



October 1, 2007

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VIA HAND DELIVERY

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

Re: Case No. 14015: 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 covering pits, Below grade tanks and adoption of a new rule covering pits, below grade tanks, closed loop systems and a=other alternative methods tot eh foregoing, and amending other rules to conforming changes statewide.

Dear Mr. Chairman:

Enclosed is the Industry Committee's Motion for Continuance in the above-referenced case.

Your consideration of this Motion is appreciated.

Very truly yours,

William F. Carr

Enclosure

cc: David K. Brooks, Esq.
Industry Committee
Eric Hiser, Esq.

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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 GOVERNING PITS, BELOW GRADE TANKS, CLOSED LOOP SYSTEMS AND OTHER ALTERNATIVE METHODS TO THE FOREGOING, AND AMENDING OTHER RULES TO CONFORMING CHANGES STATEWIDE.

CASE NO. 14015

MOTION FOR CONTINUANCE

COME NOW Benson-Montin-Greer Drilling Corporation; BP America Production Company, Inc.; Burlington Resources Oil & Gas Company; Chesapeake Operating, Inc.; ChevronTexaco; ConocoPhillips; Devon Energy Corporation; Dugan Production Corporation; Energen Resources Corporation; Marathon Oil Company; Marbob Energy Corporation; Merrion Oil and Gas Corporation; OXY USA, Inc. (including Occidental Permian, LTD and OXY USA WTP Limited Partnership); D. J. Simmons, Inc.; Williams Production Company; XTO Energy, Inc.; and Yates Petroleum Corporation, parties of record in this case, hereinafter collectively referred to as "the Industry Committee," and pursuant to Division Rule 19.15.14.1211.C NMAC, request that the hearing on this application scheduled for October 22, 2007 be continued to a special hearing date in December 2007 and in support of this Motion, state:

1. On September 21 2007, the New Mexico Oil Conservation Division ("Division") filed an Application for Rulemaking seeking an order repealing Rule 50 of the General Rules and Regulations of the Division and adopting proposed new rules governing pits, below grade tanks, closed loop systems and other alternative methods to the foregoing. The proposed amendments, if adopted, would ban all unlined pits absent a special exception, adopt new requirements for the closure of pits and below-grade tanks, otherwise substantially change the Commission's existing requirements concerning the permitting, design, construction and operation of pits and below-grade tanks (and operation of sumps), used in oil and gas operations, and require the permitting of, and prescribe rules concerning design, construction and closure of closed loop systems or alternative methods that may be proposed for use in lieu of pits or below-grade tanks. In addition, the Division proposes conforming changes to rules 7[19.15.1.7 NMAC], 21[19.15.1.21 NMAC], 52 [19.15.2.52 NMAC], 114 [19.15.3.114 NMAC], 202 [19.15.4.202NMAC] and 1103 [19.15 .13.1103 NMAC]. For the purpose of this motion, these rules will hereinafter be referred to as the "Pit Rules."

2. The first draft of the new Pit Rules was released by the Division in 2006 and a stakeholders meeting was held to review this proposal on January 10, 2007. Thereafter, this rulemaking effort was then delayed until March, 2007, when the Oil Conservation Division announced that it was in the process of convening a Task Force to advise the OCD on changes to

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the rules governing pits and below ground tanks used in oil and gas operations in the State of New Mexico.

3. This Task Force met during April, May and June 2007 and, on July 10, 2007 released a Consensus Summary in which it identified those items on which the Task Force had reached agreement and other issues where there was no consensus.

4. A preliminary draft of a Pit Rule was released by the Division to the Task Force members and selected others on August 13, 2007 and on September 21, 2007, the Division filed its notice of rulemaking and released the draft that will be presented to the Commission when this application goes to hearing.

5. It took the Task Force almost four months to review the pit issue and make recommendations to the Division on provisions for inclusion in the proposed rule (April 19 through July 10, 2007). Thereafter, the Division spent over 10 weeks developing the draft rule that is the subject of its Application for Rulemaking (July 10 through September 21, 2007). In this draft, the Division made major changes in the proposed rule and in the recommendations of the Task Force that will have significant impacts on oil and gas operators in this state.

6. Because of the impact that the new Pit Rules will have on the oil and gas industry in New Mexico, earlier this year the Industry Committee retained expert witnesses to prepare modifications, if needed, to a new pit rule once they were proposed by the Division and to present testimony on the technical issues presented by the new proposal when it goes to hearing.

7. On receipt of the new draft at 5:00 pm on Friday, September 21, 2007, the Industry Committee provided copies to its experts, Dr. Thomas, Dr. Stephens and Dr. Buchanan for review and comment and for their use in assisting in the development of written modifications to the new proposal.

8. On Monday, September 24, representatives of the Industry Committee met in Albuquerque with each of their expert witness to review the new rule proposal, to develop proposed modifications to the rules, and to prepare for hearing.

9. Based on this review of these new proposed Pit Rules, it is the opinion of the Industry Committee that the new proposal contains serious problems for the Division and the Industry. The new rules will create an enormous expense to the industry (with little or no environmental benefit or risk reduction) and, with their adoption, the Division may succeed in driving some oil production out of New Mexico. Under the rules as proposed, operators have few choices: (1) they can attempt to comply with rules that contain standards and provisions that cannot be met and request approval of alternative closure methods by the Division based on impossible standards; (2) they can skirt the regulations and pay the fines if and when they are caught; or (3) they can stop producing in New Mexico. The first option is illusory because alternative approaches must achieve unattainable standards. The second option is not acceptable to responsible corporations. The third option is not attractive for either the State or industry and is

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inconsistent with the mandate of the Oil Conservation Commission to promote development of the State's oil and gas resources.

10. The September 21, 2007 draft of the proposed Pit Rules contains substantial changes that will have a significant impact on the oil and gas industry in New Mexico. The Industry must respond to these provisions with written comments and modifications. These changes include:

A. new siting requirements, design and construction standards, and operational requirements;

B. new provisions for closing pits in place which can only be approved by the Santa Fe Office of the Division under very strict standards for closure materials, soil standards and siting requirements that may be unachievable in practice and which may be unnecessary to be fully protective of fresh water, human health and the environment;

C. new standards for what is reported as a release under the pit after the pit contents are deep trench buried or hauled;

D. a proposed exclusion for on site pit closure if an approved commercial disposal facility is more than 100 miles away which is harmful in some cases and illusory in others because of the strict closure and release standards; and

E. alternative closure methods which will require revision if they are to be meaningful.

11. Pursuant to the Division/Commission's procedural rules, notice of recommended modifications to the proposed rules must be filed 10 business days prior to the hearing date or by October 10, 2007. Comments on the proposed rules must be filed 5 business days prior to the hearing date or by October 15, 2007. A pre-hearing statement, with copies of all technical exhibits attached, must be filed 5 business days prior to hearing or by October 15, 2007.

12. The time constraints posed by the Commission's procedural rules make it impossible for the Industry Committee to properly prepare a meaningful case for presentation to the Commission on October 22, 2007. The Industry has only 20 calendar days to have its experts review the new provisions in the proposed rules, reach consensus with the Industry Committee on the impact of these changes on the industry, and have the experts assist in the development of written modifications to the new proposals. This short time period also overlaps with the very short time (25 calendar days) the industry has to develop additional comments and prepare exhibits and testimony on the proposed pit rule that is scheduled for hearing on October 22, 2007. After four months of study and review by the Task Force on which division members served as members, it took the Division over 10 weeks to prepare the draft of this rule for its Rulemaking Application, whereas those most impacted by the rules have less than three weeks to respond. The time allowed for the Industry Committee to prepare for the October 22, 2007 hearing on the proposed rule changes is just too short to provide the Industry Committee a meaningful opportunity to prepare and present its case.

13. Root principles of fairness dictate that procedural due process be afforded whenever a government decision threatens to deprive an individual of a fundamental liberty or

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property interest. *State of New Mexico, ex rel. Children, Youth & Families Department v. Maria C.*, 136 N.M. 53, (N.M. Ct. App. 2004).

14. The essence of procedural due process is notice and an “opportunity to be heard at a meaningful time and in a meaningful manner.” *State ex rel. Children, Youth & Families Dep’t v. Mafin M.*, 133 N.M. 827, 70 P.3d 1266 (N.M. 2003) (emphasis added). Due process does not require the same form of notice in all contexts; instead, the notice “should be appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 313 (1950). Notice must be “reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 314 (emphasis added); see also *City of Albuquerque v Juarez*, 93 N.M. 188, 190, 598 P.2d 650, 652 (Ct. App. 1979).

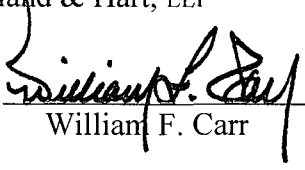
15. Due process is a flexible right. The opportunity to be heard in a meaningful manner requires time to prepare. Due process standards cannot be met if the time provided for preparation is so unreasonable that it has the effect of denying a party a reasonable opportunity to prepare its case. *Maria C.*, 94 P.3d 796 (N. M. Ct. App. 2004).

16. The Industry Committee has been trying to prepare for the hearing on the proposed Pit Rules and meet the October 22, 2007 hearing date. However, its experts have advised that it is impossible for them to be prepared to assist with the development of proposed modifications to the current draft rule by October 5, 2007 and further advised that it is not possible to be prepared for the scheduled hearing on these rules. These experts state that, for them to prepare, each will require approximately sixty days or until early December 2007.

17. Without the requested continuance, the notice of the proposed rules will remain inappropriate to the scope of the rule and the impact it will have on the Oil and Gas Industry and the Industry Committee will be denied a opportunity to participate in the hearing on the proposed Pit Rules and to present their objections and proposed modifications to the proposal in a meaningful manner.

WHEREFORE, the Industry Committee moves the Oil Conservation Commission for an Order continuing the hearing on the proposed Pit Rules now scheduled for October 22, 2007 to a special Oil Conservation Commission hearing date in December 2007.

Respectfully submitted,
Holland & Hart, LLP

By: 
William F. Carr

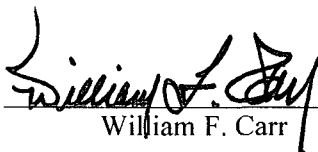
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CORPORATION; OXY USA, INC.,
OCCIDENTAL PERMIAN, LTD, OXY USA
WTP LIMITED PARTNERSHIP, D. J.
SIMMONS, INC., WILLIAMS PRODUCTION
COMPANY, XTO ENERGY, INC., and
YATES PETROLEUM CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October 2007, I have caused a copy of the Industry Committee's Motion for Continuance in the above-captioned case to be delivered to the following:

David K. Brooks, Esq.
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
(BY HAND DELIVERY)



William F. Carr