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INDEPENDENT PETROLEUM
ASSOCIATION OF NEW MEXICO

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Ms. Florene Davidson
Clerk
Oil conservation Division
New Mexico Energy, Minerals and
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Re: Post-hearing comments

Case No. 14255 Application of the New Mexico Oil Conservation Division, through the Environmental Bureau Chief for Adoption, of an amendment to 19.15.39 NMAC adding new sections to be codified at 19.15.39.9 and 19.15.39.10 NMAC addressing special provisions for Santa Fe county and the Galisteo Basin; Santa Fe, Sandoval and San Miguel Counties.

Dear Commissioners of the Oil Conservation Commission:

On behalf of the member companies of the Independent Petroleum Association of New Mexico, we submit this document pursuant to the Oil Conservation Commission's request for a written submittal of proposed findings. See 19.15.3.12(A)(2)(g) NMAC.

Recommended Findings

1. The hearing on the Santa Fe Special rule occurred on three days. December 11, 2008, December 18, 2008 and January 15, 2009. The Oil Conservation Division authored the proposed rule and presented the case.
2. The first witness was Daniel Sanchez, who testified that the reason for the rule was to satisfy the requirements of Executive Order 2008-04 and Executive Order 2008-0038. Mr. Sanchez further states that due to the fact that the Department was an

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Executive Agency, there was no need to communicate with any oil and gas operator in creation of this rule.

Reliance on Executive Orders has limited purpose and duration

3. Executive Order 2008-04, signed January 24, 2008, ordered a six month moratorium on drilling activities in Santa Fe County and the Galisteo Basin. In the Executive Order 2008-04, there is no declaration of a state of emergency.
4. The result of Executive Order 2008-04 was the “*Galisteo Basin Report*”, exhibit 20, which was admitted over counsel’s objection.
5. Executive Order 2008-0038, signed July 14, 2008, extended the moratorium on new oil and gas drilling in Santa Fe County and the Galisteo Basin. The order further directed “the Oil Conservation Division [to] investigate and begin to draft, if appropriate, rule, regulations and statutory changes, including but not limited to permitting by area, the allowance of notice and public input for all applications for permits to drill, and the adoption of special rules concerning the Galisteo Basin, all in an effort to protect this fragile and ecologically sensitive area” Exhibit 21, page 2 par. 1. Executive Order 2008-0038 did not contain a declaration of emergency, or state the statutory basis for order or its policy direction.
6. Executive Order 2008-038 expired January 14, 2009. There has been no support or request for support of Executive order by the Legislature.
7. In *Hartford Insurance Co. v. Cline*, 139 P.3d 176 (NMSC 2006), the New Mexico Supreme Court held that although an Executive Order “may be viewed as some evidence of the public policy in New Mexico, the Order alone, without parallel action by the legislature, is not sufficient proof of the public policy of New Mexico. The predominant voice behind the declaration of public policy of the state must come from the legislature, with an additional supporting role played by the courts

- and the executive department” citing *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995).
8. This Commission must find that Executive Order 2008-038, while an expression of the will of the Executive, is not a statement of mandatory action for the Oil Conservation Division.
 9. Executive Order 2008-038 states that the OCD will draft, *if appropriate*, rule, regulations and statutory changes ... in an effort to protect [the Galisteo Basin] fragile and ecologically sensitive area”
 10. In the last 18 months, the OCD has been revising and creating many new rules including the Enforcement Rule, the Surface Waste Management Rule, and the Pit Rule. In each instance the rule applied to all parts of the State. Indeed, one of the most discussed factors during the Pit Rule discussions was to ensure that the Pit Rule was consistent with the previous rules and while requested by industry, there was no need to create two rules to account for different drilling operations, geology and hydrology in the northwest versus the southeastern parts of the state.
 11. The testimony by several division witnesses presented conflicting opinions on whether it was “appropriate” to draft a new rule that may conflict with existing statewide rules. Those same witnesses noted that this proposed rule is in fact more stringent on several factors than the statewide rule.
 12. However, no reason other than a professed lack of knowledge on the geology and hydrology of the Galisteo Basin was given for the higher standards in the proposed rule.
 13. When questioned on why this new rule must also apply to the rest of Santa Fe County, the only reason given was because the Governor ordered coverage of the entire county.

14. Executive Order 2008-038 unequivocally limits the ‘adoption of special rules [to] the Galisteo Basin’.
15. This Commission must find that due to insufficient testimony or offered rationale for the proposed rule to apply to the entire county of Santa Fe, that if a rule is needed its scope must be limited to the Galisteo Basin.

The Oil Conservation Division oversteps its jurisdictional authority with the proposed rule

16. The Galisteo Basin report, Exhibit 20, is a compilation of nine different department reports on the subject of oil and gas operations in the Galisteo Basin. The main compiling agency was the Oil Conservation Division, under the direction of Mr. Mark Fesmire.
17. Page 26 of the *Galisteo Basin report* states, “At a minimum, the OCD/OCC’s statutory mandates to protect the environment should be expanded to expressly include the authority to protect surface water and ground water. Currently, the OCD/OCC finds its power to protect ground water under the Oil and Gas Act in three statutory directives: to prevent oil, gas and water from escaping from the strata in which they are found into other strata; to regulate produced water to protect against contamination of fresh water supplies; and to regulate the disposition of oil field waste to protect human health and the environment”
18. The *Galisteo Basin Report* is a clear acknowledgement by the OCD/OCC that it must seek and achieve legislative support for jurisdiction over ground water and fresh water issues other than for the disposal of produced water or disposal of solid waste. As of this date, the Legislature had not had one proposal for legislation on supporting the OCD’s increase in jurisdiction over fresh water and ground water sources.

19. Section 70-2-11, admitted at Exhibit 33 states, “The division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided.”
20. 70-2-12(B) states “Apart from any authority, express or implied, elsewhere given to or existing in the oil conservation division by virtue of the Oil and Gas Act or the statutes of this state, *the division is authorized to make rules, regulations and orders for the purposes and with respect to the subject matter stated in this subsection:* (15) to regulate the disposition of water produced or used in connection with the drilling for or producing of oil or gas or both and to direct surface or subsurface disposal of the water, including disposition by use in drilling for or production of oil or gas, in road construction or maintenance or other construction, in the generation of electricity or in other industrial processes, in a manner that will afford reasonable protection against contamination of fresh water supplies designated by the state engineer; (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; and (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 [74-6-1 NMSA 1978] as provided in Subsection E of Section 74-6-4 NMSA 1978. Emphasis added admitted as exhibit 34.
21. Note that Judge Daniel Sanchez has held that “subsection B’s language is not mandatory but ‘*authorized*’ the OC Division to make rules and regulations for the various purposes with respect to the subject matter included in the paragraphs of that section.” *Burlington Oil & Gas Co., LP, et al. v. NMOCC*, D-101-CV-2006-02841, Memorandum Opinion at 16, DJ Sanchez (February 16, 2008).
22. Thus, the OCD has the overarching responsibility and duty to prevent waste and protect correlative rights and the limited authorization to create rules on the

disposition of water produced in connection with drilling by subsurface disposal, reuse in drilling projects, in road construction, in generation of electricity or other industrial purpose. Further, the OCD may only create rules to regulate the disposition of produced water or nondomestic wastes to protect human health and the environment.

23. In his testimony, Mr. Brad Jones stated that the OCD's statutory mandates are to "prevent waste, protect correlative rights and protect fresh water, human health and the environment" Exhibit 2, written testimony page 3, line 71 and 72. When questioned as to how it was possible that the jurisdiction over fresh water, human health and the environment had become equal responsibilities with the statutory duties to prevent waste and protect correlative rights, Mr. Jones stated "the legislature has changed its tone" and proffered Section 21 of Article XX of the New Mexico Constitution as proof.
24. Section 21 of Article XX states, "The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and general welfare. The *legislature* shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people." Emphasis added.
25. This Commission must find that its statutory responsibility stems for the duties to prevent waste and protect correlative rights. The responsibilities listed in the enumerations of powers sections of the Oil and Gas act are limited to the disposition of water produced as a by-product of oil and gas drilling. The requirement to protect human health and the environment is limited to creation of rules only on the disposition of produced water and solid waste. Any allegation by the Division that the Legislature may have expected.

The additional layer of an Exploration and Development plan creates an unnecessary burden

26. The proposed rule will effectively create an additional layer of regulatory hoops that a potential operator will have to achieve prior to requesting or filing an application for a permit to drill. These same protective measures are already required in the various statewide regulations but the very open-ended and vague requirements for an Exploration and Development plan place potential operators in a veritable economic and regulatory twilight zone.
27. All three staff OCD witnesses testified that there were three needs the Exploration and Development Plan (ED) in this rule would fulfill. First, the need for public knowledge fostered the requirement that an operator disclose the full plan of operations, including risk analysis, funding, and internal studies to the public; second, the statutory requirements of the Cultural Resources Act required more operator disclosure; third, the lack of knowledge and science in the Galisteo Basin justified the extra cost and regulatory burden on operators.
28. On the question of market and competitive confidentiality needs, the OCD staff was adamant that the public's need to know was more important than corporate trade secrets.
29. A review of the testimony of Mrs. Van Gonten and Jones indicate a high level of suspicion and distrust of the oil and gas industry and thus, the additional burden or cost is irrelevant.
30. Ms. Gail MacQuesten, attorney for the Division did state in her opening statement that she acknowledged the additional cost of the proposed rule on small businesses. However, without input from the businesses affected by the proposed rule, the actual economic impact of the rule will be difficult to assess as noted by the Legislature in the Small Business Regulatory Relief Act. 14-4A-2-J "The process by

which state rules are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, *to examine the effect of proposed and existing rules on such businesses* and to review the continued need for existing rule”.

31. The Small Business Regulatory Relief Act (14-4A-4(B)), mandates all state agencies to first consider whether a “proposed rule has an adverse effect of small businesses” and second, to “consider regulatory methods that accomplish the objectives of the applicable law while minimizing the adverse effects on small business”. *14-4A-4(B)*.
32. There is no evidence in the record that the agency considered alternative regulatory methods to minimize adverse economic effects on small business.

The Cultural resources issue

33. Under 18-6-8.1, the “head of any state agency or department having direct or indirect jurisdiction over any land or structure modification which may affect a registered cultural property shall afford the state historic preservation office a reasonable and time opportunity to participate in planning such undertaking so as to preserve and protect, and to avoid or minimize adverse effects on, registered cultural properties”
34. The OCD staff, specifically Mr. Brad Jones alleged that this statute along with P.L. 108-208, “the Galisteo Basin Archaeological Sites protection Act” required full disclosure and comment of the State Office of Historic Preservation on all Exploration and Development plans. Further testimony indicated that whether there were *registered* historic sites in the Galisteo basin was unknown.
35. Ms. Kathleen Slick, the Historic Preservation Officer for the State of New Mexico made a statement on the technical cultural properties issues of the proposed rule. Over counsel’s objection, Ms. Slick made an unsworn statement to the Commission

on her agency's support of the rule and the need for her department to be involved in the Exploration and development plan approval process. Ms. Slick claimed that only 12% of the Galisteo Basin had been surveyed and over 3000 resources had been 'recorded' but only 25 sites were registered on the State or Federal registers. Ms. Slick did not give a copy of her statement to the Commission, nor did she pre-file it as required by the OCD Rule 19.15.3.11(B) (1). Ms. Slick also refused to be sworn for cross examination. The refusal of the Cultural Properties division to stand for questions and the subsequent lack of knowledge on the issue by OCD staff rendered IPANM and other parties unable to sufficiently understand the cultural resources issue. Moreover, her unsworn testimony may be considered by the Commission only as public input but not for policy deliberations.

36. Finally, the proposed rule seeks to place the burden of full archeological survey work on an operator as well as subject that operator to additional agency delay when the only requirement in law is for the protection of 'registered' cultural properties, not all artifacts which may or may not have any cultural significance. Since the Cultural properties rule is quite clear, there is no and was no evidence or rationale proffered for the additional burdens on operators.
37. The Commission may not consider the cultural resource testimony as it provided no rationale for the proposed rule on these grounds.

The lack of agency knowledge does not justify the additional burdens

38. All witnesses testified that there was very little knowledge of the geology and hydrology including connectivity in the Galisteo Basin. Mr. Tom Morrison, former employee of the Office of the State Engineer, who did not represent the OSE in his opinions, stated that the Office of the State Engineer had the jurisdiction over all water sources 'from the Colorado border down to Elephant Butte' and therefore he made the assumption that all water in the Galisteo Basin was 'fresh water' until an operator could prove differently. Mr. Morrison relied heavily on the very detailed

portion of the Galisteo Basin Report written by the OSE for his testimony.

However, Mr. Morrison was unfamiliar with the 2006 studies completed by the US Army Corps of Engineers as part of the Environmental Assessment for the Galisteo Dam and instead relied on the 1980 USGS hydrologic maps and data for Santa Fe County. Mr. Morrison was also unaware of 72-12-25 limiting the OSE's jurisdiction from aquifers deeper than 2500 feet.

39. While Mr. Morrison is an experienced hydrologist, he was not the spokesperson for the Office of the State Engineer and therefore, his reading of the Galisteo Basin report for his findings is questionable.
40. In addition, there was no cost analysis or even a clear statement of what a potential operator would need to do to proffer sufficient information to pass the administrative completeness hurdle set in the rule.
41. Mr. Morrison stated that even with several monitor wells at every location, he believed that the fractured geology of the basin would result in inadequate information for purposes of water sampling. This statement was completely inconsistent with those from Mr. VonGonten and Mr. Brad Jones who testified that an operator "may or may not" have to do a monitoring program. Mr. Morrison stated he was unfamiliar with the current OCD rules for exploratory wells or the environmental protections in the other statewide rules.
42. During the testimony, particularly of Mr. Brad Jones, it became clear that the mechanics of actual implementation of the requirements of the proposed rule had not been considered.
43. First, Mr. Jones contended that the OCD would have no decisions on the sufficiency of the documentation when an operator submits the Exploration and Development Plan.

44. Second, the standard of administrative completeness was discussed; however, if the OCD disliked a proposal in the ED plan, the OCD would only voice its disapproval of that provision at a hearing before an OCD employed hearing officer.
45. The hearing would include statements from the public, with no limitations on the quality or validity of the information offered and the operator would need to consider and respond to that information.
46. For administrative efficiency, obviously this system does not work. However, with the rule written in a manner that is so vague and subjective, IPANM would object to OCD staff being the final arbiter of the requirements of this formless rule.

Hydraulic Fracturing Does Not Pose a Threat To Human Health or the Environment

47. In New Mexico, hydraulic fracturing of oil and gas wells is essential in order to produce oil and gas at volumes that are economical.
48. In essence, hydraulic fracturing entails the use of high pressure pumps to force fluid down the well and into the formation. The intent is to pump viscous fluids into the well bore at pressures sufficient to create cracks or fissures in the rock formation containing the oil or gas in order to improve the flow characteristics of the formation.
49. To be effective, a fracture must be kept open when the pressure is relaxed. This is accomplished by introducing a proppant (usually sand) that is conveyed into the fracture by the viscous fluid.
50. Frac fluid is mainly water but may also contain a number of other constituents that are intended to ensure the effectiveness of the fracturing operations.
51. At the conclusion of a hydraulic fracturing operation, most of the frac fluid is removed from the well and properly disposed of by the operator. However, it is not possible to remove all of the frac fluid from a well. Nevertheless, the unrecoverable

frac fluid poses no threat to either human health or the environment because both gravity and geological barriers to subsurface migration of fluids prevent frac fluid, once it has been pumped into a well, from either contaminating underground sources of fresh water or reaching the surface.

52. Any undesirable movement of frac fluid toward water sources is reduced further by an energy service company's ability to control the propagation of fractures which allows them to monitor and direct the flow of frac fluids.
53. For these and other reasons Mr. William Jones, a petroleum engineer with the Oil Conservation Division, admitted that he was not "particularly concerned" with fracing and frac fluids and that he would not be "looking for the contents of frac fluids or any stimulative materials" in the drilling reports he receives from operators.
54. Mr. William Jones's testimony on this matter was supported by the testimony of Glenn Von Gonten, a senior hydrologist with OCD. During his testimony Mr. Von Gonten admitted that he is "not personally familiar with any ground water contamination cases that are due to fracing." Mr. Von Gonten's testimony on this matter is especially persuasive because he "work[s] on most of the groundwater contamination cases for the OCD."
55. Based on the testimony of Messrs. William Jones and Glenn Von Gonten, as well as information collected by OCD over several decades, this Commission concludes that hydraulic fracturing does not pose a risk to either human health or the environment.

Rules That Would Require Additional Disclosure of Fracturing Fluid Constituents Are Unnecessary

56. Extensive federal disclosure requirements are applicable to hydraulic fracturing operations, and operators and service companies must comply with these

obligations. As a result, operators must provide State and local officials (as well as medical professionals in appropriate situations), with specific and detailed information about the various chemicals, including frac fluid, that they use.

57. One federal statute that contains such disclosure requirements is the Emergency Planning and Community Right-To-Know Act or EPCRA. Operators must disclose significant information under EPCRA, including chemical names, physical hazards associated with such chemicals, OSHA permissible exposure limits, health hazards associated with the chemicals, emergency and first-aid procedures, an estimate of the maximum amount of chemicals present in a facility, and a description of the manner and location in which these chemicals are stored.
58. Another applicable federal regulation containing disclosure requirements is OSHA's hazard communication standard, which requires companies to divulge the "specific chemical identity" of a chemical product to a treating physician or nurse in an emergency medical situation.
59. Frac fluid is not exempted from the provisions of these statutes and regulations.
60. Because (i) adequate federal disclosure requirements already exist and are applicable to hydraulic fracturing operations, (ii) local and state authorities are the recipients of information that must be disclosed under these regulations, and (iii) hydraulic fracturing does not pose a risk to human health or the environment in any event, the Commission concludes that there is no need to adopt any rules that would create additional disclosure requirements with respect to hydraulic fracturing fluids.

Conclusion

61. The proposed application for the New Mexico Oil Conservation Division, for the adoption of a special rule for Santa Fe County and the Galisteo Basin is hereby rejected.

CERTIFICATE OF SERVICE

I certify that on January 29, 2009, I served copies of the foregoing statement of proposed findings, by electronic mail to the following:

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