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
ORDER NO. R-12939

THE INDUSTRY COMMITTEE'S APPLICATION FOR REHEARING

"[T]he Act provides the Commission with considerable policy-making authority. . . However, the Commission must . . . provide a basis for concluding that its decision is reasonable and not, arbitrary or capricious, have substantial support in the record for findings, and show that it is acting in accordance with law." Sanchez, D.J. *Devon Energy Production Company, L.P. v. Oil Conservation Comm'n*, No. D-0101-CV-2006-01935; *Bass Enterprises Production Company v. Oil Conservation Comm'n*, No. D-0101-CV-2006-01936; May 21, 2008.

This Application for Rehearing is submitted by HOLLAND & HART, LLP, on behalf of the Industry Committee,[1] parties of record adversely affected by Oil Conservation Commission Order No. R-12939. With this application, the Industry Committee challenges the sufficiency of the findings, the reasonableness, and legal merit of Commission Order No. R-12939 and the Pit Rules adopted thereby. In accordance with the provisions of N.M.S.A. 1978 § 70-2-25, the Industry Committee requests the New Mexico Oil Conservation Commission ("Commission") grant this Application for Rehearing in Case No. 14015 and in support hereof states:

[1] The Industry Committee is an industry group comprised of Benson-Montin-Greer Drilling Corporation; BP America Production Company; Boling Enterprises, Ltd.; Burlington Resources Oil & Gas Company LP; Chesapeake Energy Corporation; ChevronTexaco; ConocoPhillips Company; Devon Energy Corporation; D. J. Simmons, Inc.; Dugan Production Corporation; Energen Resources Corporation; Marathon Oil Company; Marbob Energy Corporation; Merrion Oil and Gas Corporation; OXY USA, INC.; Occidental Permian, LTD; OXY USA WTP Limited Partnership; Samson Resources Company; Williams Production Company, LLC; XTO Energy, Inc.; and Yates Petroleum Corporation. The members of the Industry Committee combined resources to provide sound science to the Commission as it considered the proposed Pit Rules.

I. BACKGROUND

This case involves an application for rule adoption and amendment filed by the New Mexico Oil Conservation Division seeking changes to the rules governing pits and below grade tanks. The case was originally called on October 22, 2007 and thereafter continued from time to time. Evidence was presented to the Commission on November 5 through 9, 13 through 16, 26, 27, 30, and December 3, 4, 6, 7, 10, and 14, 2007. On May 9, 2008, Order No. R-12939 was entered adopting new rules governing pits and below grade tanks in New Mexico.

The Industry Committee seeks rehearing on the following issues which have been erroneously decided by the Commission in Order No. R-12939:

1. The Commission's use of WQCC 3103 groundwater constituent standards for on-site trench burial violates its statutory duties under the Oil and Gas Act and the Water Quality Act.
2. Order No. R-12939 does not contain required findings of fact.
3. Order No. R-12939 is arbitrary, capricious and unreasonable for it adopts testing and closure standards that are not supported by substantial evidence.
4. Order No. R-12939 violates the statutory and constitutional rights of the parties for there is no rational basis for the standards imposed on the various types of closure methods permitted by these rules.
5. The rule is unreasonable for, as written, it is not clear what standards the Commission is applying in the Transitional Provisions of the rule.

II. ARGUMENT

This Application for Rehearing raises issues concerning the role of the Oil Conservation Commission in rule making proceedings and the way in which it has exercised the authority delegated to it by the Legislature.

Many of the provisions in the new pit rules as originally proposed were revised by the Commission at the request of the parties. However, some of the remaining and/or revised provisions are contrary to law, contrary to the evidence in this case, set standards that are unnecessary to protect the environment, and will discourage oil and gas development thereby causing the waste of oil and gas. Furthermore, the Commission's order adopting these rules does not contain basic jurisdictional findings or findings that reflect the basis for its decision to adopt certain onerous provisions in the rule.

These new pit rules authorize operators to close temporary pits, and closed loop system drying pads, by (1): waste excavation and removal, (2) on-site closure, or (3) alternative closure methods where the Division approves a different method for a specific pit. NMAC 19.15.17.13.B. The on-site closure procedures in these rules enable operators in certain areas in New Mexico to use "in-place burial" to close temporary pits. If operators cannot meet the requirements of "in-place burial," the rules provide for "on-site trench burial" of wastes where certain conditions are met. These conditions include a demonstration that the chloride concentrations of the pit contents to be placed in the trench do not exceed 250 mg/l and a showing that the concentrations of the water contaminants specified in the WQCC Subsection 3103.A are not exceeded. Neither the record in this case nor the findings of the Commission in Order No. R-12939 show why these standards are needed to protect groundwater, human health or the environment or how the Commission balanced these standards against its responsibility to prevent waste or protect correlative rights.

These standards for on-site trench burial, and the other chloride limitations in these rules, effectively preclude the use of on-site closure methods in much of New Mexico. At the hearing, the Commission was advised that these standards will prevent the use of on-site trench burial at most, if not all, well locations. See Testimony of Dr. Thomas, Tr. 3844. The result of these closure standards will be higher production costs for operators and less oil and gas produced thereby violating correlative rights of the owners of these oil and gas interests and causing waste of hydrocarbons.

POINT I: THE COMMISSION'S USE OF WQCC GROUNDWATER CONSTITUENT STANDARDS FOR ON-SITE TRENCH BURIAL VIOLATES ITS STATUTORY DUTIES UNDER THE OIL AND GAS ACT AND THE WATER QUALITY ACT.

The Commission also derives authority from the Water Quality Act. N.M.S.A. 1978 § 74-6-1 *et seq.* This statute creates a Water Quality Control Commission ("WQCC"). The Oil Conservation Commission is a "constituent agency" of the WQCC. N.M.S.A. 1978 § 74-6-2.K. The Water Quality Act directs the WQCC to "adopt water quality standards for surface and groundwaters of the State based on credible scientific data and other evidence appropriate under the Water Quality Control Act" and to "adopt, promulgate and publish regulations to prevent or abate water pollution in this state...." N.M.S.A. 1978 § 74-6-4.D (emphasis added).

Pursuant to its statutory grant of authority to protect ground water, the WQCC has identified thirty-nine soil constituents that it determined could pose a threat to ground water (WQCC 3103 Groundwater Constituents). N.M.S.A. 1978 § 74-6-12.F. For each of these constituents, it adopted numerical standards and procedures for applying these standards to protect ground water. In adopting these standards and rules, the WQCC acted in a manner consistent with the express policy of the Legislature expressed in Section 74-6-12.F and the power delegated to it by the Legislature. *See Tenneco Oil Co. v. NMWQCC*, 138 N.M. 625, 760 P.2d 161 (2005). The WQCC thereby sets State policy concerning the protection of ground waters in New Mexico. This policy is intended to be binding upon all constituent agencies. *See, e.g.,* N.M.S.A. 1978 §§ 74-6-4.E, 74-6-8 and 74-6-9.

The Commission, as a constituent agency of the WQCC, has been assigned by statute the administration of the WQCC regulations and standards to prevent water pollution and to protect groundwater. N.M.S.A. 1978 § 74-6-4.E. In so doing, the Commission merely applies the water quality standards as allowed by Section 74-6-8. *Kerr-McGee v. NMWQCC*, 98 N.M. 240, 647 P.2d 873 (1982). Since the WQCC adopts standards and constituent agencies administer these standards, the Oil Conservation Commission cannot change or interpret differently the standards adopted by the WQCC. *Gila Resources Information Project v. NMWQCC*, 138 N.M. 625, 124 P.3d 1164 (2005).

In this case, the Commission declares that the contents of a temporary pit must meet the concentrations of the water contaminants specified in the WQCC's Rule 3103 before they can be buried in an on-site trench. While the Commission adopts the thirty-nine constituents and the numerical concentrations limits for each as set out in the WQCC regulations, it is applying these water standards to soil and this changes the effect of these standards and results in a different interpretation of them than that of the WQCC.

The way that the Commission uses the 3103 constituent standards is inconsistent with its obligations as a constituent agency of the WQCC. Under the Water Quality Act, a "hazard to public health" warranting action:

> [E]xists when water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds at the time and place of such use, one or more of the numerical standards of Subsection A of 20.6.2.3103 NMAC, or the naturally occurring concentrations, whichever is higher, or if any toxic pollutant affecting human health is present in the water; in determining whether a discharge would cause a hazard to public health to exist, the secretary shall investigate and consider the purification and

> dilution reasonably expected to occur from the time and place of discharge to the time and place of withdrawal for use as human drinking water. NMAC 20.6.2.7.A.

This definition from the Water Quality Control Commission regulations points out the *complete disregard* exhibited by the Commission to the WQCC regulations: The Commission applies the standards not to materials present "at the time and place of such use" but rather to a *waste* that cannot, under the Commission's rules, include water (it must pass the paint filter test), and then expressly applies those standards to a *waste* that cannot be within 50 or 100 feet of water, clearly defying the requirement to "investigate and consider the purification and dilution reasonably expected to occur from the time and place of discharge to the time and place for use as human drinking water."

The Legislature has entrusted this issue by law to the policy of the Water Quality Control Commission. The Oil Conservation Commission is bound by the law. Its actions are contrary to the law. Under New Mexico law, if the Oil Conservation Commission believes that the policy of the State as to the protection of fresh water should be changed, it may not change the policy on its own. It is required to bring this matter before the WQCC or possibly even the Legislature. A rehearing should be granted on this issue.

POINT II: ORDER NO. R-12939 DOES NOT CONTAIN REQUIRED FINDINGS OF FACT.

> "An agency action is arbitrary and capricious if it is unreasonable, if it provides no rational connection between the facts found and the choices made, or if it entirely omits consideration of important aspects or relevant factors of the issue at hand." *New Mexico Mining Ass'n v. New Mexico Water Quality Control Comm'n,* 2007-NMAC-010,¶ 22, 141 N.M. 41, 150 P.3d 991, 999 (emphasis added).

"The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it." *Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 318, 373 P. 2d 809, 816 (1962). Pursuant to the Oil and Gas Act, the Commission is charged with the prevention of the waste of oil and gas (N.M.S.A. 1978 § 70-2-2), the protection of the correlative rights of the owners of oil and gas interests (N.M.S.A. 1978 § 70-2-11), and the management of certain nondomestic wastes associated with the oil and gas industry.

N.M.S.A.1978 § 70-2-12 (21) and (22).[2] The prevention of waste is its primary duty and its paramount power. *Continental,* 70 N.M. at 319. To meet its responsibilities under the Act, the Commission adopts rules, regulations and orders.

In *Fasken v. Oil Conservation Comm'n*, 87 N.M. 292, 294, 532 P. 2d 588, 590 (1975), the New Mexico Supreme Court found three categories of findings that must appear in Commission Orders: (1) findings of ultimate facts which are material to the issues; (2) sufficient findings to disclose the reasoning of the Commission in reaching its ultimate findings; and (3) the findings must have substantial support in the record.

A. ULTIMATE FINDINGS

> The Commission must provide its rationale for its decision to elevate one interest over the other to show that it has acted reasonably and in accordance with law. Sanchez, D.J. *Devon Energy Production Company, L.P. v. Oil Conservation Comm'n*, No. D-0101-CV-2006-01935; *Bass Enterprises Production Company v. Oil Conservation Comm'n*, No. D-0101-CV-2006-01936; May 21, 2008 (emphasis added).

Order No. R-12939 does not contain required findings of ultimate fact[3] on the prevention of waste of oil and gas and the protection of the correlative rights of the owners of these resources. While the Commission's obligations to prevent waste and protect correlative rights and its environmental responsibilities are sometimes incompatible with each other, neither trumps the other. Under the Act, it is the obligation of the Commission to *both* (1) prevent the waste of oil and gas and (2) regulate the disposition of these nondomestic wastes.

Here, the Commission has elevated one of its jurisdictional charges over another and in so doing minimized its role by only exercising the environmental portion of its jurisdictional

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[2] The Oil and Gas Act in the Enumeration of Powers section (N.M.S.A. § 70-2-12) authorizes the Commission:

(21) to regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment.

(22) to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment, including administering the Water Quality Act [Chapter 74, Article 6 NMSA 1978] as provided in Subsection E of Section 74-6-4 NMSA 1978. (emphasis added).

[3] The *Fasken* court defined "ultimate findings" as findings that have to do with such ultimate factors as whether a common source of supply exists, the prevention of waste, the protection of correlative rights and matters relative to net drainage.

mandate.[4] Since required jurisdictional findings on waste and correlative rights are "utterly lacking," Order No. R-12939 and the new pit rules adopted thereby are void. *Fasken*, 67 N.M. at 294, 532 P.2d at 590.

Rehearing should be granted on the issue of the impact of these closure standards on the waste of oil and gas and the impact of the rules on the correlative rights of owners of interests in these resources.

B. FINDINGS THAT DISCLOSE COMMISSION REASONING

The chloride limits in the new pit rules and the standards for materials disposed of by on-site trench burial, including the use of WQCC 3103 groundwater constituent standards (19.15.17.13.F(3)(c) NMAC) will discourage oil and gas development in New Mexico. See Testimony of Dr. Thomas, Tr. 3843-3844. Order No. R-12939 is "utterly lacking" of findings that disclose the reasoning of the Commission in adopting these requirements.

1. ON-SITE TRENCH BURIAL:

Findings 218 through 225 of the Order, which summarize the on-site trench burial closure provisions of the rule, do not meet the *Fasken* requirements. Although the evidence showed that none of the Section 3103 WQCC groundwater constituents are present at levels and in the form that gives rise to groundwater concern, the Commission decided to apply these standards to on-site trench burial. There are no findings that address the Commission's decision to apply these concentrations to on-site trench burial.

Daniel B. Stephens, Industry Committee expert and individual who wrote the book on New Mexico vadose zone hydrology referred to by other experts, recommended the adoption of higher chloride standards depending on the mixing ratio applied. See Dr. Stephens PowerPoint presentation (Exhibit 2). The Division's experts recommended 5000 mg/l, before ultimately arguing that the limit should be no higher than that advocated by Dr. Stephens. The Division's experts never took any other position on what the appropriate chloride standard should be and provide no support for the level ultimately selected. However, for on-site trench burial the Commission selected a limit of 250 mg/l. Nothing in the findings supports the adoption of the 250 mg/l chloride level or discloses the reasoning of the Commission in adopting this limitation.

[4] The Commission's Final Conclusion 299 states "In order to provide a regimen for regulating the use of pits, below-grade tanks, closed-loop systems, and sumps in a manner that will protect fresh water, human health, and the environment, the Commission concludes that the proposed rules as revised by the Commission should be adopted." (emphasis added). Nothing in its order addresses the impact of these rules on the waste of oil and gas.

If the Commission used its expertise to reject the testimony of experts who testified before it, and if the Commission's selection of a much lower limit was based on some exercise of its technical knowledge, nothing in the findings provides even the "vaguest notion of how the Commission reasoned its way to its ultimate findings." *Fasken*, 87 N.M. at 294, 532 P.2d at 590.

After pit contents have been removed to the trench for burial, the new rule provides two separate standards for sampling under a temporary pit to determine if a release has occurred. While the Industry Committee presented evidence in support of a 5000 mg/kg chloride limit, a limit of 500 mg/kg was adopted where ground water is 50 to 100 feet below the bottom of the pit and a limit of 1000 mg/kg was adopted where ground water is more than 100 feet below the bottom of the pit.

The only finding that addresses the Commission's selection of these limits is Finding 224. Here, the Commission does not explain why these limits are needed but, instead, revises the Division's proposed chloride limits to make them consistent with the landfarm criteria adopted in the Surface Waste Management Rules. The chloride limits in the Surface Waste Management Rules are currently the subject of a Petition for a Writ of Certiorari before the Court of Appeals.

The mere reference to another rule adopted by the Commission on a different record for a different purpose can hardly be construed to be findings that are sufficiently extensive to show the basis of the Commission's decision to impose these onerous limits on chloride concentrations in the Pit Rules. Indeed, it is unclear what relevance, if any, standards for unlined landfarms in the Surface Waste Management Rules have to the Pit Rules where the purpose of the Pit Rules is to eliminate unlined pits and all facilities are required to be lined and meet stringent engineering controls.

In this case, the Commission entered 302 findings and also stated that "additional reasons are included in the hearing transcript of the Commission deliberations" (Order No. R-12939, Finding 4) and that the new rules should be adopted "[f]or the reasons stated above and in the transcript... ." Finding 302. General catch all references to the hearing transcript are not a proper substitute for the findings required by our courts that disclose the reasoning of the Commission.

2. CHLORIDES:

The same issues with the adequacy of the findings is present for all chloride limitations imposed by these rules. This order contains no findings that reflect the reasoning of the

Commission in selecting these very restrictive limitations and nothing in the findings indicates that in adopting these standards any consideration was given to the impact they will have on the waste of oil and gas in this state.

The Findings in Order No. R-12939 do not disclose the reasoning of the Commission in adopting the WQCC 3101 Constituent limitations for on-site trench burial or, throughout the rule, the limits it has imposed on chlorides. Rehearing should be granted on this issue.

POINT III: ORDER NO. R-12939 IS ARBITRARY, CAPRICIOUS AND UNREASONABLE FOR IT ADOPTS TESTING AND CLOSURE STANDARDS THAT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Administrative actions may not be arbitrary and capricious and must be supported by substantial evidence. Arbitrary and capricious acts are those "that may be considered willful and unreasonable, without consideration, and in disregard of the facts and circumstances." *Viking Petroleum, Inc. v. OCC*, 100 N.M. 451, 453, 672 P. 2d 280, 282 (1983). Substantial evidence is: "Relevant evidence that a reasonable person might accept as adequate to support a conclusion." *In Matter of Application of PNM Electric Services v. N.M. Public Utility Comm'n*, 125 N.M. 302, 961 P. 2d 147, 153 (1998).

A. ADOPTION OF WQCC 3103 GROUNDWATER STANDARDS FOR ON-SITE TRENCH BURIAL

The use of the WQCC 3103 Constituent Standards for on-site trench burial in 19.15.17.13.F(3)(c) NMAC is arbitrary, capricious, unreasonable, not supported by the evidence in this case, and contrary to law.

The Division's original proposed rule prohibited on-site burial where there was a Division approved disposal facility or out-of-state waste management facility within 100 miles of the site unless an exception was granted. The Commission rejected this provision and determined that on-site closure should be based on the level of the various constituents in the waste and site-specific information rather than on the distance to a disposal facility. Findings 71 and 204. However, the standards adopted by the Commission for on-site trench burial belie these findings.

In this case, the evidence established that while a majority of wastes would not meet the Section 3103 WQCC groundwater standards (Dr. Thomas, Tr. 3844; Testimony of Mr. Von Gonten, Tr. 473), no groundwater constituents are present at levels and in a form that give rise

to groundwater concern. Dr. Thomas, Tr. 3842 & 3847. All will be stabilized, in an engineered contaminant structure with both a liner below and a cover above. These engineering controls in terms of the bottom liner, stabilization treatment, a top liner and a four-foot cover including one foot of top soil to support re-vegetation, protects groundwater and future uses of the land.

Based on the modeling work of Dr. Daniel B. Stephens, concentrations from all pits (both Industry Committee and OCD sampling) are below the derived DAF (dilution attenuation factor) for chloride, which is the most mobile constituent present. Therefore, if the highest observed average pit concentration is below the derived DAF level, even if the pit liner were to fail completely in a single moment, the Commission has a reasonable assurance that the treated material will not cause an exceedance of the WQCC standards.

Dr. Thomas also testified, and the Industry Committee's sampling effort bears out, that treating to these levels will not present a threat to human health and the environment. Dr. Thomas, Tr. 3843 & 3847. Nothing in the record contradicts this evidence and the adoption of the Section 3103 WQCC constituent concentrations and standards for "on-site trench burial" is therefore arbitrary, capricious, unreasonable for it is not supported by the evidence in this case.

B. CHLORIDE LIMITS

In the new Pit Rules, the Commission announced different chloride treatment and closure standards for various types of pits and below-grade tanks.[5] The Industry Committee recommended treatment standards that far exceeded the limits adopted by the Commission based on the work of its experts, and in particular the modeling work of Dr. Stephens. This modeling effort, used the best available information and presents a reasonably conservative view of protection of groundwaters throughout New Mexico. It resulted in a treated waste standard of

[5] Pit Rule chloride limits:

1. Below grade tanks:	250 mg/kg chloride limit
2. Closed loop systems:	
if groundwater less than 50 feet:	no on site burial
if groundwater is between 50 and 100 feet:	500 mg/kg chloride limit
if groundwater is more than 100 feet:	1000 mg/kg chloride limit
3. In-place burial:	
if groundwater less than 50 feet:	no on site burial
if groundwater is between 50 and 100 feet:	500 mg/kg chloride limit
if groundwater is more than 100 feet:	1000 mg/kg chloride limit
Contents of On-site trench burial:	250 mg/l (5000mg/kg)

24,800 mg/kg chloride or background, if background is higher.[6] The record in this case does not support the Commission's choices.

Instead of presenting evidence and developing the record in this case, the Commission relied on the chloride standards adopted in the Surface Waste Management Rules case. Order No. R-12460-B, February 14, 2007. During its deliberations on the pit rules, the Commission repeatedly stated its intention for these rules to be consistent with the Surface Waste Management Rules. In its findings, the Commission repeatedly stated that it adopted these limitations or standards, not because of any technical evidence supporting the limitation, but because the new standard would be consistent with the standards in the recently adopted Surface Waste Management Rules.

Piggy-backing into the new pit rules standards that were adopted in a different case, on a different and inadequate record, for unlined facilities, and where rules were adopted to address a different matter, is not an acceptable alternative to preparing and presenting evidence and making a record in this case that supports the adoption of the onerous chloride standards that the Commission has now included in these rules.

The provisions in the new pit rules regarding chloride limits are arbitrary, capricious and unreasonable because they are not supported by substantial evidence in light of a whole record review.[7] *Sierra Club v. N.M. Mining Comm'n*, 133 N.M. 97, 61 P.3d 806, 813 (2002) (a ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record). Rehearing should be granted and a record

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[6] The Industry Committee recommended the extremely conservative chloride limitation of 5000 mg/kg limit for in-pit burial where the integrity of the liner could not be assessed. This is not the case with on-site trench burial where the integrity of the liner is known. In these cases, the Industry Committee recommended a limitation of 24,800 mg/kg. See, Industry Committee letter dated December 13, 2007 at page 20.

[7] In the Surface Waste Management Rules hearing, the Industry Committee presented the best experts in their fields who provided evidence that (1) much higher concentrations could be safely applied and still protect groundwater (Case 13586, Stephens, Tr. at 7630); and (2) the chloride limits in the proposed rules do not make sense for there is evidence of effective bioremediation in soils that substantially exceed this chloride limit (Case 13586, Sublette, Tr. at 1022). In addition, the Division's own witness testified that a 1000 mg/kg standard was proper to protect public health and the environment. On the other side of the issue, the only testimony on the record regarding the 500 mg/kg standard on the record of that case came from Dr. Donald A. Neeper of the New Mexico Citizens for Clean Air and Water and focused on re-vegetation standards, not ground water standards. When this evidence is compared, it becomes obvious that the great weight of the evidence supported a higher chloride standard and the Commission's findings adopting a lower standard in its Surface Waste Management Rules are not supported by substantial evidence.

made that shows why these limits are needed and what impact they will have on the waste of oil and gas.

POINT IV: ORDER NO. R-12939 VIOLATES THE STATUTORY AND CONSTITUTIONAL RIGHTS OF THE PARTIES FOR THERE IS NO RATIONAL BASIS FOR THE STANDARDS IMPOSED ON THE VARIOUS TYPES OF CLOSURE METHODS PERMITTED BY THESE RULE.

Certain provisions of the new Pit Rules are constitutionally defective for they do not pass the "rational basis test." This test requires classifications in rules to be based on substantial or real distinctions and be rationally related to the goals of the agency. *Richardson v. Carnegie Library*, 107 N.M. 688, 763 P.2d 1153 (1988).

In the new pit rules, there are many different closure standards for the three approved closure approaches (removal, deep trench burial, and closure in place). In particular, the distinction between below-grade tanks and temporary pits closed by removal makes no sense. Furthermore, even though on-site trench burial is a more protective way to manage pit wastes than in-place burial, the rule imposes more stringent standards to on-site trench burial. These classifications are clearly arbitrary and unreasonable for they bear no rational relationship to any conceivable agency purpose. Accordingly, these standards lack a rational basis, fail to withstand substantive due process scrutiny and therefore rehearing should be granted to review the standards adopted in the pit rule on rationality grounds.

POINT VI: THE RULE IS UNREASONABLE FOR, AS WRITTEN, IT IS NOT CLEAR WHAT STANDARDS THE COMMISSION IS APPLYING TO THE TRANSITIONAL PROVISIONS OF THE RULE.

There are several problems with the Transitional Provisions of the new rules. Not only are the time frames established by the rule very short and may on occasion be impossible to meet but there are problems with the term "closure." The use of this term varies in meaning from starting closure activities to just construction work or completion of final closure with re-vegetation, etc. It is not clear whether operators must simply initiate activity, complete construction, or achieve re-vegetation within the 30-day, six-month or two-year time frames.

III. CONCLUSION

In reaching its decision and promulgating new pit rules, the Commission exceeded its jurisdiction and violated the Oil and Gas Act and the Water Quality Act. Order No. R-12939

does not contain the required findings upon which the Commission's jurisdiction rests and other findings on material facts are not supported by substantial evidence and are arbitrary, capricious and unreasonable. The case should be set for rehearing to address each of these errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 29, 2008 I served copies of the foregoing Application for Rehearing by U. S. Mail, postage prepaid, or Hand Delivery to the following:

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