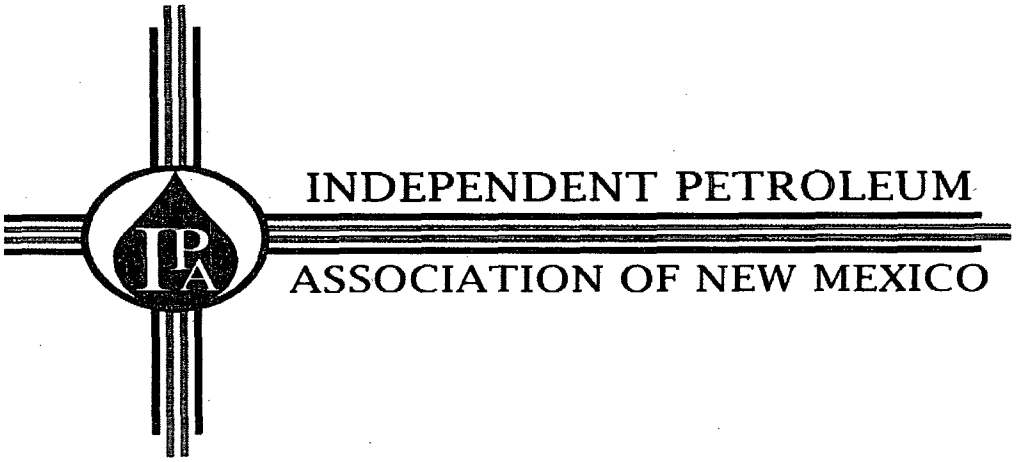

April 5, 2006

Mark Fesmire
Chairman
Oil Conservation Commission
Energy, Minerals and Natural Resources
Department of New Mexico
1220 S. St. Francis Drive
Santa Fe, NM 87505

Dear Chairman Fesmire;

The following comments are made on behalf of the Independent Petroleum Association of New Mexico (IPANM) regarding the Oil Conservation Division's (OCD) proposed changes to Rule 53 Surface Waste Management Facilities regulations (hereinafter referred to as the "Surface Waste rules"). The proposed 'Surface Waste rules' will be considered at the April 20, 2006 Oil Conservation Commission (OCC) meeting. IPANM consists of 180 companies who mostly live and work in New Mexico, raise families in New Mexico and hire locally to produce oil and gas in New Mexico. Many companies are second, third or fourth generation oil people. Independents drill some 85% of the domestic wells and produce some 82% of the natural gas and 68% of the crude oil in New Mexico.

I. General Comments

A. The purpose for Rule 53 must be to manage large Surface Waste Management facilities to protect the safety, human health and the environment. However, as written, the Rule requires even the smallest operators to land farm any accidental releases which will force oil and gas operators to continue operations for upto an additional three years after ceasing operations.

As a preliminary matter, IPANM contends that the proposed Surface Waste rule is highly inconsistent with existing OCD rules and proposed OCD rules, particularly in providing direction for operations of smaller oil and gas producers and operators. Currently, oil and gas operators[1] are placing drill cuttings and materials that come up during exploration and operations in drilling pits, and generally bio-remediate minor releases on site. While drilling and work-over pits as defined in 19.15.2.50 NMAC are exempted from the definition of surface waste management facilities, *see19.15.1.7(S)(10)(c),* it is unclear what a small operator is supposed to do with his 'waste' in the pits at the time of closure or at the time of an 'accidental release'. Similarly, 19.15.1.7.(S)(10)(d) NMAC also seems to exempt operators with waste from single wells, IPANM is very concerned with the outcome of the proposed Plugging & Abandonment and Pits & Below-grade Tanks Rules[2] (hereinafter referred to as 'the Pit Rules') regarding the closure of the pits.

Namely, at the time of closure of these exempt pits, will an Oil and Gas operator need to get a registration for a small land farm because the pit rule will declare all materials including the liners to be 'waste'? Even with the registration of small land farm, if the proposed pit rule requiring excavation of all wastes is considered in combination with this rule, small oil and gas

[1] Throughout this document the oil and gas operators will be distinguished from 'operators' who are defined in this proposed rule as the operators of the Surface Waste facility.
[2] scheduled for a hearing on June 15, 2006.

operators will be faced with the extraordinary costs of hauling off site to landfills for the liners[3] and drill cuttings. By forcing disposal at landfills, the OCD will place small oil and gas operators at a very high litigation risk because of the co-mingling of wastes at the landfill, reporting requirements and lack of indemnification at the site. It would not be surprising to find that one of these landfills could be declared a superfund site for the disposal of minute quantities of contaminants.

Moreover, the proposed rule seems to indicate that ***any*** accidental release must result in the registration of a small land farm in order to bio-remediate that area. *See 19.15.2.53(H)(2)(c) NMAC.* This rule is completely contrary to the reporting requirements of 19.15.3.116 NMAC which quantify the amounts of the spills that do not include NORM contaminants. If a release is greater than 25 barrels, the rule requires verbal notification and timely reporting, if the release is greater than 5 barrels, then a notification is still required. However, if the release is less than 5 barrels, no report is needed. To create a 'small land farm' requirement for "***any*** accidental release" is divergent to established practice, science and current rules.

The closure requirements for small land farms are inconsistent with the OCD's enforcement rule[4] and with reality for small oil and gas operators. The timeline for the operation

[3] Note that pit liners may be considered hazardous waste under the U.S. Supreme Court analysis in *Association of Battery Recyclers v. U.S. Environmental Protection Agency,* 208 F.3d 1047, 1050–56 (D.C. Cir. 2000), "Solid wastes are "considered hazardous if they possess one of four characteristics (ignitability, corrosivity, reactivity, and toxicity) or if EPA lists them as hazardous following a rulemaking." Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 915 (D.C. Cir. 1998) (citing 42 U.S.C. s 6921(a), 40 C.F.R. pt. 261). Therefore under this proposed rule, it is unclear if even a landfill, defined as a discrete area of land... designed for the permanent disposal of exempt or non-hazardous oil field waste *See 19.15.2.53(A)(1)(d).*

[4] 19.15.4.201 (B) A well shall be either properly plugged and abandoned or placed in approved temporary abandonment in accordance with these rules within 90 days after:

(1) a 60 day period following suspension of drilling operations;
(2) a determination that a well is no longer usable for beneficial purposes; or
(3) a period of one year in which a well has been continuously inactive.

[7-12-90...2-1-96; 19.15.4.201 NMAC - Rn, 19 NMAC 15.D.201, 12-14-01; A, 12/15/05]

of a well generally commences at the time of leasing the right to drill from either the private surface owner or a governmental entity. At the time of leasing, an oil and gas operator will obtain a surface use agreement from either the government entity or the private surface owner that will contain an agreement on how to remediate the land at the time of closure. However, as discussed at length at the hearings for the Enforcement Rule, Case No. 13564, a clear indication of final closure of a well is difficult to determine. But, assuming for argument, that a decision to close the well is made, then generally, once operations are finally over, the oil and gas operator will plug the well and revegetate the land as per the private surface use agreement or the government entity lease which is also a contractual relationship. In order to meet the OCD plugging requirements, the oil and gas operator will have to report completion within 90 days and under this proposed rule, if a small land farm was created to bio-remediate an accidental release, the oil and gas operation effectively must continue for up to **three more years** until the laboratory analysis reports that the THP, BTEX and Chloride numbers are at the numbers declared by the OCD to be appropriate[5]. Meanwhile, the surface owner technically can not use that land for cattle because the oil and gas operation is technically still on going, and an oil and gas operator will continue fencing to prevent livestock from eating the needed vegetation to meet the small land farm closure requirements. Since the final reporting numbers required by the OCD are admittedly higher than needed and have been arbitrarily set, to force an oil and gas operator to effectively continue operations for 3 years while preventing a surface owner from using his own land is a unconstitutional temporary taking of monies from the oil and gas operator

[5] As noted at the Outreach meeting of March 17, 2006, several experts for the OCD noted that in several instances the final reporting numbers for the contaminants were based on numbers from NMED. When asked if NMED used scientific analysis to base their numbers, the experts conceded that they did not know. In at least two instances, the experts stated that they pulled the 'numbers from thin air' and acknowledged that industry might find this arbitrary and capricious, but they felt that a random number that was higher than suggested by industry was more protective of the environment and human health.

and lands from the surface owner under eminent domain See Kelo et. al v. New London, 000 U.S. 04-108(2005). If the surface owner is the State, a lease will effectively expire within one year of ceasing operations and the operator will have to negotiate a right of way agreement with the State Land office to come onto the property to continue the bioremediation process on the land farm. Clearly, this proposed rule will adversely affect small oil and gas operators both in terms of cost and operations resources.

B. Tenants on surface owned by a private surface owner or governmental entity do not have additional legal rights

In the closure portion of the proposed Surface Waste rule, 19.15.2.53(J)(2) NMAC, the rule states, "division shall not release financial assurance until it determines the operator has successfully re-vegetated the site, or if the division has approved an alternate site use plan, until the land owner or *tenant* has obtained necessary regulatory approvals..." (emphasis added). As written, it is unclear which party the OCD intends to effectively have final say in the release of the financial assurance. In the case where the land is state owned and there are grazing allotments on the land, a rancher could be the 'tenant' as commonly understood in the industry. Clearly, granting a third party tenant the right to voice an opinion on or potentially prevent the return of financial assurance, is a violation of established Federal and State law. See, Blancett v. BLM, 04-2153 (DC. District Court, 3/20/06), citing The Taylor Grazing Act of 1934, 43 USC §315e, "grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands." At the same time, the Act provides that "nothing contained in this subchapter shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto.". See also, Hinton

v. Udall, 364 F.2d 676, 678-79 (D.C. Cir. 1966) (noting that the interests of Taylor Grazing Act permit holders "were expressly made subordinate to mineral interests by Section 6 of the Taylor Act, 43 U.S.C. § 315e"). Thus, IPANM would strongly urge the OCD to remove the word 'tenant' from the rule since the financial assurance is potentially being held hostage by a third party with no legal standing. However, if the word tenant was meant to mean the oil and gas operator leasing the right to drill on state or private lands, then this word should be changed to 'oil and gas operator'.

C. Conclusions based on science provide no technical justification for requirements of the proposed surface waste management rule.

IPANM is very concerned that, based on comments made by OCD experts at the Outreach meeting and at the Stakeholder meeting, that most of the technical requirements within the Surface Waste rule are not based on sound science. Further, the additional requirements placed on particularly smaller oil and gas operators cause extreme financial hardship without a balancing environmental benefit. As clearly demonstrated by the experts in the Surface Waste Management stakeholder meetings, the proposed Surface Waste rule is not based upon sound peer-reviewed science. In addition, since the proposed rule unmistakably conflicts with several portions of the proposed Surface Waste Management rule, clearly the inconsistencies must be identified and addressed.

II. Technical comments including new draft of March 31, 2006

Definitions

19.15.1.7 (O)(3) Oil field waste must include drill cuttings and wastes generated from oil field closures. This change in the definition will clarify that cuttings and liners are wastes commonly generated in the field. This also clarifies the disposal of such items later on in the rule.

19.15.1.7 (O)(5) Operator: The definition needs to be clarified. In other places in the Oil and Gas Act, operator means the oil and gas operator, while in this proposed rule, the OCD intends operator to mean the operator of the surface waste facility. Since there will be contracts and legal documents involving both parties, the regulation must be clarified.

19.15.2.53 Surface Waste Management Facilities

(A)(1)(c) Land farm vs. small land farm. From a drafting perspective, the differences between a land farm and small land farm are greater than just the size. The use of the same terminology here is confusing. In essence, a small land farm is really a biopile that is registered and has closure requirements. While IPANM strenuously objects to the creation and regulation of a small land farm entity, this needs to be clarified.

(C)(4)(a) notice to surface owners of record. Who exactly is a surface owner of record? By the records of the tax assessor, the owners of legal tax paying title will be notified, but looking at the county clerk's records, the owners of equitable title will also receive notice. Moreover, from a privacy and pubic perception standpoint, the notice of approval of a Surface Waste facility should come from the government, not a private entity. Notification of every surface owner should be part of OCD's statutory responsibility for public notice.

(I) and (J) – requirements for evaporation, storage, treatment and skimmer ponds and closure: These sections need to be moved to before the small land farm section H. Since the first sentence of Section H states that small land farms are exempt from the provisions of 19.15.2.53 '*except for the following requirements*' then Section I and J would apply to small land farms. Section I is concerned with engineering, construction and design of pits, below grade tanks etc. which do not apply to small land farms. Section J applies to closure and release of financial assurance for larger facilities. At a minimum, from a drafting standpoint, the word facility be itself is vague, 'facility' needs to be replaced with 'surface waste facility' in all instances of paragraphs I and J.

III. Conclusion

In conclusion, IPANM thanks the OCD for the opportunity to comment on Rule 19.15.2.53 concerning Surface waste management. Preliminarily, IPANM recognizes that the OCD may have attempted to exempt small oil and gas operators from the rule, however, there are clarifications that need to be made. First, the requirement that all accidental releases will result in a registered small land farm will place a financial and legal burden on small operators that are contrary to established practice with private surface owners and the State Land Office. Further, the OCD must place some sort of a minimum amount on the release, like in the corrective Action rule 19.15.3.116 NMAC, so that operators will comply with both notification and the land farming requirements if truly needed to protect the safety, health and the environment. Finally, the OCD must base the required scientific analysis numbers on established peer-reviewed science. If, as stated by one expert witness for the OCD at the Outreach meeting, the numbers are 'pulled from thin air' then the rule and the

correlative economic damage it will cause particularly small operators will be unenforceable in any court of law.

If you have any questions, please do not hesitate to call Karin Foster, Director of Governmental Affairs at 505-238-8385.

Thank you.