

NEW MEXICO  
ENVIRONMENTAL LAW CENTER

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November 2, 2007

**VIA HAND DELIVERY**

Mr. Mark Fesmire  
Chairman  
Oil Conservation Commission  
New Mexico Department of Energy, Minerals  
and Natural Resources  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87505

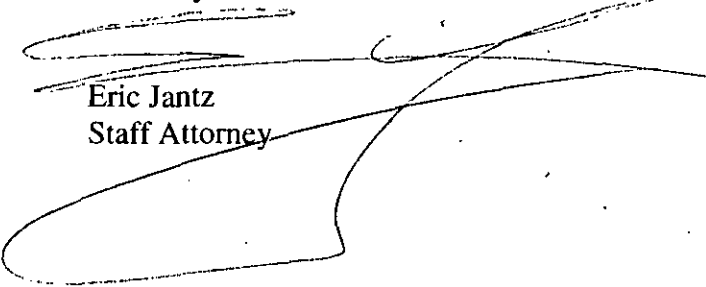
**RE: Repeal of Rule 50 and the adoption of a new rule governing regulation of pits,  
below grade tanks, closed loop waste systems and alternatives to those waste  
disposal methods; Case No. 14015**

Dear Mr. Chairman:

Please find enclosed the Oil & Gas Accountability Project's Response to  
IAPNM's Motion to Compel and Motion for Alternative Dispute Resolution in the above  
matter.

If you have any questions, please feel free to contact me.

Sincerely,

  
Eric Jantz  
Staff Attorney

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

**IN THE MATTER OF THE APPLICATION OF THE NEW MEXICO OIL  
CONSERVATION DIVISION FOR REPEAL OF EXISTING RULE 50  
CONCERNING PITS AND BELOW GRADE TANKS AND ADOPTION OF A  
NEW RULE GOVENING PITS AND BELOW GRADE TANKS, CLOSED LOOP  
SYSTEMS AND OTHER ALTERNATIVE METHODS TO THE FOREGOING,  
AND AMENDING OTHER RULES TO CONFORMING CHANGES  
STATEWIDE.**

**CASE NO. 14015**

**Oil & Gas Accountability Project's Response to Motion to Compel and Request for  
Alternative Dispute Resolution**

The Oil & Gas Accountability Project ("OGAP") hereby submits its response to the Independent Petroleum Association of New Mexico's ("IPANM") Motion to Compel and Request for Alternative Dispute Resolution. OGAP respectfully requests that both IPANM's Motion to Compel and Request for Alternative Dispute Resolution be DENIED.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The background for this proceeding is extensive. Briefly, and in relevant part, the New Mexico Oil Conservation Division ("Division") issued its first draft of a proposed repeal of Rule 50 and the adoption of a new rule governing regulation of pits, below grade tanks, closed loop waste systems and alternatives to those waste disposal methods ("Pit Rule") in March 2006. A number of oil and gas representatives, including IPANM issued comments on this draft Pit Rule. Additional meetings on the draft Pit Rule were held in January 2007 and were intended to solicit the concerns of stakeholders, including IPANM. Finally, in March 2007, the Governor appointed a task force to advise the

Division on issues raised by the proposed Pit Rule. The task force engaged in discussions and identified those areas of the Pit Rule where the task force members could find consensus and those areas where no agreement could be reached. IPANM and other oil and gas industry organizations had representatives on the task force. On September 21, 2007, the Division released its final proposed rule and issued a public notice of rulemaking before the Oil Conservation Commission (“Commission”).

On October 22, the Commission entertained opening statements from the parties to the above-captioned proceeding. IPANM reserved its opening statement, but proffered a Motion to Compel and Motion for Alternative Dispute Resolution.

## **II. ARGUMENT**

### **A. Motion to Compel**

In its Motion to Compel IPANM asserts that Small Business Regulatory Relief Act (“SBRRA”) 1978, NMSA § 14-4A *et. seq.* requires the Division to consider the adverse effects the proposed Pit Rule will have on small businesses and regulatory measures to accomplish the objective of the applicable law while minimizing the adverse effects on small businesses. Motion to Compel at 3, ¶ 9. The IPANM argues that without access to all documents related to adverse effects the proposed Pit Rule might have on small businesses the Division provided to the Small Business Advisory Commission pursuant to the SBRRA, it “will be denied the opportunity to participate in the hearing on the proposed Pit Rules and to present [its] objection to the proposal in a meaningful manner”. Motion to Compel at 4, ¶¶ 12-13.

1. IPANM Misconstrues the SBRRA

IPANM's Motion to Compel is without merit because it misconstrues the SBRRA in three fundamental ways. First, the Division is not bound by SBRRA's requirements under these circumstances because it cannot adopt the Pit Rule. Second, SBRRA only requires evaluating a rule's adverse effects on small businesses prior to the rule's adoption, not at the time the Rule is proposed. Third, the Division is only required to provide a copy of the proposed Pit Rule to the Small Business Regulatory Advisory Commission ("Small Business Commission").

a. The Division Cannot Adopt the Pit Rule

The SBRRA provides that:

Prior to adoption of a proposed rule that the agency deems to have an adverse effect on small business, the agency shall consider regulatory methods that accomplish the objectives of the applicable law while minimizing the adverse effects on small business.

1978, NMSA § 14-4A-4(B). Further, the SBRRA defines "agency" as "every department, agency, board, commission .." of the executive branch of state government. Id. at § 14-4A-3(A).

In this case, the Division is not the agency, as defined under the SBRRA, that must comply with the SBRRA's requirements because it has not and cannot adopt the proposed Pit Rule. 1978, NMSA § 70-2-6(B) ("any hearing on any matter may be held before the commission.."); 19.15.14.1201, 1205 NMAC (outlining Commission authority and process for rulemaking hearings). The Division is merely a proponent of the proposed Pit Rule and has no more authority to adopt the Pit Rule than any other proponent of a proposed rule that comes before the Commission. Thus, the Division is under no obligation pursuant

to the SBRRA to conduct any analysis of the Pit Rule's effect on small businesses and IPANM's demand that it do so is misplaced.

b. The Commission has not adopted the Pit Rule

Moreover, the SBRRA requires only that the Commission resolve whether a proposed rule will have an adverse effect on small business and how to minimize that effect prior to adoption of the proposed rule. 1978, NMSA § 14-4A-4(B). Here, obviously, the Commission has not yet adopted the Pit Rule. Indeed, the Commission has instituted a process whereby all interested parties can make arguments and offer evidence to the Commission about any adverse impacts the proposed Pit Rule may have on small oil and gas operators – a process that includes IPANM. Therefore, IPANM's Motion to Compel is premature and not ripe for consideration.

c. The Division is only required to provide the Small Business Commission with a copy of the proposed Pit Rule.

Finally, the only SBRRA requirement that could reasonably construed to apply to the Division is the requirement that prior to the adoption of a proposed rule that might have an adverse effect on small business an agency shall provide a copy of the proposed rule to the Small Business Commission. 1978, NMSA § 14-4A-4(A). To the extent that the Division has evidence that it provided the Small Business Commission with a copy of the proposed Pit Rule, it should make such evidence available to IPANM and the other parties to this proceeding, and indeed, has done so. *See*, The New Mexico Oil Conservation Division's Response to IPANM's Motion to Compel, Exhibits A-C (Oct. 29, 2007). However, any implication that this requirement requires more should be rejected.

2. The Current Process does not Violate IPANM's Due Process Rights.

IPANM complains that unless it is allowed access to all Division documents related to analyses of adverse effects on small oil and gas operators, its due process rights will be violated. This argument is likewise without merit for two reasons. First, to the extent that IPANM relies on its incorrect interpretation of the SBRRA to support its due process argument, the due process argument must be rejected. *See*, Section II.A.1, above.

Second, given the history of IPANM's participation in the process of fashioning the proposed rule to date and its anticipated participation in the scheduled hearing before the Commission on the Pit Rule, IPANM's due process rights have clearly been protected.

Due process requires notice and an opportunity to be heard, the opportunity to defend against accusations, the opportunity to challenge the opposition's evidence, and the right to a fair hearing before an impartial tribunal. State ex. rel. Children, Youth & Families Dept. v. Mafin, 133 N.M. 827, 833, 70 P.3d 1266, 1272 (N.M. 2003). In this case, IPANM has had ample opportunity to be heard in a meaningful time and manner and challenge evidence that is contrary to its position. Additionally, the upcoming hearing will provide a fair hearing before an impartial tribunal. As demonstrated in Section I, above, the Division has engaged stakeholders on numerous occasions since 2006, and on each occasion, IPANM had the opportunity to present reasons why a proposed Pit Rule would have adverse consequences on its members and how to fashion a rule that avoided those consequences. Moreover, IPANM had a seat on the Governor's

task force to advise the Division on issues surrounding the proposed Pit Rule. Finally, IPANM is a party to the above-captioned proceeding and appears to be ready to take full advantage of the opportunity to present evidence about the adverse effects of the Pit Rule on its members. *See, generally*, IPANM Comments and Witness List (Oct. 29, 2007). Given the extent to which IPANM has had the opportunity to participate in fashioning the proposed Pit Rule and indeed has participated in that process, it cannot now complain that its due process rights have been violated.

**B: Request for Alternative Dispute Resolution**

In its Request for Alternative Dispute Resolution, IPANM again asserts that the Division failed to consider the requirements of the SBRRA in its proposed Pit Rule. Request for Alternative Dispute Resolution at 3. Additionally, IPANM asserts that adoption of the Pit Rule will result in a loss of oil and gas production and associated revenues to the State. *Id.* at 2. As a result, IPANM requests access to alternative dispute resolution processes, pursuant to 1978, NMSA § 12-8A-3(A), to resolve those alleged shortcomings. *Id.* at 2-3. IPANM's request should be rejected.

As demonstrated in Section II.A.1, above, IPANM has misconstrued the SBRRA's requirements. As such, the Commission should disregard those arguments as a basis for IPANM's request for alternative dispute resolution of the Pit Rule. Additionally, IPANM has offered no substantive reason why the current process, i.e., a hearing before the Commission, is inadequate to address IPANM's concern. International Minerals & Chem. Corp. v. New Mexico Pub. Serv.

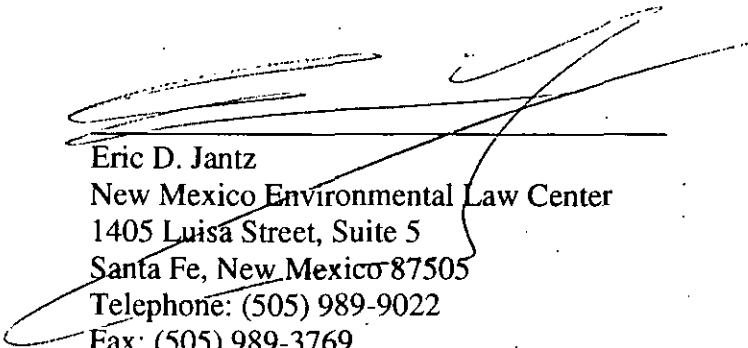
Comm'n, 81 N.M. 280,283, 466 P.2d 557, 560 (N.M. 1970) (proponent of motion in administrative proceedings bears burden of proof). Indeed, as noted above, IPANM appears to be amply ready to advance its reasons why the Commission should reject proposed Pit Rule because of its alleged adverse impacts on small oil and gas operators. IPANM's request for alternative dispute resolution should be rejected.

### III. CONCLUSION

For all the foregoing reasons, OGAP respectfully requests that IPANM's Motion to Compel and Request for Alternative Dispute Resolution be **DENIED**.

Dated: November 2, 2007

NEW MEXICO  
ENVIRONMENTAL LAW CENTER



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### CERTIFICATE OF SERVICE

I hereby certify that on this 2<sup>nd</sup> day of November, 2007, I have delivered a copy of the foregoing pleading in the above-captioned case via email, facsimile, or U.S. mail to the following:

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