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 NOS. 14013

The Industry Committee submits this brief to address the legality of provision 19.15.17.13.F.1.a NMAC in the proposed Pit Rule that limits the use of on-site closure methods to those situations in which the location of the proposed pit is not "within a 100 mile radius of a division-approved facility or an out-of-state waste management facility." Because the Commission does not have express authority to impose such a requirement on operators, and because this provision violates the Commerce Clause of the United States Constitution, the Industry Committee proposes that the OCD eliminate 19.15.17.13.F.1.a in its entirety.

First, 19.15.17.13.F.1.a should be stricken because the New Mexico Oil and Gas Act does not expressly authorize the Commission to arbitrarily require operators located within a certain distance of certain preferred facilities to transport waste to a disposal facility when other operators, not located near the preferred facilities, are not required to transport their waste. An administrative agency is allowed to make rules and regulations to effectuate the purpose(s) of a statute. *Sandoval v. Valdez*, 91 N.M. 705, 580 P. 2d 131 (Ct. App. 1978). The regulations must be consistent with the legislative objective. *Willey v. Farmers Ins. Group*, 86 N.M. 325, 523 P. 2d 1351 (1974). The Commission's primary jurisdiction is to prevent waste and protect correlative rights. N.M.S.A. 1978, § 70-2-1 *et seq.* (2007). The Commission has also been granted certain enumerated powers including the authority to regulate the disposition of oil and

gas waste "to protect public health and the environment." N.M.S.A. 1978, § 70-2-12 (2007). However, the Oil and Gas Act does not give the Commission authority to effectively create a preferred class of waste disposal facilities and then mandate that all waste within an arbitrary distance of those facilities be transported, relying upon economics to thus force the waste to the preferred facilities. The creation of a class of preferred facilities, and the economic regulation of waste transport to support that preferred class, under the pretense of environmental regulation, is far beyond the scope of authority conferred upon the Commission by the Oil and Gas Act. Therefore, this proposed rule should be deleted.

Second, 19.15.17.13.F.1.a should be stricken because its impermissibly regulates interstate commerce. It is well established that state laws are within the domain of the Commerce Clause if they burden interstate commerce. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937). Here, the proposed provision mandates that operators dispose of waste at a facility if their operations are located within 100 miles of one. The proposed provision then relies upon the disproportionate cost of transporting dense, bulky material to ensure that the local, preferred facilities will receive the economic benefit of the rule. When the effect of a state law "is to favor in-state economic interests over out-of-state interests" it is generally struck down as a violation of the Commerce Clause. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 487 (2005) (internal quotation marks omitted).[1] Although 19.15.17.13.F.1.a does not expressly seek to regulate interstate commerce, it nonetheless does so by its practical effect. In this case, the article of commerce at issue is the service of disposing of drilling waste. By requiring operators to dispose of waste at a facility if within 100 miles of one, the de facto result of the provision is

[1] A state law may also be invalidated when its effects on interstate commerce are only indirect or incidental if the burden it imposes is clearly excessive when balanced against the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). However, because this proposed rule actually *discriminates* against interstate commerce, the *Pike* balancing test need not be utilized.

to ensure that the disposal facilities in Southeastern New Mexico will have a steady stream of business. 19.15.17.13.F.1.a is essentially another example of the type of flow control measure that has long been held invalid as discriminatory for requiring local processing. *See, e.g., Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (striking down a Louisiana statute that required shrimp to be processed in-state before being exported); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (striking down an Alaska regulation requiring Alaska timber to be processed within the state prior to export). Furthermore, the 100 mile limit is completely arbitrary; its only clear objective is to foster local economic protectionism which is prohibited by the Commerce Clause. *See Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (striking down a city ordinance that required all milk sold in the city to be pasteurized within five miles of city limits because it effectively discriminated against interstate commerce).

Clearly, the practical effect of 19.15.17.13.F.1.a is to discriminate against interstate commerce by favoring local businesses over similar out-of-state facilities. Such discrimination against interstate commerce is per se invalid unless the OCD can demonstrate, under strict scrutiny, that is has no other means to advance a legitimate local purpose. *See Maine v. Taylor*, 477 U.S. 131, 137-39 (1986). The proposed rule does not fall within this narrow class. Here, the Commission has many alternatives for addressing any health or environmental concerns without invoking the 100 mile transport requirement. Most obvious is to continue to allow approved on-site closure methods that are protective of human health and the environment. Because the Commission cannot show that implementing 19.15.17.13.F.1.a is the only way to protect New Mexico's health and environment, and because the proposed rule impermissibly favors certain local, preferred facilities, it is invalid under the Commerce Clause of the United States Constitution.

For all these reasons, the provision in the proposed Pit Rule limiting on-site closure methods to pits located more than 100 miles away from a waste management facility should be deleted.

Respectfully submitted,

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