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Chairman Mark Fesmire
Oil Conservation Commission
Energy, Minerals Natural Resources
Santa Fe, NM 87504-1148

By Email

Re: Case No. 13,586: Application of the New Mexico Oil Conservation Division for the Repeal of Existing rules 709, 710 and 711 concerning Surface Waste Management and the Adoption of new rules 51, 52, and 53 governing Surface Waste Management

Dear Sir;

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 Rules 709, 710 and 711 Surface Waste Management Facilities regulations (hereinafter referred to as the "Surface Waste rules"). The testimony concerning the proposed changes to the 'Surface Waste rules' was considered at an Oil Conservation Commission (OCC) hearing on April 20th-21st, May 4th-6th, and May 18th, 2006. At the conclusion of the hearing, the Commission requested comments on the proposed rule as well as a brief on the facts and legal findings from the transcript of the OCC hearing. Subsequent to the hearing, the Honorable Governor Bill Richardson convened a taskforce to create a document on areas of consensus on the proposed

rule. The original date for final deliberations by the OCC was postponed to September 21, 2006. At the taskforce meetings, only technical experts from the OCD were allowed to present 'science' while other members of the public were allowed to attend; there was no opportunity for public comment. As a result of the hearing testimony and the taskforce proceedings, there are several areas that present significant concern with the promulgation of the new rules 51, 52 and 53 as currently proposed in the June 8, 2006 draft. First, IPANM would contend that during the hearing and the taskforce meetings have resulted in substantive changes to the proposed rule, thus, a re-submission of the rule is necessary with a new period for public comment. Second, these comments are intended to be part of a compilation to the record coupled with our comments of April. 5, 2006, our oral testimony at the hearing and all other comments made by industry representatives including the New Mexico Oil and Gas Association and the Industry Committee.

I. Executive Summary:

In the first instance, IPANM contends that any changes proffered by the Governor's taskforce that are accepted by the OCC must be open for public comment. Because there were changes made during the hearing, post hearing and at the taskforce meetings, these substantive changes, if accepted by the Commission, must be made available to the public for a full and fair hearing process. Second, the evidence at the hearing was overwhelmingly against the methodology and rationale used by OCD for changing the rule. Indeed, the statutory mandates required under the Small Business Regulatory Relief Act were wholly ignored by the OCD staff. The complexity and conflicts of the proposed rule have created bad policy based on miscalculations, misinterpretations, inappropriate use of data and even typographical errors. The OCD also may have unintentionally misled the Commission in at least two instances: First, in relation to the protection of small oil and gas operators, there was a show of reliance on existing Rules 116 and 19. However, testimony at the hearing and public statements by the Division Chair indicate that there is a clear intention by the Division to eradicate standards for remediation of small spills in favor of landfarming all spills. The current status of the Pit Rule will also result in use of additional and larger surface waste management facilities- neither of which will assist small business entities – particularly when there is no science to support the

agency determination that all wastes must be hauled to commercial disposal facilities. Second, the Chairman's reliance upon and refusal to discuss the effects of the Executive order on Environmental Justice may have misled the Commission to believe that the order has the force of law. However, without legislative support for the environmental justice concepts, there is no requirement that the agency need follow the standards therein at this time. As a constituent agency to the Water Quality Control Commission, the OCD clearly attempts to expand its jurisdictional authority when the proffered non-degradation standard is more stringent than the WQCC's. Finally, the one size fits all standards create ridiculous outcomes when comparing a small 1400 cubic yard facility to a 500 acre facility. IPANM would urge the adoption of the proposed standards in the Industry Committee comments as a regulation that would be protective of the health, safety and environment and well as allow the OCC to meet its statutory mandates to protect correlative rights and prevent waste.

II. Facts

Over the course of several days during the spring of 2006, the Surface Waste Management hearing was held before the Oil Conservation Commission. The OCC, a division of the Energy, Minerals and Natural Resources Department of the State of New Mexico is a statutorily created commission "to be composed of a designee of the commissioner of public lands, a designee of the secretary of energy, minerals and natural resources and the director of the oil conservation division. The designees of the commissioner of public lands and the secretary of energy, minerals and natural resources shall be persons who have expertise in the regulation of petroleum production by virtue of education or training" *70-2-4 NMSA 1978.* The Commission is currently staffed by Mark Fesmire, Chair of the OCD, William C. Olson, Chief of the Ground Water Quality Bureau of the New Mexico Environment Department and Jami Bailey, Director of the Oil, Gas and Minerals Division of the State Land Office.

At the hearing, the NMOCD presented several witnesses in support of the proposed changes and amendments to Rules 709, 710 and 711. The OCD witnesses included Wayne Price, Environmental Bureau Chief at NMOCD and Commissioner with the WQCC; Edwin E. Martin, Environmental engineer, Environmental Bureau, NMOCD; Carl J. Chavez, Environmental

engineer, NMOCD; Glen Von Gonten, Senior hydrologist, Environmental Bureau, NMOCD. Controlled Recovery, Inc. (CRI), owner of a large landfill in Southeastern New Mexico, cross examined all witnesses and presented I. Keith Gordon, Engineer. The Industry Committee, comprising of twelve oil and gas companies[1], proffered Daniel B. Stephens, Hydrogeologist; Kerry L. Sublette, Chemical/environmental engineer; and Ben Thomas, III, Toxicologist. Dr. Don Neeper, Soil Specialist, testified on behalf of the Citizens for Clean Air and Water. In addition, the oral record included statements by Mark Mathis, Executive Director for the Citizens Alliance for Responsible Energy, Yolanda Perez, Senior Regulatory Specialist for ConocoPhillips and co-chair of the Regulatory Affairs Committee for the New Mexico Oil and Gas Association and Karin Foster, Director of Government Affairs of the Independent Petroleum Association of New Mexico. Several entities including IPANM, filed written comments which are part of the record of the hearing.

The transcript of the proceedings consists of nearly 1700 pages of text. While each witness made relevant comments to the proceeding, for purposes of this document, various statements made by witnesses will be either directly transcribed or referred to with adequate citations within the context of arguments made below.

III. Legal Argument

Point One

The Oil Conservation Division failed to address the issues concerning economic impact on small businesses and therefore violated the mandates of the Small Business Regulatory Relief Act.

According to the Department of Energy, independent oil and natural gas companies currently drill 85% of the domestic wells and produce 82% of our homegrown natural gas and 68% of our crude oil. In New Mexico, oil and natural gas are the biggest drivers of the state's economy, generating $2.2 billion in direct revenue to the state in fiscal year 2005. The oil and gas producers of New Mexico are the first and vital small businesses in the long chain of private

[1] The Industry Committee represented by Mr. Bill Carr and Mr. Eric Hiser, consisted of : BP America Production Company, Burlington Resources Oil & Gas Company, ConocoPhillips Company, Devon Energy Production Company, Dugan Production Corp., Marathon Oil Company, Marbob Energy Corporation, Occidental Permian, Ltd., OXY USA, Inc., OXY USA WTP Limited Partnership, XTO Energy, Inc., and Yates Petroleum Corporation.

entities who work with and for industry – to the benefit of the state. IPANM currently represents about 190 companies who are independent 'small businesses' employing on average twenty-five people. Most of our small producers are New Mexico based companies who live in, work in and employ folks from the 'land of enchantment'.

The Small Business Regulatory Relief Act (hereinafter SBRRA), sponsored by Speaker Ben Lujan and signed into law by the Honorable Governor Bill Richardson on April 6, 2005, requires that all New Mexico state agencies pay heed when promulgating rules or regulations that may have a negative impact on small businesses. Under the law, a 'small business' is defined as "a business entity, including its affiliates, that is independently owned and operated and employs fifty or fewer full-time employees" *14- 4A-3(E) NMSA 1978.* A 'rule' means, "any rule, regulation, order, standard or statement of policy, including amendments to or repeals of any of those, issued or promulgated by an agency and purporting to ... affect persons not members or employees of the issuing agency". *14-4A-3(D) NMSA 1978.* At the time of the creation of the Small business Regulatory Relief Act, the Legislature demonstrated an explicit understanding that 'a vibrant and growing small business sector is critical to creating jobs in a dynamic economy; [and that] small businesses bear a disproportionate share of regulatory costs and burdens" *14-4A-2(A, B).* The legislature further stated that "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" 14-4A-2(*J emphasis added).*

The SBRRA 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).* The Legislature also ordered state agencies to review "*all* of its rules that existed on the effective date of the Small Business Regulatory Relief Act to determine whether the rules should be continued without change or should be amended or repealed to minimize the economic impact of the rules on small businesses, subject to compliance with the stated objectives of the laws pursuant to which the rules were adopted". The end date for the review of all agencies rules as they pertained to small business was July 1, 2010. *14-4A-6(A).* If the agency determined a

change in a rule was needed, the agency is **must** consider "(1) the continued need for the rule; (2) the nature of complaints or comments received from the public concerning the rule; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates or conflicts with other federal, state and local government rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions or other factors have changed in the topical area affected by the rule." *14-4A-6(C)(1-5) emphasis added.*

A review of the transcript demonstrates that the OCD failed to adhere to the Small Business Regulatory Relief Act's statutory mandate to consider and demonstrate their understanding of an agency rule's impact on small business. Since most oil and gas operators in the State of New Mexico fit within the statutory definition of 'small business' and the OCD regulation clearly affects the economics of small businesses, the OCD had the statutory burden to balance the SBRRA five factors for a full and fair consideration of small business impacts.

1. The discussions relating to small business impacts were conflicting and sparse

As part of the hearing direct examination, Division Chief Wayne Price was asked by OCD Attorney David Brooks whether considerations for small businesses were undertaken when the rule was developed. Mr. Price's response was "we discussed that somewhat. We addressed that, and we didn't see any documentation or we didn't have any hard data or evidence to show that what we're doing is impacting small businesses whatsoever" (Price, ln. 7 – 11, p. 168). Mr. Price continued to state, "If anything, I think we're helping them" and that he had an 'honest belief' that implementing the surface waste management program would 'effect a savings for operators in the field" (Price, ln. 11, p. 168). While Mr. Price's statement demonstrates that he was coached by OCD attorneys to make reference to the SBRRA, other than pure speculation offered by Mr. Price, there is no other discussion or evidence offered to support Mr. Price's heartwarming 'belief' that he is assisting industry. The following dialogue occurred on re-direct examination by Mr. Brooks:

> Q. Now even if you're mistaken and this does have some adverse impact on small business—and I'm talking about small business particularly, as defined in the New Mexico Small Business Regulatory Act, which is less than 50 employees—even if the Commission were to determine that these Rules might have adverse—disproportionately adverse effect on businesses with less than 50 employees, would you still recommend—would you still believe

that the *environmental protection* as provided by these Rules would justify their adoption? *(emphasis added)*

A. Yes, I would.

(Price, ln. 8 – 18, p. 301)

First, Mr. Price's testimony is interesting in light of the SBRRA burden of proof of consideration of small business impact upon the agency to "minimizing the effects on small business" prior "to the adoption of a proposed rule" *14-4A-4(B).*' Clearly Mr. Price's 'belief' that industry need propose or demonstrate the proposed rule's effect on small business is misplaced. Further, the SBRRA mandates that 'when adopting rules to protect the *health, safety and economic welfare* of the state, agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on small business' *14-4A-2(D)(Legislative Findings – emphasis added).* However, counsel for the OCD seems to imply in his question that if there are 'environmental protection' implications then the disproportionate adverse effects on small businesses would be outweighed. Since environmental protection is not within the purview of either 'health, safety and economic welfare' noted in the SBRRA, then the balancing test created in section 14-4A-2D must be discarded in favor of a clear demonstration by the agency of a reduction of the impacts on small business in the review of and promulgation of a rule or regulation. A review of the transcript reveals that the OCD utterly failed to demonstrate an understanding of, consider or reduce impacts on small businesses with the promulgation of rules 51, 52 and 53 relating to Surface Waste Management.

Second, Mr. Price's testimony is fraught with inconsistencies when discussing the OCD's true intentions with regard to small operators. Initially, Mr. Price hides behind Counsel's opening statement that small operators will be protected by the current versions of OCD rules 116 and 19 regulating procedures for reporting accidental releases or spills. (Price, ln. 21 – 25, p. 168). The current rule 19.15.3.116 NMAC quantifies the amounts of the spills that do not include NORM contaminants. If an accidental release is greater than 25 barrels, the rule requires verbal notification to the OCD, timely reporting and an abatement plan; if the release is greater than 5 barrels, then a notification is required; if the accidental release is less than 5 barrels, no report is needed. For the releases under 25 barrels, on-site remediation has been the scientifically and best practices method of cleaning up the accidental release. Thus, technically, with Rule 116 and

19 as written, under the current version of the proposed rule, a small oil and gas operator[2] will only need to a small registered landfarm[3] if he has multiple accidental spills and chooses to pick up the contaminated soils and bring them to a small registered landfarm as permitted by Section H. of Rule 53[4]. In addition, the OCD's irrational insistence that all drill cuttings be hauled to a commercial permitted landfarm already conflicts with science and substantial policy rationale behind the current rules 116 and 19. As noted below in the lengthy colloquy between Commissioner Olson and several witnesses, the need for Rule 53 as it pertains to the creation of small registered landfarms for small oil and gas operators clearly conflicts with established rules. The main reason for concern are recent statements made by OCD Division Chief and OCC Chairman Mark Fesmire that both Rule 116 and 19 are currently not protecting the environment and that they will be 'overhauled' in the very near future. *IPANM guest speaker, Mark Fesmire, August 2006, BLM Resource Advisory Committee, Fall 2005.* Several statements in this record made by several OCD witnesses and Chairman Fesmire also indicate that the OCD does intend to have all spills and accidental releases, currently regulated under Rule 116 and 19, placed in a landfarm[5]. Of note is the questioning by Commissioner Fesmire of Mr. Van Gonten:

> Q. Okay. So the idea of a small landfarm is to encourage immediate cleanup of small spills, correct?
>
> A. Commissioner, yes, sir, that is correct.
>
> (Von Gonten, ln. 7-9, p. 692).

[2] As with the written comments made by IPANM in April 2006, the use of the word 'operator' in this rule pertains to the operator of a surface waste facility. Thus, a small oil and gas operator who opts to open a small registered landfarm would be considered a dual operator for the purpose of NMOCD rule 53.

[3] The rule creates two types of landfarms: First, Section G pertains to the larger permitted landfarm with cell sizes of up to 10 acres and a total acreage of up to 500 acres. The majority of the closure requirements in the rule pertain to the large permitted landfarms in Section G. IPANM is cognizant of the nuances between the permitted landfarm and the small registered landfarm, in Section H, which is currently at a maximum of 1400 cubic yards for a 3 year duration to accept only hydrocarbon contaminated soils (no drill cuttings). However, with the currently proposed pit rule and the statements made by several regulators as to the environmental impacts of the spill and abatement rule, IPANM is very concerned that all small operators will find themselves having to become landfarm operators to economically dispose of 'wastes'.

[4] Note that the additional permitting, operating and closure requirements of the proposed rule will also have an immediate adverse economic impact on small operators since commercial landfarmers will pass costs through to the consumer, in this case, the small oil and gas producers. See Point two on economic costs.

[5] "So when we do have a leak or spill, we'd be proactive, we can get it up and put it into a landfarm and start treating it to make it less toxic" (Price, ln. , p. 88); "Well, one of the things that we want to do is, we want to encourage operators, when they have their *de minimis* leaks and spills out there, rather than have them build up in one place and not be treated, is to properly handle those, treat those and put into their small landfarm that they can remediate." (Price, ln. 23 – 3, p. 51-52).

If the OCD staff is aware of Rule 116 and 19 going by the wayside and the proposed versions to the Pit rule become regulation, then the proposed Surface Waste Management rule does have a very real economic effect on the oil and gas industry. The cost of hauling drill cuttings, small amounts of hydro-carbon contaminated soils and eventually pit liners to landfarms or landfills will be costly not only to oil and gas operators but to the environment as well[6]. Note that currently, all Northwest operators must transport excess cuttings and waste from closed loop systems to Southeastern New Mexico since there are no land fills up North. This 300 mile trip not only has a negative impact on the environment, but increases the probability of accidents ranging from fatalities to broken windshields. (*See, oral comments by Mark Mathis for CARE, p. 1150-51).* Thus, OCD's attempt to end-run the clear requirements of the SBRRA, knowing of the agency's intent to eviscerate Rule 116 and 19, makes the OCD's reliance at the hearing on those two rules without any more evidence to demonstrate *diminimus* impact on small businesses wholly disingenuous and capricious.

Finally, when asked on cross examination by Mr. Carr if the agency had given "consideration" to the small business entity in terms of impact on the small businesses, Mr. Price admitted that he had [considered the impact] however, he did not consider the very basic and important question of what the impact would be on a small operator if he could not meet the closure standards. (Price, ln. 22 – 25, p. 304). Mr. Price admitted on cross examination that the small operator would have to bear the increased cost of "dig and haul those soils to a commercial landfill" if the closure standards could not be met (Price, ln. 7-9, p. 305). Mr. Price also conceded to Commissioner Bailey that the agency had set 'some real stringent closure standards' and that as the Environmental Bureau Chief that he advocated for 'try[ing] to approach zero

[6] It is estimated by industry watch groups that the excavation of only a the pit and transport of the contents and the used liners will result in approximately 25 million additional driving miles per year – at a cost of 3.5 million gallons of diesel fuel and an increase in drilling costs of more than 10% per well. *See, Collins, G. for Citizens Alliance for Responsible Energy, "It's the pits" comments on NM proposed drilling pit closure rule, March 2006, pg. 2.* Currently the cost of closing a pit is about $12, 000 to $15,000 which involves rolling the liner into an on-site trench and back filling the pit and the trench with native top soil. With the proposed Pit rules, it is estimated that the cost will increase 15 fold to about $180,000 to $200,000 per well to fully excavate, test and remove all contents from the site to a land fill. This is assuming that under the Surface Waste Management rule that permitting for landfills will occur with enough speed to accept the increase in demand for land fill space. In fact, it would not be surprising to find out of state or tribal concerns accepting industry non hazardous 'waste' product and used liners – a very high price. It is also interesting to note that none of the other top seven oil producing states require more than evaporation of liquids in the pit and back fill to close industry pits.

discharge, zero release' (Price, ln. 23, p. 242; ln. 13, p. 176). Similarly, hydrologist for the OCD testified 'our approach is no release, no risk' (Von Gonten, ln. 1, p. 560). In fact, Mr. Von Gonten admitted that according to the standards set by the Division, approximately 45% of landfarms would not meet the closure requirement and the operator would be forced to either petition the Commission for a hearing or ultimately remove the soils to a landfill (Von Gonten, ln. 1-17; p. 656; ln. 20 – 24, p. 657). However, as noted below in the discussion pertaining to the regulatory standards of Water Quality Control Commission, which are based on the science of hydrology, some release of hydrocarbons, chlorides[7] and other constituents will be allowable because there is no proven harm to the environment. Moreover, in the instances where the OCD staff did rely on scientific principles to support their very stringent standards for closure, there were several instances where there was "misrepresentation of modeling, typographical errors, inappropriate use of data, calculation errors" (Stephens, ln. 1-7, p. 790), or simply refused to accept any standard lower than the protection for the human health and safety based on drinking the hydrocarbon contaminated soils or even bathing in the soils. [8] Even the experts to the hearing expressed frustration with attempting to understand the OCD's creation of standards that were clearly not based on science:

> "The list -- and we heard this testimony from Mr. van Gonten -- of constituents in this soil closure standard list is based on the assumption that the dilution and attenuation factor is 1, except for chloride. Chloride is arbitrarily set to 1000 milligrams per kilogram. And sulfate, inexplicably, is set to background. I'm not sure why, but that's the way it is. All the other constituents in that list, I understand, are based on the assumption of a dilution attenuation factor of 1 that is associated with a look-up table and the New Mexico Environment Department's voluntary cleanup program."

[7] For example, the chloride closure standard established in Rule 53 calls for 1000 mg/kg. However, in testimony by renowned expert hydrologist Daniel B. Stephens, there are "small landfarm situations that 10,000 milligrams per kilogram could be protective of groundwater. It just depends on the site. It depends on the soil" (Stephens, ln. 2-7, p. 758).

[8] The OCD's insistence on drinking water and dermal contact standards became very clear at the Taskforce meetings when OCD's Glenn Van Gonten admitted that the closure standards in the proposed rule 53 for the Section G (permitted landfarms) were incorrect. An August 25, 2006 email from Van Gonten to members of the taskforce stated, "OCD based the 53G(6) closure standard on the more conservative of either the inhalation/dermal contact concentration for soils or the soil-to-ground water pathway. NMED, however, did not consistently use the WQCC standards ... therefore OCD recalculated its standards using NMED's (actually EPA's)equations... Please note that some of the concentrations have been increased, while some by been decreased... Remember that the final closure standard will be based first on the most conservative of the inhalation/dermal contact soil concentration or the soil-to ground water pathway concentration... then the operator must meet the greater of either the background soil concentration, a PQL, or the recalculated numerical concentration..."

(Stephens, ln. 8-18, p. 778).

Looking at the direct impact on New Mexican small businesses as a result of new rule 51, 52 and 53, the adverse economic implications are huge. First, for the small permitted landfarms, the OCD will require extensive testing and sampling to determine background levels of the list of constituents commonly referred to as the '3103' list. The estimated cost of each composite sample will be $1200 for lab costs plus the cost of digging the hole, taking the sample, filling the hole and for the lab tech time out in the field. The number of samples needed to achieve closure on a registered landfarm is unknown[9], however, since the closure standards are so rigid, repeated sampling would be necessary. Second, each registered landfarm will need to have written consent of the land owner prior to commencing operations. This consent will not come freely – traditionally, surface owners demand payment in the form of actual monies or 'good will'. Operators have been known to re-stock fish ponds, build and maintain roads and even pay for the full electrification of remote barns[10]. Third, if the land owner refuses consent to use the surface for landfarming, the operator has only three options, to go to the OCC for an exception, to apply under the permitted landfarm section of the rule or not landfarm at all, and haul all oilfield waste, including hydrocarbon contaminated soils to a commercial centralized landfarm or landfill. Fourth, under established science, testified to extensively at the hearing by Dr. Sublette, the best way to remediate hydrocarbon spills is to do 'best gardening practices' or in other words, add water to the soils. For small operators, obtaining water rights to maintain 60 to 80% moisture levels will be particularly costly in light of the recent droughts in the Southeast. Fifth, if the small registered landfarm operator can not meet the closure standards set by the OCD within three years of registration, he will have to 'dig and haul' or 'suck, muck and truck' the soils from

[9] The Taskforce report changes section G(2) background testing to requiring an operator who has not already established background to take, at a minimum, 12 composite samples with each consisting of 16 discrete samples..." The cost of this sampling will be huge and will create a nice cottage industry for chemists in New Mexico.

[10] Achieving an agreement in the context of private surface use agreements has been part of industry practice for over 80 years. Although New Mexico operator do not have the statutory responsibility to pay private fee surface owners for the use of their surface, as part of best management practices and company good neighbor policies, operators often make good will payments to the surface owner in exchange for permission to enter upon land for operations. Note that payments to tenants, or grazing allotees on State and Federal lands is statutorily prohibited, however, the State Land Office has traditionally told operators to make the 'good will' payments without reporting the details to the SLO. In the Northwest part of the State, the BLM has created a voluntary per well payment of $1000 to create a fund to pay surface owners for damages obtained as a result of oil and gas operations.

the spill to a commercial landfarm or landfill. Current prices at commercial landfarms are at about $14 per cubic yard disposed at the landfarm. There are approximately 20 landfarms in southeast New Mexico that are still accepting oil field waste. These landfarms are mature, however, and as the demand for space at the landfarm increases, the supply of available cells will decrease, driving up the price to dispose of wastes. Of even more drastic import is the current lack of supply of landfill cell space. In the Southeast, the only landfill accepting oil field waste is that of Controlled Recovering, Inc. which is also a mature landfill. At the hearing, there was mention made by CRI executives that the cost of disposal at the landfill is guaranteed to increase to around the $30 per cubic yard mark due to the increased demand and lack of supply. In addition, the operators in the Northwest part of the state currently have no local landfill accepting oil field wastes. The operators would need to haul soils over 300 miles to the southeastern part of the state. There has also been discussion at the hearing that tribal entities or out-of state landfill operations may crop up to accommodate the need created by this new rule[11].

2. The OCD's rationale for the continued need for the rule demonstrated a lack of understanding of science and statutory authority – see also discussion of WQCC jurisdiction, point Three.

The OCD's stated rationales for the changes to the Rule did not refer to protection of small businesses, in fact, the reasons for the rule changes seem to pertain to environmentalist politics rather than science or even a real need for the change. When asked why the rule changes were needed, Mr. Price, responded, "[W]e wanted to normalize OCD Rules with other state and federal regulations. And we wanted to address and balance environmental justice, aesthetics, sensible waste management, sound science and other relevant issues." (Price, ln. 8-11, p. 59; ln. 5-9, p. 164). Mr. Price noted that aesthetics played in important role in regulating the disposal of wastes even if the wastes were not toxic (Price, ln. 24-6, p. 59-60). Although Mr. Price admitted that aesthetics were not a regulated issue, he personally held a belief that aesthetics was part of

[11] The assumptions of economic impacts on small oil and gas operators is based on the premise and existence of the current versions of Rules 116 and 19 (Spill and Abatement) and the Pit rule. However, there have been statements made by OCD staff that the Division intends to 'overhaul' and potentially eliminate the Spill and Abatement rule in favor of landfarming all spills and accidental releases. The Pit rule is currently on hold pending the outcome of this hearing. The currently proposed changes to the Pit rule, upon which IPANM did comment, would required dig and haul of all pits at the time of closure which would only serve to place more of a strain on and increase the costs of doing business to small oil and gas operators.

'sensible waste management' which also created the unregulated responsibility for 'pollution management, proper management and proper response' (Price, ln. 14-6 p. 175-176; ln. 8-9, p. 176). Mr. Price agreed that the OCD's statutory responsibilities included protection of the environment, protection of fresh water, protection of human health and prevention of waste and correlative rights, in addition to being a constituent agency to the Water Quality Control Commission[12]. (Price, ln. 4-25, p. 166). Moreover, "pollution prevention, is one our major goals... if you prevent pollution in the Oil and Gas industry, you prevent waste and – you prevent the waste of oil and gas" (Price, ln. 7-10, p. 167).

First, as noted below in the discussion relating to the Water Quality Control Commission, the Oil Conservation Commission is empowered to 'prevent waste ... and protect correlative rights' *See Section 70-2-11(A).* As part of the duty to prevent waste, the Commission is required 'to prevent crude petroleum oil, natural gas or water from escaping strata in which it is found into other strata' *Section 70-2-12(B)(2).* Further, the authority to regulate the fresh waters of the state is expressly left to the Water Quality Control Commission, and the OCC is delegated the role of constituent agency of the WQCC. *Section 74-6-2(K)(4).* As a constituent agency to the WQCC, the OCC is only to "regulate the disposition of nondomestic wastes resulting from the oil field services industry... the treatment of natural gas or refinement of crude oil to protect public health and the environment, including *administering* the Water Quality Act [74-6-1 NMSA 1978][emphasis added] ...' *Section 70-2-12(B)(22).*

Finally, in response to cross examination for the reasoning behind changing the current Rules 51, 52 and 53, Mr. Price stated:

> "Q (by Mr. Carr) . What do you mean by improper use of landfarms?
>
> A. Well, about a year ago we were taken to taken to task on the issue of how we had approved the landfarm permits, and that issue was the fact that the way our public notices were written, and also the way the permits were basically written, we were allowing exempt—RCRA-exempt waste, which included a gamut of waste that probably would not be proper for a landfarm. And so we had—we just basically felt like, you know, it's time that we need to change that. It wasn't correct, so we need to change it. Landfarms in essence, from a long-term standpoint, it appeared that would become landfills.

[12] A full analysis of the constituent responsibilities of the OCD to the WQCC is noted below in Point Two.

Q. I guess the question I have is, when you talk about an improper use of the landfarm, are we talking really about an enforcement issue, or was there something really wrong with the underlying Rule?

A. There was something wrong with the underlying Rule.

Q. And when you've gotten criticism from citizens' groups, has that been only because of problems with the Rule, not because of agency enforcement of existing rules?

A. I think the biggest criticism we had there is the lack of inspections and enforcement. And you know, we have a total of five people here, and it's just difficult to get out to all of these sites.

(Price, ln. 3-2, p. 174-175).

Thus, a review of the transcript indicates the OCD's unwillingness to consider the impacts on small businesses when promulgating the new rules. Further, as proffered reasons for changing the rule, the OCD witnesses stated that aesthetics and pollution management were paramount responsibilities of the agency. When asked on cross examination, Mr. Price, who is the Environmental Bureau chief to the OCD had to admit that contrary to initially stated by the Division, that the criticism of lack of enforcement and inspections of landfarms, rather than the actual rule 711 were the basis of the reason for the change.

3. The Complexity of the Rule is such that creating a consistent and fair rule will be nearly impossible

The complexity of the proposed rule is one of the reasons why there were six full days of testimony and a subsequent summer's worth of meetings with representatives from industry, environmental groups and the OCD staff. In its most basic form, the complexity of the rule arises from the Divisions desire to create one rule to regulate three very different entities: the small registered landfarm- created to bioremediate small hydrocarbon only spills at oil and gas well sites; the commercial centralized landfarm designed for the temporary remediation of hydrocarbon contaminated soils from multiple operators and the large commercial landfill for the permanent disposal of oil field wastes. During the hearing, there was much conflicting testimony on the true purpose of landfarms since the small surface size of 1400 cubic yards would result in a smaller impact to the environment than the larger 500 acre commercial landfarm. As Mr. Price noted, "..one of the things that we want to do is, we want to encourage operators, when they have

their *de minimus* leaks and spills out there, rather than have them build up in one place and not be treated, is to properly handle those, treat those and put into their small landfarm that they can remediate. Remember, the – most of the products that we're talking about are from leaks and spills. They're [sic] not going to be tankbottoms at small landfarms, they're [sic] going to be leaks and spills from condensate oil spills, and those materials typically do not have those contaminants that you're talking about, and so it's even a less concern. And the size of it is even --- makes it even less of a concern from an environmental standpoint" (Price, ln. 23-11, p. 151-152). Similarly, Commissioner Olson asked several witnesses, including IPANM if and why there was even a need for a registered landfarm to remediate spills if Rule 116 still applied:

> "Q (by Commissioner Olson). Yeah, I guess I'm just seeing—it seems a little problematic to me, that it's seeming to me that all spills—because almost the ones that I'm familiar with, everything is subject to Rule 116 and then is being cleaned up, and therefore they're all exempt. So I don't understand, I guess, outside of a pit closure, what would actually go to a small landfarm, be classified as that under Rule 53. So these—That's my impression.
>
> COMMISSIONER BAILEY: So you're saying that we don't need to have small landfarm rules at all?
>
> Q. (By Commissioner Olson) Well, that's kind of what this is sounding like when I read that definition. That's at least my interpretation of it.
>
> (Martin, questioning by Olson, ln. 8-25; p. 1506).

> Q: (By Commissioner Olson). Do you think, then, that the remediation standards or closure standards for spill sites should be different than a small landfarm?
>
> COMMISSIONER OLSON: Because it just seems to me that if most things are done under spills, under Rule 116, there's no real standards that apply, even those may be rather large -- you know, landfarming activities is what I would call them. But it doesn't seem like the bioremediation endpoint standards would even really apply to those, because they would be exempt from the regulation.
>
> (Foster, questioning by Olson, ln.4-6; p. 1531; LN. 16-22, p 1532).

Also of note to this particular discussion on complexity of the rule is the lack of consistent testimony on closure standards for commercial and registered landfarms versus the different policy considerations and environmental concerns pertaining to large 500 acre landfills.

In the case of discussing the very technical use of Dilution attenuation factors or DAF, it became apparent that OCD's desire to create one rule and standard for these three very different types of facilities was simply ridiculous:

> Q (By Hiser): We have heard some concerns with the size of landfarms. If landfarms were required to be much smaller than the 500 acres, would that in any way affect the kind of standards we're trying to put on the...
> A. If you were to restrict it to a much smaller size, say you were having a single landfarm facility of only five or 10 acres, I think we would have to revisit that, potentially.
> (Van Gonten, ln. 16-22, p. 659)
> Q: (By Hiser): Okay, thank you. What peer-reviewed information did you use to base your rejection of EPA/NMED's recommended DAF of 20?
> A: We looked at the guidance document that they proposed, and they said that for very small sites, not commercial and centralized landfarms up to 500 acres, that a -- actually the curve indicates that a DAF of 1 is appropriate for large-scale sites. NMED's DAF of 20 is only appropriate for those areas that are small-scale sites. It is not appropriate, explicitly not appropriate, for areas with shallow groundwater or karst.
> Q. I see. And so in large part, the Division's approach to this entire landfarm regulation is based upon the 500-acre landfarm?
> A. That is what we have to consider that a commercial or centralized facility may be, as large as 500 acres.
> (Van gonten, ln. 18-9 p. 638-9).

Therefore, under the standard noted by Van Gonten, the DAF of 20 is the scientifically responsible level for small registered landfarms, however, the DAF remains at 1 in the proposed rule to apply to all landfarms. The confusion continues at the OCD because of the agency's perceived need to always create the highest standard of protection – even if it conflicts with sister agency standards (*See Footnote 8, OCD's statement that they need to have a higher standard than NMED since they perceive NMED calculations to be incorrect*). First, the agency relied on NMED soil screening levels (SSL's) for review of discussion of migration to the ground water pathway. However, use of this method was summarily rejected by the OCD witness, Ed Martin:

> " Q (By Commissioner Olson). Just how many are there, roughly, that are under 100 feet to groundwater? How many landfarms?
> A. Under 100 feet?
> Q. Yeah.
> A. Majority.
> Q. Majority of them? And do most of those have groundwater monitoring?

A. Most do not.
Q. Most do not. They mostly rely on the treatment zone—
A. Treatment zone monitoring.
Q. And that's the three feet underneath of the native soil?
A. Yes.
Q. How many of those have had problems with migration into the treatment zone?

A. None to my knowledge.

(Martin, ln.4-20, p. 1499).

As part of the pollution prevention authority, Mr. Price argued that "there are many ***potentially*** toxic constituents in crude oil and therefore should be treated similarly to hazardous waste." *Emphasis added* (Price, p. 61-63). Because of this very awkward presumption by the OCD to create a rule with the highest standards possible, the outcomes are highly unattainable and unreasonable. For example:

Q. (By Mr. Hiser) Now did I hear you correctly in your testimony, that you said that your basis for choosing which of these standards applied was, you chose the most protective one?

A. Yes.

Q. So you didn't undertake any other evaluation, other than choosing which of the different numbers for the constituents would be the lowest?

A. That's correct.

(Van Gonten, ln. 19-2, p. 627 - 628)

Q. And so haven't you taken a numeric thing which is meant to be used as calculating site-specific situations and converted that into a standard?

A. We borrowed it for our own purposes—
Q. So you—
A. -- but again, our purpose was to make sure that there were no releases, given that there could be a certain very minimal amount of release—

(Van Gonten, ln.24-6; p. 640-641).

However, the experts for industry directly contradicted not only the methods of analysis used by OCD staff, but questioned the basis of their rationale: " For a variety of mixtures of sand and clay and loamy sand, no matter how we seem to twist the soil properties around, assuming we had a chloride source in this five -- actually, this particular slide is for a 2.5-acre landfarm. We had the landfarm operate for three years and removed the source after three years. And what we saw is that after 50, 60 years, or more than 80 years, the chloride

concentration in the aquifer gradually increased. But it didn't increase up to a point which would be in excess of the groundwater standard, 250 milligrams per liter." (Stephens, p. 755).

Thus, the OCD's reliance on faulty science based on miscalculations creates a policy that must be rejected by the OCC as not based on science or good public policy.

4. The rule overlaps, duplicates or conflicts with other federal, state and local government rules

In considering whether the SBRRA has been violated by a promulgating agency, a review of conflicting or duplicated statutes must be considered. As noted below, the OCD is in clear violation of the Water Quality Control Act to which it is a constituent agency with no power to promulgate rules protecting ground water. Further, the WQCC allows for reasonable degradation when in the economic interest of the state. Thus, the 'zero discharge' or non-degradation policy promoted by the agency is a more stringent standard that allowable under law. Note that 'non-degradation' is defined as "An environmental policy which disallows any lowering of naturally occurring quality regardless of preestablished health standards." *EPA website "Terms of Environment: Glossary, Abbreviations and Acronyms.* The non-degradation policy adopted by the OCD in the proposed rule is contrary to the clear legislative intent and statutory intent of the Water Quality Act [Chapter 74, Article 6 NMSA 1978]. "Traditional principles of statutory interpretation dictate that we first look at the plain meaning of the statutory language. *General Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985); *Wilksman v. City of Albuquerque*, 102 N.M. 41, 43, 690 P.2d 1035, 1037 (1984). In construing a statute, we assume that the legislative purpose is expressed by the ordinary meaning of the words used. *Anaya*. Therefore, the proposed regulation and stated intent of the OCD in its promulgation of the new rule, the OCD has gone well beyond its statutory authority as a constituent agency to the WQCC. Moreover, the knowing misrepresentations and reliance upon rules 116 and 19 and the current version of the Pit rule is wholly disingenuous, bordering on fraud to the public. Since the agency has made public statements both outside the hearing and indirectly on the record indicating that Rule 116 will be eviscerated then reliance thereon is

unfair. There were also several statements made at the taskforce meeting which is not considered part of the record in this case, but the agency executives stated that the public policy of the Division has switched from a preference for landfarms to landfills.

As to the application of the Small Business Regulatory Relief Act, a review of the record demonstrates that the OCD staff utterly failed in its responsibility to consider and amend the regulation to protect, not harm small New Mexican businesses. Further, the OCD's duplicitous insistence to small operators present at the hearing that they were protected by the current Rules 116 and 19 must be deems nothing more than capricious behavior give the OCD's very public statements of their intent to disban both these rules. Finally, the complexity of the rule – creating a one size fits all rule – to cover small registered landfarms up to 500 acre commercial disposal facilities is bad public policy that creates an unattainable regulation open to misinterpretation that will not only harm small businesses, but will ultimately result in harm to the environment.

Point Two

The OCD's proposed changes to Rules 51, 52 and 53 affecting Surface Waste Management is in clear violation of the statutory authority of the Water Quality Control Commission.

The Oil Conservation Commission was created by the Legislature under the Oil and Gas Act, and is empowered to 'prevent waste ... and protect correlative rights' *See Section 70-2-11(A).* As part of the duty to prevent waste, the Commission is required 'to prevent crude petroleum oil, natural gas or water from escaping strata in which it is found into other strata' *Section 70-2-12(B)(2).* The OCC must also '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' *Section 70-2-12(B)(21).* 'Nondomestic wastes' is not defined in the Oil and Gas Act, however, in the Solid Waste Act [Section 74-9-1 to -43], it is defined as "waste associated with the exploration, development, production, transportation, storage, treatment or refinement of crude oil, natural gas ... *but does not include* drilling fluids, produced waters, petroleum liquids, petroleum sludges, or *except in an emergency* declared by the director of the oil conservation division ... petroleum-contaminated soils associated with the exploration, development, production, transportation, storage, treatment or refinement of crude oil or natural gas" emphasis added, *Section 74-9-43.* Thus, without a declaration of an

emergency, it would appear that hydrocarbon contaminated soils can not be disposed of in a solid waste facility. The statutory authority to accept solid wastes is also embedded within the Solid Waste Act, requiring permits for disposal under the Environmental Improvement Act [Section 74 – 1 NMSA 1978] and giving review power over the waste facilities to the environmental improvement Board [Section 74-9-8].

Reviewing the transcript of the OCC hearing, there is no evidence or testimony of a state of emergency requiring the disposal of hydrocarbon contaminated soils in solid waste facilities. Therefore, in this new proposed rule, the OCD has created 'surface waste management' facilities, the small registered landfarm, the permitted landfarm and the landfills for the remediation or permanent disposal of hydrocarbon contaminated soils. Mr. Price only stated that "the underlying philosophy is, we recognize that Rule 711, which is the older surface waste management rule, basically had some deficiencies in it. And it was our goal to update – to go to a new rule that basically brings us up to speed with the rest of the industry and also with the rest of sister agencies and federal agencies.." (W. Price, p. 41-42, vol. I). Whether there is a need for additional waste disposal facilities is unclear, and whether the OCC has a jurisdictional authority to create additional facilities is also unclear. Moreover, since hydrocarbon contaminated soils can not enter solid waste facilities absent a declaration of an emergency, and the OCC does not have the jurisdictional authority to create, maintain and regulate waste management facilities, the disposal of hydrocontaminated soils to any place other than a valid NMED permitted landfills is suspect since OCC may only *administer* the disposal of the wastes under the Water Quality Control Act [74-6 NMSA 1978] emphasis added.

The New Mexico Water Quality Control Commission was created under the Water Quality Act, NMSA §§74-6-1 to -17(1967, as amended through 2003). The Commission is required to adopt a "comprehensive water quality management program, adopt water quality standards for surface and ground waters, adopt regulations to prevent or abate water pollution, and assign responsibility for administering its regulations to constituent agencies" *74-6-4-(B) to (E)." See Gila Resources Information Project v. N.M. Water Quality Cont. Comm'n,* 2005-NMCA-139. The Water Quality Act also requires that the Commission 'adopt water quality standards for surface and ground waters of the state based on credible scientific date and other

evidence appropriate under the Water Quality Act [74-6-1 NMSA 1978] *74-6-4(C).* The legislature was very clear in the standards the WQCC must use in establishing rules and regulations pertaining to waters. Indeed, in its June 15, 2006 opinion, the Court of Appeals noted that the New Mexico Environment Department's authority as a constituent agency of WQCC must be derived from statute. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n,* slip op. June 15, 2006, no. 25,027, p. 6 *citing In re Application of PNM Elec. Servs.,* 1998-NMSC-017, ¶10, 125 N.M. 302". Therefore, if Section 74-6-4(C) states, "the standards shall include narrative standards and as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses ... In making standards, the [WQCC] commission shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes" *74-6-4(C).* The Act further grants the WQCC the authority 'by regulation, the commission may impose reasonable conditions upon permits..." *Section 74-6-5(J).* However, in "adopting regulations, the WQCC should consider, among other things, the economic impact of regulations" *Id* at 13.

The OCC is reminded that the preeminent canon of statutory interpretation requires both an agency and the courts to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain,* 503 U. S. 249, 253-254 (1992). An inquiry [on statutory interpretation] begins with the statutory text, and ends there as well if the text is unambiguous. *Lamie v. United States Trustee,* 540 U. S. _,(2004), 103 N.M. at 76, 703 P.2d at 173; *Old Abe v. New Mexico Mining Commission,*121 N.M. 83, 90, 908 P.2d 776 (1995), *See also Tyrone, supra.* However, the courts will "reject the literal language of a statute when its plain language would make its application absurd or unreasonable" *Id.* at 6, *citing Medina v. Berg Constr., Inc.* 1996-NMCA-087, 122 N.M. 350. Reviewing the relevant statutes that give the OCC its authority, it is clear that the OCC is empowered to promulgate rules and regulations pertaining to disposal of nondomestic wastes and produced water. However, if the underlying intent and reasoning behind a rule by a constituent agency of the WQCC is to protect ground water, then the rule promulgation is within the statutory authority of the WQCC only, while the permitting process is left to the constituent agency. *See, Tyrone, supra at. p. 7*

1. Established Case Law on WQCC constituent agency authority demonstrates that OCD is acting outside its statutory mandates

In *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n,* slip op. June 15, 2006, no. 25,027, the Court of Appeals applied a detailed analysis to the Water Quality Act. The facts of the Phelps Dodge Tyrone (hereinafter 'Tyrone') case are similar to the issue at hand in that NMED and OCC are both constituent agencies of WQCC and the case involved the agency action of expanding its permitting process under the guise of protecting ground water. The Court of Appeals reviewed a dispute between the New Mexico Environment Department (hereinafter 'NMED') and Phelps Dodge Tyrone (hereinafter 'Tyrone') concerning the authority of NMED, as a constituent agency to issue a groundwater discharge permit and impose restrictions and requirements at the time of closure of mining operations. Tyrone contended that the NMED had no authority to impose the enlarged restrictions. The Court held that the commission failed to use proper analysis in determining whether the conditions were reasonable but that NMED did have the authority to impose reasonable permit conditions. Relying on the clear legislative intent of Section 74-6-4(D) which states that "the commission may not specify the method to be used to prevent or abate water pollution, but may specify a standard of performance for new sources that reflects the greatest reduction in the concentration of water contaminants ... through application of the best available demonstrated control technology... or other alternative, including where practicable a standard permitting no discharge of pollutants" the Court held that a constituent agency had the legislative authority to grant a permit, but only the Commission had the authority to promulgate regulations pertaining to protection of ground water. The Court further noted that 'regulations, by their nature, are general requirements ... designed to apply to all situations and can apply to any site. In contrast, a constituent agency's action in connection with a permit application is specific to the site in the application" *Tyrone* at 8. "The unique nature of a site requires flexibility for both operators and regulators. This need for flexibility explains the legislature's intent that regulations not dictate a specific method to be used in all situations" *Id.* at 9. "Section 74-6-4(D) is consistent with the idea that each site is unique, different in scale, different in impact, and different in geology and hydrology." *Id.*

There are also a line of cases where in the Court of Appeals and the NM Supreme Court have reviewed an agency's decision making processes. The Supreme Court held in *Rio Grande*

Chapter of the Sierra Club. v. N.M. Mining Comm'n, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806, that "... an agency rule would be arbitrary or capricious if the agency . . . failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). A ruling by an administrative agency is also arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record. *Snyder Ranches, Inc. v. Oil Conservation Comm'n*, 110 N.M. 637, 639, 798 P.2d 587, 589 (1990); *see Hobbs Gas Co. v. N.M. Serv. Comm'n*, 115 N.M. 678, 680, 858 P.2d 54, 56 (1993) (stating that burden on review of administrative decision under arbitrary and capricious standard is to show that the decision is "unreasonable or unlawful."). Finally, in *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 107 N.M. 469, 474, 760 P.2d 161, 166 noted that "the courts are not free to accept post hoc rationalizations of counsel in support of agency decisions, because a reviewing court must judge propriety of agency action solely on grounds invoked by agency".

Point Three

OCD's misplaced reliance on Executive Order 2005-056, intending to expand public notice provisions without legislative support or a clear statement on Environmental Justice in the Regulation will lead to capricious enforcement actions

During the hearing, several references were made directly and indirectly to the public notice provisions of the newly released Environmental Justice Executive order issued by Governor Richardson. The proposed rule 53 section H, for a registered landfarm, does not have a public notice provision, however, if there is a land owner who objects to the registration, the operator will have to seek a permit which does have a public notice provision. Von Gonten, ln. 6-21, p. 596; ln. 4-13, p. 678[13]. Moreover, after listening to testimony during the hearing and

[13] Q (by Mr. Brooks). If the operator believes that he has the right to use the land for that purpose without surface approval, does he still have the right to file for a permit, if he chooses to go that route, to give OCD an opportunity to review the environmental objections the surface owner might have?

comments made by Commissioner Fesmire, it is clear that under the Executive order, the OCD will require public notice for all registrations and permits. In at least two instances on the record when the other two commissioners asked questions about the notice requirements for small registered and permitted landfarms, Commissioner Fesmire interrupted his fellow commissioners[14] (see also quotes below). However, in the absence of a declaration of an emergency or legislative support for the policies of an executive order, established New Mexico case law holds that the executive branch can not usurp legislative authority to create a new law. Since the public notice requirement is expanded to multiple language documentation and longer hearing processes to accommodate a larger segment of the public, regulated entities will be affected economically. Therefore, the Environmental Justice executive order must be interpreted only as Governor Richardson's desire to create a task force to review the issue of Environmental justice and the findings and orders of the Order have no effect in law until the legislative branch specifically adopts the Environmental Justice concept.

1. Summary of Executive Order

On November 18, 2005, the Honorable Governor Bill Richardson issued Executive Order 2005-056, entitled "Environmental Justice Executive Order". The executive findings in the order stated, "the State of New Mexico is committed to affording all of its residents, including communities of color and low-income communities, fair treatment and meaningful involvement in the development, implementation, and enforcement of environmental laws, regulations and policies regardless of race, color, ethnicity, religion, income or education level". Further, the order stated, "the State of New Mexico is further committed to promoting the protection of

A. Yes, if the landowner refused permission, then the operator would have the ability to apply for a 53.G landfarm for a centralized facility.
(Von Gonten, ln. 18-2 p.597-8).

[14] Q. (by Commissioner Bailey) Okay. Page 25, the last sentence of that paragraph that comes onto the top of page 25, of the very last line, use plan until the landowner or tenant --
CHAIRMAN FESMIRE: We've got that one taken care of.
COMMISSIONER BAILEY: You've got that taken care of --
CHAIRMAN FESMIRE: Yeah.
COMMISSIONER BAILEY: Good.
(Price, ln. 18-1, p. 246-247).

human health and the environment, empowerment via public involvement in the development, implementation and enforcement environmental laws, regulations and policies... environmental justice issues ... causing concern and creating problems for some communities, businesses and households that bear the impacts of air and water contamination, noise, crowding, reduced quality of life, and depressed land and housing values – many of which could be mitigated by better siting decisions and processes..." As a result of the findings, Governor Richardson ordered and directed, "all cabinet level department and board and commissions that are involved in decisions that may affect environmental quality and public health shall provide meaningful opportunities for involvement to all people regardless of race, color, ethnicity, religion, income or education level..." and "shall utilize available environmental and public health data to address impacts ... in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities." The order also created an Environmental Justice Taskforce. There was no declaration of emergency attached to the order. During the 2006 Legislative session, there were only two bills relating to the concept of Environmental Justice. House Bills 32 and 579, sought to gain a $75,000 appropriation for an Environmental Justice pilot project in northwestern New Mexico. At the Committee hearings, the sponsor of the legislation did not mention the Governor's executive order. The only proffered reason for the funding for this project was to match federal dollars from a national EPA project of the same name.

2. Hearing testimony

As a result of Executive Order 2005-056 (hereinafter referred to as the 'Environmental Justice Order'), the following colloquy between Commissioner Olson and Mr. Wayne Price occurred at the Surface Waste Management hearing before the OCC:

> Q. (by Commissioner Olson) : you were testifying that you're looking to make things consistent with the executive order that came out on environmental justice that the Governor had issued. One of the things that's listed in the executive order is items being printed, at a minimum, in English and Spanish. I didn't see that—
>
> A. Thank you, Commissioner Olson, we had a quite lengthy debate concerning that, and I had actually discussed this with two or three of the attorneys here, and that particular—I think you're referring to the new public notice regulations

which were mandated by the Legislature and in the Water Quality Act. However, this is under the Oil and Gas Act, and that would not apply.

Q. No, I was talking about the executive order on environmental justice, which—

CHAIRMAN FESMIRE: But that will be under the executive order itself, probably not in our Rules.

COMMISSIONER OLSON: Right, it's not going to be in the Rules or the -

CHAIRMAN FESMIRE: But we still have to comply with that executive order.

COMMISSIONER OLSON: Right.

THE WITNESS: Right. We did discuss that, and the consensus was, at that time that we discussed it, that it would not—our public notice regs would be sufficient under the oil and gas regulations. Knowing that there's a new statute out there, that—

CHAIRMAN FESMIRE: It's not a statute, it's an executive order—

COMMISSIONER OLSON: Right.

CHAIRMAN FESMIRE: -- and we will have to comply with that, no matter what our rule says.

COMMISSIONER OLSON: Right.
THE WITNESS: Thank you, Chairman Fesmire.
(Price, ln. 15 – 24, p. 262 – 263).

3. Statute and case law do not support the OCD position on the implementation of the Executive Order at this time

A review of the New Mexico Annotated Code and Statutes demonstrates that the concept of Environmental Justice is new in our state. Traditionally, the Executive branch has used the limited power of the executive order in cases of an emergency whereby "[i]t is the duty of all political subdivisions of the state and their coordinators of the civil emergency preparedness programs appointed pursuant to the provisions of the State Civil emergency preparedness Act [12-10-1 NMSA 1978] to comply with and enforce all executive orders and regulations made by the governor or under his authority pursuant to law" *12-12-10(A) NMSA 1978.* Under the same Act, there is a limit on executive orders such that "[i]n no event shall any executive order issued pursuant to the powers granted in Subsection B of Section 3 [12-12-3 NMSA 1978] of the Energy Emergency Powers Act continue in effect for more than one hundred twenty days unless

extended, restricted or suspended by joint resolution of the legislature in regular, extraordinary or special session." *12-12-6 NMSA 1978.* However, while an executive order "may be viewed as some evidence of public policy considerations 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 comes from the legislature, with an additional supporting role played by the courts and the executive department" *Hartford Insurance v. Cline,* 2006-NMSC-033, __ NM __, __ P.3d __ (June 20, 2006).

"The Constitution of the State of New Mexico commands that "the powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others. . . ."" N.M. Const. art. III, § 1; *State ex rel. Taylor v. Johnson,*125 NM 343, 346, 961 P.2d 768, 1998-NMSC-015. "It is the function of the judiciary . . . to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution." *State v. Mechem* , 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), *overruled on other grounds by Wylie Corp. v. Mowrer* , 104 N.M. 751, 726 P.2d 1381 (1986). Article III, Section 1 of the New Mexico Constitution prohibits any branch of government from usurping the power of the other branches: "This provision articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty" *Taylor, supra at 349 citing Gregory v. Ashcroft* , 501 U.S. 452, 458-59, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); The Federalist No. 47, at 332 (James Madison) (M. Walter Dunne 1901) (discussing Montesquieu). Further, within our constitutional system, each branch of government maintains its independent and distinct function. *State v. Fifth Judicial Dist. Court*, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932) (noting that "the Legislature makes, the executive executes, and the judiciary construes the laws."). We have said that only the legislative branch is constitutionally established to create substantive law. *See State ex rel. Sofeico v. Heffernan*, 41 N.M. 219, 230-31, 67 P.2d 240, 246 (1936) (stating that the Legislature, rather than the State Game Commission, has the power to define what constitutes a game animal, because only the Legislature constitutionally "can create substantive law"); *State v. Armstrong* , 31 N.M. 220,

255, 243 P. 333, 347 (1924) (stating that the Legislature possesses the sole power of creating law). "We also have recognized the unique position of the Legislature in creating and developing public policy. 'It is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, [but] to a lesser extent, [and only] as authorized by the constitution or legislature.'" *Taylor, id citing Torres v. State* , 119 N.M. 609, 612, 894 P.2d 386, 389 (1995).

Moreover, "[a] governor's proper role is the execution of the laws" *Taylor, id.* NM Const. art. V, § 4. "The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches." *Taylor at 350, citing State ex rel. Clark* , 1995-NMSC-51, 120 N.M. at 574, 904 P.2d at 23. "If a governor's actions infringe upon "the essence of legislative authority—the making of laws—then the governor has exceeded his authority." *Id. at 573.I* "Infringement upon legislative power may also occur where the executive does not "execute existing New Mexico statutory or case law [and rather attempts] to create new law." *Id.*

"Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform." *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority* , 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). "The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature" *Taylor at 350 See, e.g. In re Proposed Revocation of Food and Drink Purveyor's Permit* , 102 N.M. 63, 66, 691 P.2d 64, 67 (stating that an "agency cannot amend or enlarge its authority through rules and regulations"); *Rainbo Baking Co. v. Commissioner of Revenue* , 84 N.M. 303, 306, 502 P.2d 406, 409 (Ct. App. 1972).

Finally, the New Mexico Supreme Court has noted that without specific legislative support for the concept of Environmental Justice, and absent any regulatory statement supporting the concept that regulatory review of the concept is moot. Thus, Commission Chair Fesmire's preclusion of the discussion relating to environmental justice and the OCD's failure to reference the concept in its rules must preclude any regulatory requirements there from. *See Colonias Development Council v. Rhino Environmental Services, Inc.* 2005-NMSC-024, __ NM __, __ P.3d __. footnote 4.

Thus, OCD's belief that the Executive Order on Environmental Justice is controlling, is

clearly misplaced. While it is understandable that a state agency would want to follow policy set by its Chief Executive, to intend to follow the order without Legislative or regulatory support is not only bad policy, but is contrary to established law at this time. Moreover, it is disheartening that when a Commissioner asked the question of how the OCD intends to work with the Executive order, the Chair of the committee not only cuts that Commissioner off, but makes a conclusory statement that to the effect that this regulation will be affected by the order, but no language pertaining to the order or the concepts therein will be included, one has to suspect that this regulation is being driven by politics rather than protection of the human health, safety and the environment belonging to the citizens of New Mexico.

IV. Technical changes to the Rule

A.(1)(e): As discussed the prior draft comments to the rule, the size of the small registered landfarm must be increased from 1400 cubic yards. The expert testimony at the hearing recommended a 2 acre size, provided that the location remained a temporary remediation site for maximum three years. IPANM would also request that drill cuttings deposited in the soil as part of an accidental release be allowed to remain for bioremediation. If at the time of closure, the allowable limits are exceeded because of the cuttings, then those cuttings could be transported. However, based on science, it is our belief that the cuttings will not exceed background levels after the permissible time period of remediation.

H(5)(iii). The allowable closure limits for small registered landfarms should be no more stringent than closure requirements for the commercial permitted landfarms, therefore the allowable TPH limits should be changes to 2500 mg/kg.

V. CONCLUSION:

In conclusion, IPANM contends that the processes used to change Rule 709, 710 and 711 to the new Rules 51, 52, and 53, were faulty and violative of due process. As such, while this document is being submitted pursuant to the September 6, 2006 deadline, IPANM would respectfully request OCC to issue its findings and give the public the opportunity for comment on the accepted changes. Since the taskforce process was instituted after the closure of the hearing, there was no opportunity to comment on OCD staff statements made at the taskforce

meetings which have become the basis for much of the proposed changes from the Taskforce. Indeed, at the taskforce meetings were was some concessions made by OCD staff that their analysis may have been too stringent. However, since the taskforce's mandate was to stay within the parameters of the hearing, true, open discussion and consensus was difficult and if any of these consensus changes are accepted by the OCC, they must be subject to the public hearing process. Moreover, the evidence at the hearing was overwhelmingly against the methodology and rationale used by OCD for changing the rule. There was little or no comment on the affect on small business entities – particularly since the OCD often stated a mistaken belief that protection of the environment outweighed the statutory burdens of the Small Business Regulatory Relief Act. The OCD also stepped outside its statutory responsibilities as a constituent agency to the Water Quality Control Commission when it forced a nondegradation standard that is more stringent than the WQCC. The misplaced insistence on the DAF 1 numbers created standards that were highly protective only if citizens of New Mexico were expected to eat or bath in previously hydrocarbon contaminated soils, rather than meet the requirements of the WQCC or the Oil and Gas Act. The overly protective standards used in a one size fits all scenario creates ridiculous outcomes when comparing a 1400 cubic yard facility to a 500 acre facility. Finally, the OCD's mistaken belief that the Environmental Justice Executive order of 2005 trumps the regulation or the public hearing process is of great concern, particularly since this executive order has no legislative support and does not have the force of law.

IPANM and the Industry Committee, have provided comments and proposed modifications on the Rule which we believe are based on sound science and should be accepted in whole by the Commission. We believe that adoption of the industry proposals would meet OCC's statutory duty and would satisfy your policy objectives. Thank you for the opportunity to comment on the proposed changes to the Surface Waste Management Rules 51, 52, and 53. Should you have any questions, please do not hesitate to contact Karin V. Foster, our Director of Government Affairs at 505-238-8385.

Submitted by K. Foster

September 6, 2006