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March 23, 2007

Ms. Florene Davidson
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87505

Re: In the Matter of the Application of Harvey E. Yates Company for an Exemption to Commission Rule 19.15.2.50(A) - Case No. 13817

Dear Ms. Davidson:

Enclosed for filing are an original and six copies of Harvey E. Yates Company's Response to Motion to Dismiss.

Very truly yours,

Adam H. Greenwood

AHG/ssc
Enclosures

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

IN THE MATTER OF THE APPLICATION OF HARVEY E. YATES COMPANY FOR AN EXEMPTION TO COMMISSION RULE 19.15.2.50(A) **CASE NO. 13817**

RESPONSE TO MOTION TO DISMISS

The Harvey E. Yates Company ("HEYCO") respectfully requests that the Oil Conservation Commission (the "Commission") reject the Oil Conservation Division's (the "Division") attempt to deny HEYCO a hearing on its application for an exemption to Rule 19.15.2.50(A). In order to prevent waste and protect correlative rights, HEYCO should not be prevented from presenting evidence to show that its proposed reserve pit will not endanger fresh water, public health, or the environment.

ARGUMENT

HEYCO must use a reserve pit if it is not to be prohibited from developing the federal resources on a federal lease within the area covered by Rule 19.15.1.21 NMAC ("Rule 21"). Rule 21 does not flatly prohibit reserve pits and oil and gas development within this area. Instead, it states that the Division "shall not issue permits under 19.15.2.50 NMAC" ("Rule 50"). Rule 21 as enacted is therefore not a ban on pits, but a restriction on Rule 50 permits.

But neither Rule 50 nor any other rule flatly forbids the use of a necessary reserve pit without a Rule 50 permit. On the contrary, Rule 50(A) expressly states the Division can grant exemptions to the requirement that an operator must have a permit:

> Discharge into, or construction of, any pit or below-grade tank is prohibited absent possession of a permit issued by the division, . . . unless the division grants an exemption pursuant to Subsection G of 19.15.2.50 NMAC.

Under the plain language of Rule 50(A), the Division can exempt a pit from the Rule 50 permit requirement. All that is necessary is that the operator meet the standards outlined in Rule 50(G).

The relevant part of Rule 50(G) is Rule 50(G)(2). It simply states that

> [t]he division may grant an exemption from any requirement if the operator demonstrates that the granting of such exemption will not endanger fresh water, public health or the environment.

HEYCO is therefore eligible for the Rule 50(A) exemption if it can demonstrate that its permit would not endanger fresh water, public health or the environment, which HEYCO is willing and able to do if given a hearing.

Interaction between these regulations is clear. Rule 21 prohibits Rule 50 permits for pits in the covered area. Rule 50(A) states that Rule 50 permits for pits are not necessary if an exemption is granted under Rule 50(G). Rule 50(G)(2) states that exemptions are proper if the operator can show that proper precautions will be put in place to protect fresh water, public health or the environment. Yet, the Division has consistently tried to stop HEYCO from making this showing, dismissing HEYCO's Application at the Division level without a hearing and now seeking the same result before the Commission.

In its Motion to Dismiss, the Division labors mightily to explain away the plain language of the Commission's rules, but cannot find a persuasive argument. First, the Division argues that Rule 21 and Rule 50 are in conflict and that Rule 21 prevails. This makes no sense. Rule 21 is not only harmonious with Rule 50 but is dependent on it. Rule 21 merely modifies the circumstances in which Rule 50 permits can be granted so if Rule 50 did not exist, Rule 21 would be meaningless. The Division is well aware that HEYCO has not asked the Division or the Commission to override any part of the plain language of Rule 21. Rule 21 and Rule 50 must be construed to give effect to each. *See* 1978 NMSA §12-2A-10(B) ("If an administrative agency's rules appear to conflict, they must be construed, if possible, to give effect to each.")

Second, the Division argues that Rule 21 itself does not create an exemption. But HEYCO has never argued differently. Indeed, an exemption to Rule 21 would be redundant, since as HEYCO has shown Rule 21 relies on Rule 50 and Rule 50 already allows for exemptions. Additionally, any ambiguity in the regulations should be construed against the Division which drafted the regulations. Moreover, if an exemption were unavailable under Rule 50 then Rule 21 would create an unconstitutional conclusive presumption. *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643, 945 S.Ct. 291, 298 (1974). The regulations should therefore be construed harmoniously to avoid this unconstitutional result. *See Lovelace Medical Center v. Mendez*, 111 N.M. 336, 340, 805 P.2d 603, 607 (1991) ("It is a well-established principle of statutory construction that statutes should be construed, if possible, to avoid constitutional questions.").

More to the point, the Division argues that Rule 50 does not allow exemptions from the requirement to have a permit. The Division points out that Rule 50(G)(2) allows "exemption from any requirement." The Division argues that Rule 50(G)(2) therefore does not allow exemptions from the requirement to have a permit. The Division is in error. It is simply indisputable that having a permit is one of the requirements of Rule 50. And it also indisputable that Rule 50(G)(2) allows for exemptions from "*any* requirement" (emphasis added). But even if "any" could somehow not mean "any," Rule 50(A) specifically states that exemptions are available from the requirement to have a permit:

> Discharge into, or construction of, any pit or below-grade tank is prohibited absent possession of a permit issued by the division, . . . *unless the division grants an exemption pursuant to Subsection G of 19.15.2.50 NMAC.*

(emphasis added). The Division argues that Rule 50(G)(2) needs to be interpreted in the context of the rest of Rule 50, but ignores the language emphasized above, which is in the very first

sentence of Rule 50. As with statutes, Rule 50(G)(2) should be read in light of all of Rule 50, including Rule 50(A). *See Cummings v. X-Ray Assocs.*, 1996 NMSC 35, ¶ 44, 121 N.M. 821, 918 P.2d 1321 (when "analyzing a statute, . . . read the act in its entirety and construe all the provisions together and attempt to view them as a harmonious whole").

The Division also argues that the plain language of Rule 21 and Rule 50 should be ignored to better comply with the "intent" of the rule. But as the Division has assured the Commission, administrative rules are construed in the same manner as statutes. *New Mexico Dept. Of Health v. Ulibarri*, 115 N.M. 413, 416, 852 P.2d 686 (Ct. App. 1993). And it is a fundamental concept of statutory interpretation that "[t]he primary indicator of the legislature's intent is the plain language of the statute." *U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep't*, 2006 NMSC 17, ¶6, 139 N.M. 589, 136 P.3d 999. New Mexico courts do not sanction interpretations of regulations that are contrary to the plain language of the regulations. *See Laguna Indus. v. New Mexico Taxation & Revenue Dep't*, 114 N.M. 644, 652, 845 P.2d 167 (Ct. App. 1992).

In any case, the Division is incorrect that in the order adopting Rule 21, R-12172, the Oil Conservation Commission (the "Commission") expressed an intent incompatible with HEYCO's plain-language interpretation of Rule 21 and Rule 50. As would be expected, R-12172 is compatible with Rule 21's plain language and the plain language of Rule 50. In R-12172, the Commission took the position that pits would generally be banned in the selected area. *Id.* at 8 ("the proposed rule would effectively prohibit the construction and use of pits in the selected areas"). HEYCO is willing to draw the Commission's attention to these portions of R-12172 because nowhere in these portions, or elsewhere, does the Commission state that exemptions could not be considered on a case-by-case basis. On the contrary, the findings made in R-12172 are compatible with the possibility of case-by-case exemptions. For example, R-12172 found that grasslands needed to be protected but that grasslands occupied "a significant part of the area," not the entire area. *Id.* at 12. R-12172 also found that fresh water aquifers were close to the surface "in many areas," not all areas. *Id.* These findings obvious suggest that a case-by-case consideration of exemptions is compatible with protection of the selected area.

The compatibility of case-by-case exemptions is heightened given that HEYCO must show, and will show, that its proposed operations "do not endanger fresh water, public health or the environment." Rule 50(G)(2). Such a showing should satisfy all the concerns expressed in R-12172. HEYCO is prepared to address specific concerns by presenting evidence at a hearing that the aquifer in the area of the proposed pit is not close to the surface. HEYCO is also prepared to present evidence of its superior reclamation track record. Why the Division is opposed to HEYCO presenting this evidence is unclear.

In addition, R-12172 found that closed-loop drilling systems can generally be viable. *Id.* at 12. But contrary to the Division's implication, R-12172 did not make a finding that closed-loop drilling systems were viable in every conceivable circumstance. In fact, R-12172 acknowledged that the finding on closed-loop drilling systems was reached because no contrary evidence had been submitted. Given these facts, the Division has no basis for its argument that R-12172 intended to prevent HEYCO from presenting evidence that closed-loop drilling systems

are not viable in the case-specific circumstance of exploratory drilling for a low-pressure gas reservoir. HEYCO is sure that the Commission did not intend Rule 21 to be a flat prohibition on use of leases in the covered area and will therefore be willing to hear evidence as to the necessity of a reserve pit in the particular circumstances of this case. R-12172 should be interpreted as an attempt to regulate drilling and development in a way that protects fresh water and the environment, but not as an attempt to prohibit drilling and development altogether.

In conclusion, not only is R-12172 compatible with the plain language of Rule 21 and Rule 50, it supports the idea that exceptions might be appropriate under some circumstances. Given R-12172's evident purpose of protecting the environment and fresh water, exemptions under Rule 50(G) are appropriate as they require a showing that the environment and fresh water will not be endangered.

The Division's attempt to deny HEYCO the chance for the exemption that is expressly written into Rule 50 is particularly striking in light of the Division's and Commission's frequent practice of granting exemptions and variances. *See, e.g.,* R-12558. The Division's online case files list 220 records under the subject heading "Exception to Rules and Regulations." In addition, Division and Commission regulations and orders routinely contain provisions allowing for exemptions on a proper showing. *See, e.g.,* R-111-P. It is not surprising that the language of Rule 21 and Rule 50, read together, also allow for exemptions. The Division cannot explain why the Commission would not want to retain flexibility to prevent waste, protect correlative rights, *see* 1978 NMSA § 70-2-11 (1977) and comply with other statutory commands on a case-by-case basis, as it has so often done in the past.

The Commission should therefore allow HEYCO to have a fair hearing and deny the Division's Motion to Dismiss.

WHEREFORE, the Harvey E. Yates Company respectfully requests that the Oil Conservation Division's Motion to Dismiss be denied.

Respectfully Submitted,

By: _____

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WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed to the following counsel of record this 23rd day of March, 2007:

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By: _____
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