing within 30 days after the operator or the division sends notice to such person of the requested exception, and the director determines that a comment or request for hearing presents issues that have technical merit or there is significant interest from the affected public, then the director may cause the matter to be set for hearing.

5. If the environmental bureau of the division's Santa Fe office denies the requested exception or fails to grant or deny the requested exception in writing within 60 days, then the operator may apply for a hearing. In addition to the information required by Subsection A of 19.15.4.8 NMAC, the application shall include:

- a. proof of notification to the surface owner of the location of the requested exception,
- b. a statement in detail explaining why the applicant wants an exception to 19.15.17 NMAC, and
- c. a statement in detail explaining why the applicant believes that the exception will protect fresh water, public health and safety, livestock and the environment.

6. If the director orders a hearing or the operator applies for a hearing, the division clerk shall set the matter for hearing as soon as practicable. (OCD Exhibit 2 pgs 43-44)

A variance may be granted only after the operator can demonstrate said variance offers equal or better protection to fresh water, public health and safety, livestock and the environment. The equal or better protection standard assures that the operator adequately protects public health and the environment. A person's health is directly tied to their safety; if a person is unsafe they are putting themselves at risk of being unhealthy. The Division further requested a 60 day review period because it allows adequate time to review the proposed variance. The Commission should not adopt a rule which allows for a variance to be approved without review because it abrogates the Division's responsibility to the public. (Transcript Vol. 8 pgs. 1888-1890)

The hearing application for a variance requires notice to the surface owner only when the variance request has been denied. (Transcript Vol.8 pg. 1995 lns. 13-17) To proceed to hearing an operator does not need to retain an attorney. (Transcript Vol. 8 pg. 1958 lns. 20-22)

A request for an exception would be filed with the environmental bureau in Santa Fe. If the operator demonstrates the requested exception provides equal or better protection than the environmental bureau in Santa Fe shall approve the exception within 60 days. During the first 30 day period, a person within standing to contest could file a comment or a request for hearing. Only if the director determines that the comment or request presents issues of technical merit or of significant interest to the affected public, will the matter be set for hearing. (Transcript Vol. 8 pg. 1892-1894)

The exception and variance modification should be adopted because site-specific information for well locations is more readily accessible at district offices and therefore a proposed variance would be more easily analyzed by the district office personnel. (Transcript Vol. 8 pg. 1960 lns. 12 -22)

(39) 19.15.17.16 Permit Approvals, Conditions, Denials, Revocations, Suspensions, Modifications or Transfers.

A. The division shall review all applications to permit facilities subject to 19.15.17 NMAC. Within 30 days of receiving an application the division shall make an administrative completeness determination or provide written notice of deficiencies to the applicant's signatory. The application will be considered complete if written notice is not provided by the division within the 30 day evaluation period.

B. Whether or not the division deems an application to be administratively complete within the 30 day evaluation period, the division shall also have an additional 30 days to approve, deny or approve with conditions an application. If the division does not take action within the 60 day review period, then the application is deemed denied and the operator may file an application for hearing with the division clerk.


C. If the division denies an application or approves the application subject to conditions not expressly provided by the Oil and Gas Act or in 19.15.17 NMAC, then the division shall notify the applicant by certified mail, return receipt requested, of the cause for the denial or additional conditions and shall set the matter for hearing if the applicant so requests within 20 days after receipt of such notification. (OCD Exhibit 2 pg. 47)

Administrative completeness is a quantitative review of an application to determine if all pieces of information required for review are present. The Division would have 30 days to make such an analysis. The Division would have a second 30 day review period to evaluate the application for the quality of the information. The entire analysis could be completed in less than 60 days. If the Division does not respond to an application or denies the application the operator may request a hearing. This proposed modification would be effectively enforced by the Division. (Transcript Vol. 8 pgs 1895-1900)

CONCLUDES THAT:

1. The Commission is empowered to create rules. NMSA 70-2-11.
2. The Commission (and the Division) has statutory duty to prevent waste and protect correlative rights. NMSA 70-2-11(A) and Continental Oil Co., 70 N.M. at 323, 373 P.2d at 817.
3. The Commission concludes that adoption of the modifications proposed by the Division, will assist the Division in carrying out its statutory mandates of protecting water, public health and the environment, while preventing waste and protecting correlative rights.
4. The Division has the jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of the Oil & Gas Act or any other law of New Mexico relating to the conservation of oil and gas. NMSA 70-2-6.
5. The Commission should adopt the proposed modifications because said modifications are effectively enforceable by the Division.
6. The requirements of the modifications proposed by the Division are reasonable and that alternative regulatory methods would not accomplish the Division's objectives.

Respectfully Submitted,



Gabrielle A. Gerholt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following parties on September 17, 2012:

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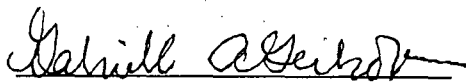
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