STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

APPLICATION OF THE OIL CONSERVATION DIVISION FOR REPEAL OF EXISTING RULES 709, 710 AND 711 CONCERNING SURFACE WASTE MANAGEMENT AND THE ADOPTION OF NEW RULES GOVERNING SURFACE WASTE MANAGEMENT.

CASE NO. 13586
ORDER NO. R-12460-B

THE INDUSTRY COMMITTEE'S APPLICATION FOR REHEARING

This Application for Rehearing is submitted by HOLLAND & HART, LLP, on behalf of the Industry Committee,[1] parties of record adversely affected by Oil Conservation Commission Order No. R-12460-B. In accordance with the provisions of N.M.S.A. § 70-2-25 (2005), the Industry Committee requests the New Mexico Oil Conservation Commission ("Commission") grant this Application for Rehearing in Case No. 13586 and in support hereof states:

BACKGROUND

On September 28, 2005, the New Mexico Oil Conservation Division ("Division") filed its application for rule adoption and amendment in this case and on that date published notice of the proposed rules. The case was originally called and opening statements presented on November 10, 2005 and thereafter continued from time to time. Evidence was presented to the Commission on April 20, 21, May 4, 5, 6 and 18, 2006. At the suggestion of the Division's staff, members of the New Mexico Citizens for Clean Air and Water and the Industry Committee met to discuss the proposed rules and reached agreement on certain issues which they presented in a letter agreement to the Commission at the conclusion of the hearing. Thereafter the Secretary of Energy,

[1] The Industry Committee is an industry group comprised of Burlington Resources Oil & Gas Company LP, Chesapeake Operating, Inc., ChevronTexaco, ConocoPhillips Company, Devon Energy Corporation, Dugan Production Corporation, Energen Resources Corporation, Marathon Oil Company, Marbob Energy Corporation, OXY USA, INC., Occidental Permian, LTD, OXY USA WTP Limited Partnership, D. J. Simmons, Inc., Williams Production Company, XTO Energy, Inc. and Yates Petroleum Corporation. The committee was formed to combine resources to provide sound science to the Commission as it considered the proposed Surface Waste Rules.

Minerals and Natural Resources named a Task Force to review the draft rules. This Task Force met during the Summer of 2006 and reported to the Commission on September 1, 2006. The Commission met on September 21 and 22, 2006, and, after receiving additional statements, deliberated on the rules and approved numerous revisions thereto. The Commission again reviewed the rules and approved additional modifications thereto on October 19, 2006. On that date, new Surface Waste Management Rules were adopted by the Commission. On November 2, 2006 a *nunc pro tunc* Order (Order No. R-12460-C) was entered correcting the transition provisions in Rule 19.15.2.53.L NMAC.

The Industry Committee files this Application for a Rehearing to address the following issues which have been erroneously decided by the Commission in Order No. R-12406-B:

1. The Commission's no degradation policy exceeds its jurisdiction and violates its statutory duties under the Oil and Gas Act and the Water Quality Act;
2. The amendments to the proposed rules adopted during the Commission hearing and deliberations, violated the Commission's own Procedural Rules;
3. Order No. R-12460-B violates the due process rights of affected owners of oil and gas interests;
4. Order No. R-12460-B does not contain required findings of fact on the ultimate jurisdictional issues in this case thereby requiring its reversal; and
5. Order No. R-12406-B is arbitrary, capricious and unreasonable and must be reversed for it contains findings on material facts that are not supported by substantial evidence.

ARGUMENT:

POINT I

THE COMMISSION'S NO DEGRADATION POLICY EXCEEDS ITS JURISDICTION AND VIOLATES ITS STATUTORY DUTIES UNDER THE OIL AND GAS ACT AND THE WATER QUALITY ACT.

A. OIL CONSERVATION COMMISSION JURISDICTION.

"The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it." *Continental Oil Company v. Oil*

Conservation Comm'n, 70 N.M. 310, 318, 373 P. 2d 809, 816 (N.M. 1962). The Oil and Gas Act and the Water Quality Act empower the Commission to regulate the disposition of oil and gas wastes. These statutes also limit that authority. The Commission may not interpret these statutes in a way that expands its jurisdiction in ways contrary to law. *See generally, In re application of Rhino Envtl. Servs.*, 2005-NMSC-024, 117 P. 3d 939, 947 (N.M. 2005).

1. The Commission's Authority under the Oil and Gas Act.

Pursuant to the Oil and Gas Act, the Commission's jurisdiction is based on the prevention of the waste of oil and gas. N.M.S.A. § 70-2-2 (2006). It is its primary duty and its paramount power. *Continental, 70 N.M.* at 319. The Commission is also required to protect the correlative rights of the owners of oil and gas interests. N.M.S.A. § 70-2-11 (2006). To meet these statutory mandates, the Oil and Gas Act further enumerates the powers of the Commission and specifically directs it:

> (21) to regulate the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas to protect public health and the environment; and
>
> (22) to regulate the disposition of nondomestic wastes resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to protect public health and the environment, **including administering the Water Quality Act [Chapter 74, Article 6 NMSA 1978] as provided in Subsection E of Section 74-6-4 NMSA 1978.**" N.M.S.A. § 70-2-12 (2006) (Emphasis added).

2. The Commission's Authority under the Water Quality Act.

The Commission also derives authority from the Water Quality Act. N.M.S.A. § 74-6-1 *et seq.* (2006). This statute creates a Water Quality Control Commission ("WQCC"). The Oil Conservation Commission is a "constituent agency" of the WQCC. N.M.S.A. § 74-6-2.K (2006). The Water Quality Act directs the WQCC to "adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Control Act" and to "adopt, promulgate and publish regulations to prevent or abate water pollution in this state...." N.M.S.A. § 74-6-4.D (2006). (emphasis added).

The Water Quality Act also provides:

> "in the adoption of regulations and water quality standards and in an action for enforcement of the Water Quality Act and regulations adopted pursuant to that act, reasonable degradation of water quality resulting from beneficial use **shall** be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded." N.M.S.A. § 74-6-12.F (2006) (emphasis added).

When the legislature adopted the Water Quality Act, it determined that the water policy of the State allows reasonable degradation for beneficial use. Furthermore, this language is not permissive - it is mandatory. *See Cerrillos Gravel Products, Inc v. Bd. of Cty Com'nrs of Santa Fe Cty*, 2005-NMSC-023, ¶12, 117 P. 3d 932, 936 ("By using the word 'may' instead of 'shall' the Legislature indicated it was being permissive, granting the County discretionary authority to enforce violations of ordinances by quasi-criminal prosecution subject to fines and imprisonment.")

Pursuant to its statutory grant of authority to protect ground water, the WQCC has identified thirty-nine soil constituents that it determined could pose a threat to ground water (WQCC 3103 Groundwater Constituents). N.M.S.A. § 74-6-12.F (2006), Testimony of Stephens, Tr. at 768. For each of these constituents, it adopted numerical standards and procedures for applying these standards to protect ground water. Pursuant to WQCC rules, reasonable degradation of ground water for beneficial use is allowed as long as these standards are not exceeded. In adopting these standards and rules, the WQCC acted in a manner consistent with the express policy of the Legislature expressed in N.M.S.A. § 74-6-12.F and the power delegated to it by the Legislature. *See Tenneco Oil Co. v. NMWQCC*, 138 N.M. 625, 760 P.2d 161 (2005). The WQCC thereby sets State policy concerning the protection of ground waters in New Mexico. (Testimony of Price, Tr. at 166). This policy is intended to be binding upon all constituent agencies. *See, e.g.,* N.M.S.A. § 74-6-4.E, § 74-6-8 and § 74-6-9.

The stated goal of the new Surface Waste Management Rules is to protect fresh water, human health and the environment. Testimony of Price, Tr. at 42, 163-164; Testimony of vonGonten, Tr. at 629, 641-651. However, the new Surface Waste Management Rules exceed the Commission's jurisdiction for they contain a no degradation policy which permits no releases of oil field wastes (NMAC 1.15.2.53 G.(6))

in contravention of the provisions in the Water Quality Act that authorize reasonable degradation for beneficial use. The Commission's no degradation policy requires operators of surface waste management facilities, prior to commencement of operations, to test and to establish the background concentrations of various constituents. These background concentrations are then used as the subsequent monitoring and closure standards. This no degradation/no release policy exceeds the jurisdiction of the Commission and violates the Water Quality Act and the Oil and Gas Act. *See,* Testimony of Price, Tr. at 180.

An agency may not expand its jurisdiction beyond that authority delegated to it by the legislature. *See City of Santa Fe v. Gamble Skogmo, Inc.*, 73 N.M. 410, 389 P. 2d 13, 20 (N.M. 1964)(A broad mandate to an agency would offer no guidance and would violate the well-settled principle that a legislative body may not vest unbridled or arbitrary power in an administrative agency); *see also Whitman v. American Trucking Ass'n*, 531 U.S. 457, 473 (2001) (discussing the unconstitutionality of any agency's determination of the scope for its own jurisdiction under a "standardless delegation of power.")

B. THE STATUTORY REQUIREMENTS OF THE WATER QUALITY ACT APPLY TO THE COMMISSION'S ADOPTION OF SURFACE WASTE MANAGEMENT RULES.

The Commission does not dispute its responsibilities under the Water Quality Act or the provision therein that authorizes the reasonable degradation of ground water (Order No. R-12460-B, Finding 24). However, in support of its no degradation policy, it cites the provision that provides that the Water Quality Act "does not apply to any activity or condition subject to the authority of the oil conservation commission pursuant to provisions of the Oil and Gas Act. . ." Order No. R-12460-B, Finding 23 (N.M.S.A. § 74-6-12.G (2006).

Any reliance by the Commission on the above-cited exclusion from the Water Quality Act is misplaced. Although the Water Quality Act provides that it does not apply to the authority of the Commission under the Oil and Gas Act, subsequent amendments to the Oil and Gas Act direct the Commission, where oil field wastes are concerned, to "administer the Water Quality Act." N.M.S.A. § 70-2-12(B)(22). Under these circular

statutory provisions, the Commission is required to administer the Water Quality Act as it applies to oil field wastes. Furthermore, the Commission itself acknowledged that its authority is subject to the Water Quality Act when it defined "oil field waste" to include the activities covered by both subsections (21) and (22) of Section N.M.S.A. § 70-2-12.B (2006)[2].

The Water Quality Act authorizes reasonable degradation of ground water for beneficial use. N.M.S.A. §74-6-12(F)(2006). The Commission's rules prohibit any reasonable degradation, and thereby violate the Water Quality Act. Since the Oil and Gas Act *expressly* directs the Commission to administer the Water Quality Act with respect to these wastes, these new rules also violate the Oil and Gas Act. The Commission's intention also thwarts the intent of the Legislature to provide uniformity in the administration of the water quality standards, inconsistent with the Water Quality Act. An agency may not expand its jurisdiction against an express legislative command. *See Skogmo, Inc.*, 73 N.M. 410.

C. THE COMMISSION MAY NOT INTERPRET ITS STATUTORY AUTHORITY UNDER THE OIL AND GAS ACT TO AVOID THE PROVISIONS OF THE WATER QUALITY ACT.

To adopt a no degradation policy and to avoid the provision in the Water Quality Act that provides that reasonable degradation of water quality resulting from beneficial use **shall** be allowed." N.M.S.A. § 74-6-12.F (2006) (emphasis added), the Commission argues that its new rules are designed to address more than just the protection of fresh water (Order No. R-12406-B, Findings 22 and 24). It states that it is therefore exercising a broader authority to protect the human health and the environment under the Oil and Gas Act. It asserts that its authority, as conferred upon the Commission by the Water

---

[2] The definition of "Oil field wastes" in the new Surface Waste Management Rules includes the types of waste identified in both subsections (21) and (22) of the enumeration of powers section of the Oil and Gas Act that require the Commission to administer the Water Quality Act. It provides:

> "Oil field wastes shall mean those wastes generated in conjunction with the exploration for, drilling for, production of, refining of, processing of, gathering of or transportation of crude oil, natural gas or carbon dioxide; waste generated from oil field service operations; and waste generated from oil field remediation or abatement activity regardless of the date of the release. . ."

Quality Act, "is included within, and does not limit, the general authority of the Commission and the Division to regulate the disposition of oil and gas industry wastes under the Oil and Gas Act, without reference to the Water Quality Act." Order No. R-12460-B, Finding 24.[3]

As noted above, the Commission's no degradation policy requires: (i) testing prior to commencement of surface waste management operations to establish the background concentrations of various constituents; and then (ii) using these background measurements as the subsequent monitoring and closure standards. These constituents include benzene, total BTEX, gasoline range organics (GRO) and diesel range organics (DRO), total petroleum hydrocarbons ("TPH"), chlorides and the WQCC Section 3103 Ground Water Constituents. NMAC 19.15.2.53G(6). However, except for the WQCC 3103 Ground Water Constituents, the new Surface Waste Management Rules contain numerical standards for each of these constituents that must be met during periodic monitoring and at closure. Therefore, the no degradation limits in the new Surface Waste Management Rules only apply to the WQCC 3103 Groundwater Constituents.

The Oil Conservation Commission found when it adopted this policy that: "the WQCC has identified all of these constituents as constituents of concern for ground water protection" (Order No. R-12406-B, Finding 162 (emphasis added)) and throughout the Surface Waste Management Rules, the Commission repeatedly relies on the WQCC's list of constituents. The WQCC has established a numerical standard for each of the WQCC 3103 Groundwater Constituents which it has determined is protective of ground water. In fact, the Commission makes no findings and there is no technical evidence in the record that the WQCC constituents present any concern other than as a potential concern for ground water. Ironically, the Commission asserts that it is acting solely under the Oil and Gas Act and not the Water Quality Act when the sole record basis for action is the

[3] The Commission's invocation of the Oil and Gas Act is disingenuous, for while it asserts it is acting under its general authority of this statute, the only thing its no degradation policy applies to is the protection of fresh water. It does not adopt this policy for any other constituent of surficial concern.

perceived threat to fresh water. The Commission's argument is belied by its own record and, indeed, by its own findings.

Here, the Oil Conservation Commission adopts the WQCC 3103 Groundwater Constituents but interprets them differently. It does not administer the Water Quality Act. It does not use the numerical standards that have been determined to be protective of ground water. It simply ignores its role as a constituent agency of the Water Quality Control Commission and adopts rules that conflict with the water quality policy of the State as announced by our Legislature in the Water Quality Act and by the WQCC.

New Mexico law on this point is clear. The Oil Conservation Commission is a creature of statute and its powers are expressly defined and limited by law. *Continental, 70 N.M.* at 318. As a constituent agency of the WQCC, the Commission has been assigned by statute the administration of these regulations and standards to prevent water pollution and to protect ground water. N.M.S.A. § 74-6-4.E (2006). The Oil and Gas Act also confirms that in regulating the disposition of nondomestic wastes resulting from the certain oil and gas activity, it is the duty of the Commission to administer the Water Quality Act. N.M.S.A. § 70-2-12 (21) and (22). In so doing, the Commission merely applies the water quality standards as allowed by Section 74-6-8. *See, Kerr-McGee v. NMWQCC*, 98 N.M. 240, 647 P.2d 873 (1982). Since the WQCC adopts standards and constituent agencies administer these standards, the Oil Conservation Commission may administer – but cannot change or interpret differently -- the standards adopted by the WQCC. *See, Gila Resources Information Project v. NMWQCC*, 138 N.M. 625, 124 P.3d 1164 (2005).

Here the Commission ignores the directives of our Legislature and the courts. The new Surface Waste Management Rules violate the Water Quality Act and the Oil and Gas Act and these rules are therefore void. Under New Mexico law, if the Oil Conservation Commission believes that the policy of the state as to the protection of fresh water should be changed, it may not change the policy on its own. It is required to bring this matter before the WQCC or possibly even the Legislature. *Id.*

D. THE COMMISSION'S INTERPRETATION OF ITS AUTHORITY UNDER THE OIL AND GAS ACT AND THE WATER QUALITY ACT VIOLATES FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION.

As noted above, the Commission argues that it is not bound by the provision in the Water Quality Act that authorizes reasonable degradation of ground water for beneficial use because its authority, as conferred by the Water Quality Act, "is included within, and does not limit, the general authority of the Commission and the Division to regulate the disposition of oil and gas industry wastes under the Oil and Gas Act, without reference to the Water Quality Act." Order No. R-12460-B, Finding 24. The Commission's interpretation of the statutes that empower it to act violates the most fundamental principles of statutory construction.

1. Specific provisions control over general grants of authority.

In the adoption of these rules and its no degradation policy, the Commission uses its general statutory authority under the Oil and Gas Act to ignore the more specific, later enacted, provision in the Water Quality Act that authorizes reasonable degradation for beneficial use. In this way the Commission creates a conflict between the provisions of these statutes and violates fundamental principles of statutory construction.

It is well-settled in New Mexico that a specific provision controls over a more general statute. *City of Alamogordo v. Walker Motor Co.*, 94 NM 690, 616 P. 2d 403 (N.M. 1980) ("Where one statute deals with a subject in general terms and another deals with a part of the same subject in a more specific way, the more specific statute will be considered to be an exception to the general statute."); *McGarry v. Scott, et al*, 134 N.M. 32, 38, 72 P. 3d 608, 614 (N.M. 2003). The Commission cannot ignore its duties as a constituent agency of the Water Quality Control Commission to administer those regulations when it is adopting regulations related to ground water because there is a specific obligation imposed on it by both the Oil and Gas Act (in subsection 22) and in the Water Quality Act. The New Mexico Supreme Court has stated:

> This rule in effect treats the special law as an exception to the general law because the Legislature is presumed not to have intended a conflict between two of its statutes and because the Legislature's attention is more particularly directed to the relevant subject matter in deliberating upon the special law.

McGarry, 134 N.M. at 38, 72 P. 3d at 614. Here, the Legislature prescribed a comprehensive system for regulation of water quality and created the Water Quality Control Commission to develop a comprehensive policy. It directed the constituent agencies to administer that policy. The Legislature's intent with respect to the Oil Conservation Commission was then made explicitly clear by the amendment of the Oil and Gas Act to state that, in regulating wastes, the Oil Conservation Commission was to act in accordance with its responsibilities under the Water Quality Act. The Commission simply may not "wish away" the legislative command.

2. Recently enacted statutory provisions control over earlier enacted provisions.

The Oil and Gas Act was adopted in 1935 and the Water Quality Act was adopted in 1967. The amendments to the Oil and Gas Act that expressly conferred jurisdiction on the Commission to regulate the disposition of non-domestic waste resulting from oil and gas related activity and administer the Water Quality Act were adopted in 1989. To the extent there is conflict between the statutes empowering the Commission to adopt these rules, the controlling provisions are found in the more recently adopted Water Quality Act which authorizes reasonable degradation of water and in the 1989 amendments to the Oil and Gas Act that require the Commission to administer the Water Quality Act. *City of Alamogordo*, 94 N.M. at 692, 616 P. 2d at 405 (citing to *Rader v. Rhodes*, 48 NM 511, 153 P. 2d 516 (1944)) ("[W]here the conflict between an earlier act and a later act is clear and irreconcilable, the later act, as the most recent expression of legislative intent, will be considered to have repealed by implication the earlier conflicting statute to the extent of the inconsistency.") In *City of Alamogordo*, the court addressed whether a general statute passed in 1965 controlled over a specific conflicting statute passed seven years later. The court held: "We believe that if the Legislature had intended that an existing general law be an exception to the later enacted specific limitations...it would have so provided in more specific language." 94 N.M. at 692, 616 P. 2d at 405. By relying on its general statutory powers under the 1935 Act and adopting regulations that contain a no degradation policy, the Commission ignores the later adopted express provisions in Section 70-2-12(B)(22) of the Oil and Gas Act which require it to administer the Water

Quality Act. *State of New Mexico ex rel Bird, et al v. Apodaca*, 91 N.M. 279, 284, 573 P. 2d 213, 218 (N.M. 1977). The Commission cannot adopt a no degradation policy that is in direct conflict with provisions of the Water Quality Act. Its New Surface Waste Management Rules are therefore void.

3. The Commission's interpretation of its statutory mandate would make portions of the Water Quality Act superfluous and surplusage.

In this case, the Commission has improperly chosen to exercise general authority under the Oil and Gas Act while ignoring provisions of the Water Quality Act in violation of the clear intent of the legislature. In construing a particular statute, a reviewing court's central concern is to determine and give effect to the intent of the legislature. As noted in *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P. 2d 1111, 1114 (N.M. 1988):

> We will construe the entire statute as a whole so that all the provisions will be considered in relation to one another. Statutes must be construed so that no part of the statute is rendered surplusage or superfluous. The complement of the preceding rule is that we will not read into a statute or ordinance language which is not there, particularly if it makes sense as written. We will not depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions.

See also Cobb v. State Canvassing Board, 2006 NMSC 34, 140 P.3d 498.

The Commission's interpretation of its statutory authority renders provisions of the Water Quality Act superfluous and surplusage and therefore violates fundamental principles of statutory construction. In the event of an irreconcilable conflict, the more specific and recent act – the Water Quality Act – must prevail over the older and less-specific Oil and Gas Act. *See City of Alamogordo*, 91 N.M. at 284.

E. WITH THE NEW SURFACE WASTE MANAGEMENT RULES, THE COMMISSION IS LEGISLATING.

The Oil Conservation Division testified that its proposed Surface Waste Management Rules represent an attempt to "normalize" OCD rules with other state and

federal agencies. Testimony of Price, Tr. at 42, 163-164; Testimony of von Gonten, Tr. at 629, 641-651. They do not.

Beyond the Water Quality Act, the general policy underlying environmental law in New Mexico is one of treatment and abatement of contamination as opposed to storing such substances indefinitely. *See, e.g.*, NMSA 1978, § 74-9-2 (1990) ("The purpose] of the Solid Waste Act [is] to...promote source reduction, recycling, reuse, treatment and transformation of solid waste as viable alternatives to disposal of those wastes by landfill disposal methods."); *id.* § 74-4-3 (2002) (promoting treatment of hazardous waste); *id.* § 74-4A-3 (1991) (stating that one purpose of the Radioactive and Hazardous Materials Act is "the safe treatment and disposal of hazardous wastes and the regulation of hazardous waste generators"); *id.* §§ 74-4G-2 to -3 (1997) (providing incentives for voluntary remediation of contaminated land and defining "remediation" as "actions necessary to investigate, prevent, minimize or mitigate damages to the public health or to the environment"); *id.* § 74-1-3 (1997) (mentioning liquid waste and soil "treatment").

In serving this purpose, the state's environmental laws mandate remediation of contaminants to acceptable standards. *See, e.g., id.* § 74-6-4(F) (1999) (allowing for "reasonable degradation of water quality"); *id.* § 74-9-8 (1991) (establishing requirements for detoxification of solid wastes and standards for water protection consistent with those in the Water Quality Act); *id.* § 74-4-4 (2002) (establishing rules and standards "equivalent to and no more stringent than federal regulations" and implementing programs to reduce the volume and toxicity of waste).

The policy of the state for the <u>treatment of wastes</u> is found in the Water Quality Act and the other laws cited above. The Commission's no release/no degradation policy violates the provision of the Water Quality Act that authorizes reasonable degradation of water quality resulting from beneficial use where water quality standards are not exceeded. N.M.S.A. § 74-6-12.F (2006). Other treatment statutes and rules permit some level of degradation and then require treatment up to certain specific standards. The Commission's new Surface Waste Management Rules do not "normalize" the Commission's regulation of these wastes with the statutes and rules of other agencies - they are in conflict with them.

The Commission's no degradation standard is new to New Mexico. It is contrary to the policy of this State as announced by our legislature. Here the Commission's interpretation of its own authority goes beyond the powers conferred on it by the legislature. It is trying to do by rule what statute does not allow. It is legislating. If a no degradation policy is to apply in this State, it must be adopted by the legislature – not the Oil Conservation Commission.

POINT II

THE AMENDMENTS TO THE PROPOSED RULES ADOPTED DURING THE COMMISSION HEARING AND DELIBERATIONS, VIOLATED THE COMMISSION'S OWN PROCEDURAL RULES.

Under Commission procedural rules, "The division, any operator or producer or any other person may initiate a rulemaking proceeding by filing an application to adopt, amend or repeal a rule. . . ." NMAC 19.15.14.1201(A) (2005). Thereafter, the Commission reviews the application and decides whether or not to hear the application. NMAC 19.15.14.1201(C) (2005). The procedural rules then provide for notice of the rulemaking and direct that "any person, other than the applicant or a commissioner, recommending modifications to a proposed rule change shall, no later than 10 business days prior to the scheduled hearing date, file a notice of recommended modification with the commission clerk." NMAC 19.15.14.1204(C)(1) (2005). The intent of these procedural rules is to assure that all affected parties have an opportunity to become fully aware of a proposed rule before it goes to hearing.

The applicant in this rulemaking case is the Division. The application for rule adoption and the original draft of the rule were filed September 28, 2005, and on numerous occasions the rule was revised. Although an operator who amends an application in an adjudicatory hearing is required to continue and re-advertise its application until the next hearing docket, apparently the Division is not required to do so. In this case, under the Commission's Procedural Rules, affected parties were required to file recommended modifications on or before April 6, 2006. *See,* NMAC 19.15.14.1204(C)(1) (2005)). However, the Commission continued to modify the rule through October 19, 2006. The Commission has now adopted the tenth version of the rule and this version is significantly different from the Division's original rule proposal.

The Commission's procedural rules state that after hearing "[t]he commission shall issue a written order adopting or refusing to adopt the proposed rule change, or adopting the proposed rule change in part..." NMAC 19.15.14.1205(E)(3) (2005). The Commission did not follow its own rules. In Order No. R-12460-B, the Commission states that it has adopted "the final rules, incorporating all changes proposed during the proceedings." Order No. R-12460-B, Finding 237. Here, the Division and Commission modified the rule as advertised numerous times. These changes constituted substantive alterations from what was originally proposed by the Division. While some of the changes were at the request of the Industry Committee and other parties, some were raised by Division witnesses during the hearing and some were raised by the Commissioners themselves during deliberations after the conclusion of the hearing. Many of the changes had never been proposed, in writing, prior to the Commission's action creating them and hence cannot be reconciled with the Commission's authority to adopt or refuse to adopt the proposed rule change, or to adopt the proposed change in part. The result is that the rules were repeatedly revised and there was insufficient notice to affected persons of many these changes. These new rules are therefore void.

POINT III

ORDER NO. R-12460-B VIOLATES THE DUE PROCESS RIGHTS OF THE OWNERS OF OIL AND GAS INTERESTS.

A. DUE PROCESS

At the end of the deliberations on September 22, 2006, the Commission declared the process used to develop and adopt the new Surface Waste Management Rules to be a success. Tr. at 1912-1925. A review of this process suggests something else.

After at least eight months of "stakeholder meetings" "outreach meetings" and "Commission meetings," and at least eight drafts of the proposed rules, the Secretary of the Department of Energy, Minerals and Natural Resources stopped the process. She named a Task Force to take another look at the rules, review the work of the Commission, and make additional recommendations thereon. Two additional drafts of the proposed rule were released after all evidence had been presented and closing arguments presented. These last drafts contained modifications to the rules that had not previously been proposed and on which no opportunity to comment or defend had been

provided. Even Commissioner Olson, during deliberations, acknowledged that the first post hearing draft of the rules contained significant modifications. He said: "... I had to do quite a lot of comparison, because there is a big difference between the version we saw at the hearing and then this June 8th version that incorporated a lot of things." Tr. at 1803. Although the Commission characterized the process as "well-vetted and well commented," the true result of these procedures has been confusion at the Commission level[4] as well as for operators. *See* Tr. at 1915. This flawed process has created serious procedural issues that impair the due process rights of affected parties.

The most obvious of these post hearing modifications to the Rules was the Commission's decision in September 2006 to change monitoring and closure standards for surface waste facilities from the WQCC 3103 Ground Water Standards multiplied by a Dilution Attenuation Factor ("DAF") of one to a policy based on background or Practical Quantitation Limit ("PQL"). This is a substantive change and it has a direct impact on all affected owners of oil and gas interests. With this modification to the proposed rules, the Commission announced a new, complex and controversial standard. No notice was provided of this change and there was no opportunity for affected persons to comment or defend against its adoption. The due process rights of those affected by the rules have been impaired.

Due process requires sufficient and unambiguous notice so that the right parties and interests can be represented at the hearings. *See Nesbit v. City of Albuquerque*, 575 P.2d 1340 (1997); N.M. Atty. Gen. Op. No. 94-07 (1994). Sufficient and unambiguous notice of the proposed rules was impossible in this case for the testimony and an opportunity to propose modifications to the proposed rules was closed by the

---

[4] On October 19, 2006, less than one hour before the rules were adopted by the Commission, it engaged in a lengthy debate over the effect of these rules and how they impact the soon to be reviewed pit rules. The result was an agreement to adopt these rules as written and then to re-open certain portions of the rules when new pit rules are considered. Tr. at 1946-1952.

The confusion resulting from this process, and the problems it created for all involved, is further underscored by the fact that even after the Commission had adopted these rules, it had to enter a *nunc pro tunc* order (Order No. R-12460-C, dated November 2, 2006) to revise NMAC Rule 19.15.2.53.L(1) to clarify that existing surface waste management facilities could continue to operate under current permits, orders, or pursuant to prior specific Division waivers, exceptions or agreements. Without this amendment, these new rules could have, in effect, repealed the permits for all existing surface waste facilities which would have been an unreasonable and unintentional result.

Commission before the last two drafts of the proposed rules were even released by the Commission. Defective notice should reverse the outcome of rule or other administrative proceeding. *Martinez v. Maggiore*, 133 N.M. 472, 64 P.3d 499, 502 (N.M.Ct.App. 2002) (discussing that notice is defective when the agency did not discuss what the type of "special waste" was in the notice publication pursuant to the Solid Waste Act). The importance of the individual's and administrative body's interests, together with the 'risk of an erroneous deprivation of such [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,' dictates what additional process, if any, is due in administrative proceedings." *Archuleta v. Santa Fe Police Dept.*, 2005-NMSC-006, 108 P. 3d 1019 (N.M. 2005) (internal citations omitted).

In this case, operators did not have a reasonable opportunity to participate in the hearing. The confused way the Commission managed this process caused problems for all involved. The rules were substantively changed after the case was taken under advisement by the Commission on May 18, 2006. These substantive modifications require that new notice of the proposed rules be provided by the Commission. Rehearing should be granted and proper notice of the proposed rules should be given.

B. Logical Outgrowth Doctrine

In response to the Industry Committee's concerns about the sufficiency of the notice provided in this case, the Commission, instead of continuing and providing notice of its final rule proposal, voted to adopt the rules and defended its actions under the "logical outgrowth doctrine."

Findings 27 and 28 of Order No. R-12460-B state that the Commission may adopt the modifications made by the Division from May 13 to June 5 because they are "logical outgrowths" of the Division's Original Proposal. The Commission also finds that "Any other construction would lead to absurd results since the Commission would be without power to correct clerical mistakes in the proposal." Order No. R-12460-B, Finding 27. There is no New Mexico or Tenth Circuit case law adopting this doctrine. Only one 1987 New Mexico Attorney General opinion discusses the "logical outgrowth doctrine." The Attorney General was asked whether the Environmental Improvement Board could make "minor, nonsubstantive corrections, such as typographical and grammatical corrections,

to its regulations after a public hearing on the regulations but prior to filing." N.M.A.G. Opinion No. 87-59. The Attorney General determined that having to provide public notice of nonsubstantive changes in a proposed regulation did not serve the purpose of the notice and hearing requirements because those types of changes do not affect the regulation's content. Also, the Attorney General concluded that typographical and grammatical corrections "would affect no interested parties within the area of EIB's regulatory responsibility." Therefore, the Attorney General concluded that the Board did not need to provide additional notice and hold additional hearings to make "minor, nonsubstantive corrections to regulations after hearing but prior to filing."

Here, the Commission adopts a broader interpretation of this doctrine. It does not limit its application to "clerical mistakes" or "minor nonsubstantive corrections." The Commission contends that even major substantive changes to the original proposal may be made so long as they are the logical outgrowth of the original proposal. Its position seems to be that notice is sufficient if it ensured meaningful public participation in the agencies proceedings. Here, the opportunity for meaningful participation closed prior to the release of the last two drafts of the rules. In fact, the Commission rejected the proposed rule's 1000 ppm chloride standard and adopted a far more stringent 500 ppm standard only in the final draft of the rules. A similar problem exists with the Commission's elimination of the DAF concept for the WQCC constituents. No party before the Commission urged elimination of the DAF concept. The "logical outgrowth" doctrine can not be used as a cloak for such major substantive changes as increasing the stringency of the rules or entirely abandoning the DAF concept nor as a substitute for notice and an opportunity to be heard on the merits of the proposed rules. The essential inquiry "is whether the commenters have had a fair opportunity to present their views on the contents of the **final** plan." *See, BASF Wyandotte Corp. v. Costle*, 598 F. 2d 637, 642 (1st Cir. 1979) (emphasis added). Here, no one other than the commissioners had any opportunity to comment upon the final mix in the rule. The final rules are the result of a complex mix of controversial and uncommented upon data and calculations and the Commission should grant rehearing, and provide reasonable notice of its proposed rules to affected persons.

POINT V

ORDER NO. R-12460-B DOES NOT CONTAIN REQUIRED FINDINGS OF FACT ON THE ULTIMATE JURISDICTIONAL ISSUES IN THIS CASE.

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

The Commission entered 238 findings in this case and also advised that "Additional reasons are included in the hearing transcript." Order No. R-12460-B, Finding 4. A general reference to the hearing transcript does not provide the findings required to disclose the reasoning of the Commission required by our court.

Furthermore, Order No. R-12460-B does not contain required findings on the prevention of waste of oil and gas and the protection of the correlative rights of the owners of these resources. Since these required jurisdictional findings are utterly lacking, reversal of this order is required. *Fasken*, 67 N.M. at 294, 532 P.2d at 590.

Perhaps the reason Order No. R-12460-B contains no findings on the prevention of waste or the protection of the correlative rights of the owners of oil and gas interests is because the record does not contain substantial evidence that would support findings on these basic jurisdictional issues. *In Matter of Application of PNM Electric Services v. NM Public Utility Com'n*, 125 N.M. 302, 961 P.2d 147, 153 (N.M. 1998) ("Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion."); *Viking Petroleum, Inc. v. Oil Conservation Com'n,* 100 N.M. 451, 453, 672 P.2d 280, 282 (N.M. 1983). When asked, neither Mr. Price nor Mr. vonGonten could explain how the proposed rules would prevent the waste of oil and gas and neither were able to relate this proposal to the protection of correlative rights. Testimony of Price, Tr. 167, 166, Testimony of vonGonten, Tr. at 652.

Without these jurisdictional findings, supported by substantial evidence in the record, Order No. R-12460-B and the Surface Waste Management Rules adopted thereby are void. *See Fasken*, 87 N.M. at 294.

POINT VI

ORDER NO. R-12460-B IS ARBITRARY, CAPRICIOUS AND UNREASONABLE AND MUST BE REVERSED FOR IT CONTAINS FINDINGS ON MATERIAL FACTS THAT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

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

A. CHLORIDE LIMITS:

The provisions in the Surface Waste Management Rules regarding chloride limits are arbitrary and capricious because they are not supported by substantial evidence in light of a whole record review. *Sierra Club v. New Mexico Mining Comm'n*, 133 N.M. 97, 61 P.3d 806, 813 (N.M. 2002) (a ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record).

On a whole record review, the substantial weight of the evidence required at least a 1000 mg/kg chloride limit for landfarms. NMAC 19.15.2.53(G)(1), (4) and (6)(d) sets chloride limits for landfarms of "500 mg/kg if the landfarm is located where ground water is less than 100 feet but at least 50 feet below the lowest elevation at which the operator will place oil field waste or 1000 mg/kg if the landfarm is located where ground water is 100 feet or more below the lowest elevation at which the operator will place oil field waste." The findings in Order R-12460-B in support of these limits, in sum, cite testimony of Mr. Wayne Price, a witness for the Oil Conservation Division; testimony of Dr. Donald A. Neeper, a witness for the New Mexico Citizens for Clean Air and Water; and the objections of Controlled Recovery Inc.("CRI"). *See* Findings 121, 122, 123, 199 and 200.

CRI may have objected to the proposed 1000 mg/kg standard but it did not present any evidence or sworn testimony to support the basis for the objection. The objection to the 1000 mg/kg and support for a 500 mg/kg standard was only presented in CRI's pre-hearing statement, its closing statement, and the unsworn statement after the record was closed by Mr. Marsh. None of this is evidence which the Commission may rely on to support its Findings in Order R-12460-B. CRI's only sworn witness did not discuss chloride standards at all and only discussed gas management systems in landfills. *See* generally Testimony of Gordon, Tr. at 481-501.

The only testimony on the record regarding the 500 mg/kg standard came from Dr. Donald A. Neeper of the New Mexico Citizens for Clean Air and Water. Dr. Neeper is an expert in low-temperature physics and has researched such things as vapor transport. *See* Testimony of Dr. Neeper, Tr. at 1324. Dr. Neeper's testimony focused on re-vegetation standards, not ground water standards.

On the other hand, there was ample record support for the 1000 mg/kg standard. In fact, the Division itself championed the 1000 mg/kg standard. *See e.g.* Finding 121, Order R-12460-B. *See, e.g.*Testimony of Price, Tr. at 115, 232.

The Industry Committee offered the testimony of Dr. Daniel B. Stephens who was qualified as an expert in hydrogeology, acquifer contamination problems, infiltration, vadose zone and groundwater issues. D r. Stephens showed models he created that proved that much higher levels could be applied without exceeding the groundwater standards for chlorides. *See* Tr. at 756. Although a default number of 1000 mg/kg, Dr. Stephens testified that much higher concentrations could be safely applied and still protect groundwater. Tr. at 763. The results of his modeling of various types of vadose and acquifer soils under a number of conditions showed limits on chloride concentrations in landfarm soils varied from 3,890 mg/kg to 11,650 mg/kg (Testimony of Stephens, Tr. at 756) and with an evapotransporative cover much higher concentrations were protective of groundwater. Testimony of Stephens, Tr. at 758-762. Based on Dr. Stephens work, the Industry Committee recommended a more flexible approach than the Division's single 1000mg/kg chloride limitation which is based on the size and character of the landfarm. Testimony of Stephens, Tr. at 764.

The Industry Committee also offered Dr. Kerry Sublette, an expert in biochemistry, microbiology and chemical engineering and the leading authority on the use of the bioremediation endpoint approach to remediation of petroleum hydrocarbon contaminated soils. Dr. Sublette testified for the Industry Committee about how chlorides can be managed so remediation still works where chloride concentrations exceed the 1000 kg/mg limit in the Division's proposed rules. Testimony of Sublette at 1021-1026. Dr. Sublette testified that the 1000mg/kg chloride limit in the proposed rules does not make sense for there is evidence of effective bioremediation in soils that substantially exceed this limit. Testimony of Sublette, Tr. at 1022. He testified that organisms adapt to and become more tolerant of chlorides and by managing the landfarm by adding fertilizers, hay, moisture and by tilling the soils the effects of chlorides on hydrocarbon degradation can be minimized. Testimony of Sublette, Tr. at 1023-1027.

In sum, the Industry Committee presented the best experts in their fields who provided evidence that: 1) at least a 1000 mg/kg chloride limit standard would be protective of groundwater; and 2) that a 1000 mg/kg standard was not necessary because landfarms could be effectively bioremediated at much higher levels. In addition, the Division's own witness testified that a 1000 mg/kg standard was proper to protect public health and the environment. When compared to the testimony of only one witness who supported the 500 mg/kg and while well-respected among the Commission is admittedly not an expert in ground water or hydrocarbon degradation in landfarms, it becomes obvious that the great weight of the evidence supported at least a 1000 mg/kg standard. Therefore, the Commission's findings adopting a lower standard are not supported by substantial evidence. The Commission's standard could best be characterized as the "illogical in-growth" of the Commission new policy because all evidence pointed to a 1000 mg/kg standard or more as being appropriate for chloride limits. Instead the Commission adopted a lower limit standard.

The Chloride limits set by the Commission in Order No. R-12460-B are not supported by the evidence and on a full record review and are therefore arbitrary, capricious and unreasonable and therefore void.

B. NO DEGRADATION CLOSURE STANDARDS:

In addition to being contrary to law (See Point I), the Commission's no degradation policy is not supported by the record in this case and is therefore arbitrary, capricious, unreasonable and void. At all times prior to the closing of the record on May 18, 2006, the closure standards in the proposed rules were based on the WQCC 3103 Ground Water Constituents numerical standards multiplied by a DAF of 1. Only after the Task Force met did the Commission change the closure standards to background concentrations or the Practical Quantitation Limit. This is a new closure standard and a new approach to monitoring and closing a surface waste management facility. It is a different standard than that which was proposed by the Division, and reviewed by the Commission and commenter's throughout the eleven months these rules were under consideration. It is not the logical outgrowth of the original proposal, which expressly allowed consideration of health and environmental effects - it is a different and more stringent proposal that wholly rejects any consideration of health or environmental effects. Affected persons did not have a fair opportunity to present their views on the contents of this final plan. It is uncommented upon proposal. Since it was first proposed after the record was closed, this change lacks any record support. Since it is not supported by substantial evidence, or any record evidence, it is arbitrary, capricious, unreasonable and void.

C. 80% TOTAL TPH REDUCTION:

In Rule 53.G(8)(a), the Commission authorizes the use of an environmentally acceptable bioremediation endpoint approach by operators and provides that an "environmentally acceptable bioremediation endpoint occurs when the TPH concentration has been reduced by at least 80% by a combination of physical, biological and chemical processes and the rate of change is negligible." NMAC 19.15.2.58 G(8)(a), Testimony of Price, Tr at 91.

Most crude oils produced in New Mexico in terms of volumes have an API gravity of less than 42. Testimony of vonGonten, Tr. at 588, Testimony of Sublette, Tr. at 987. The undisputed evidence in this case establishes that with the adoption of an 80% minimum removal standard, any crude oil with an API gravity of less than 45 cannot be

landfarmed. Most spills in New Mexico cannot be landfarmed to this standard. Tsetimony of Sublette, Tr. at 987-989.

The 80% total TPH reduction minimum removal standard is an unnecessary restraint on use of bioremediation endpoint and will effectively preclude the bioremediation of most New Mexico crudes. Testimony of Sublette, Tr. at 987-988, 1007. Dr. Sublette and Dr. Thomas testified that an 80% minimum removal standard is unnecessary for at the end of the bioremediation process the toxicity of the hydrocarbon contaminated soil have been eliminated and it does not pose a threat to human health, the environment or fresh water. Testimony of Sublette, Tr. at 976-984, Testimony of Thomas, Tr. at 1214. Dr. Sublette further recommended that the Commission encourage the use of the bioremediation endpoint and that, instead of an 80% total TPH reduction, a 1% TEPH limitation on solid phase and a revegetation standard be adopted. Testimony of Sublette, Tr. at 1006, 1042-1045. The New Mexico Citizens for Clean Air and Water and the Industry Committee also agreed that "The requirement for a minimum reduction of 80% in the TPH concentration when using the bioremediation endpoint option for permitted landfarms should be replaced with a maximum residual TPH concentration at the bioremediation endpoint. An appropriate maximum residual TPH concentration is < 1% of total extractable petroleum hydrocarbons as determined by EPA 418.1 or and EPA approved equivalent method." Testimony of Sublette, Tr. at 1006.

On full record review, the provision in Rule 53.G(7)(a)(iii) that requires an 80% reduction of total TPH by bioremediation is not supported by the evidence in this case and is arbitrary, unreasonable and capricious.

D. RESPONSE ACTION PLAN:

Rule 53 G. (5)(e) of the Surface Waste Management Rules requires the submission of a response action plan if any vadose zone sampling results show the concentrations of TPH, BTEX, chlorides, or constituents listed in Subsections A and B of 20.6.2.3103 NMAC ("3101 constituents") exceed the background concentrations. This required plan must address changes in operation of the landfarm to prevent further contamination and a plan for isolating or remedying any existing contamination. NMAC 19.15.2.53.G(5)(e).

The requirement for a release action plan whenever sampling results exceed background concentrations establishes an unworkable anti-degradation ground water standard for, as all witnesses agreed, some migration from the treatment zone into the vadose zone is unavoidable and will trigger corrective action. Testimony of Stephens, Tr. at 784-785. The requirement for a release action plan whenever sampling results exceed background concentrations is too stringent and, in some cases, an accurate measurement cannot be obtained because it is not possible to accurately measure of these constitutents be cause they fall below the practical quantitation limit ("PQL").

The evidence showed that some constituents that exceed background or the WQCC 3103 Groundwater Standards will be found in most if not all samples and trigger a response action plan. The proposed rules would discourage the use of landfarming for it would be impossible to operate a landfarm without triggering a response action obligation. Testimony of Stephens, Tr. at 785-91, Testimony of Thomas, Tr. at 1198.

The response action trigger in the new Surface Waste Management Rules effectively rules out landfarming, the most effective tool available to the Commission to deal with hydrocarbon contaminated soils and is unnecessary. Testimony of Stephens, Tr. at 787.

The use of background as the response action trigger is arbitrary, capricious and unreasonable for, on a full record review, it is not supported by substantial evidence.

III. CONCLUSION:

In reaching its decision and promulgating new Surface Waste Management Rules, the Commission exceeded its jurisdiction and violated the Oil and Gas Act and the Water Quality Act. The procedures used by the Commission for the adopting of these rules violated its own procedural rules and the due process rights of affected parties. Order No. R-12460-B does not contain the required findings upon which the Commission's jurisdiction rests and other findings on material facts are not supported by substantial evidence and are arbitrary, capricious and unreasonable. The case should be set for rehearing to address each of these errors.

Respectfully submitted,

By: _____
William F. Carr
Ocean Munds-Dry
Holland & Hart LLP
Post Office Box 2208
Santa Fe, New Mexico 87504-2208
Telephone: (505) 988-4421

Eric L. Hiser, Esq.
Jorden Bischoff & Hiser, P. L. C.
7272 East Indian School Road
Suite 360
Scottsdale, Arizona 85251
Telephone: (480) 505-3927

ATTORNEYS FOR THE INDUSTRY COMMITTEE
Burlington Resources Oil & Gas Company LP, Chesapeake Operating, Inc., ChevronTexaco, ConocoPhillips Company, Devon Energy Corporation, Dugan Production Corporation, Energen Resources Corporation, Marathon Oil Company, Marbob Energy Corporation, OXY USA, INC., Occidental Permian, LTD, OXY USA WTP Limited Partnership, D. J. Simmons, Inc., Williams Production Company, XTO Energy, Inc., Yates Petroleum Corporation.

CERTIFICATE OF SERVICE

I certify that on November 8, 2006 I served copies of the foregoing Application for Rehearing by U. S. Mail, postage prepaid, or Hand Delivery to the following:

Oil Conservation Commission (BY HAND DELIVERY)
Florene Davidson, Clerk
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505

Alletta Belin, Esq.
Belin & Sugarman
618 Paseo de Peralta
Santa Fe, New Mexico 87501
Attorney for the New Mexico Citizens for Clean Air & Water, Inc.

David K. Brooks, Esq. (BY HAND DELIVERY)
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
Attorney for the Oil Conservation Commission

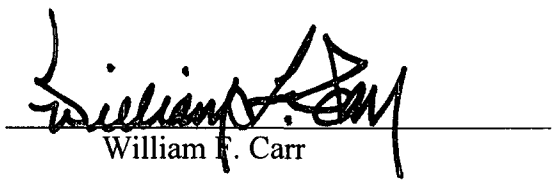
Pete V. Domenici Jr.
Domenici Law Firm
320 Gold Ave SW Suite 1000
Albuquerque, New Mexico 87102
Attorney for Gandy Marley, Inc.

Gregory D. Huffaker Jr.
Huffaker & Moffatt LLC
Post Office Box 1868
Santa Fe, New Mexico 87504-1868
Attorney for Controlled Recovery, Inc.

Carolyn Lamb, Esq.
Post Office Box 1102
Durango, Colorado 81302
Attorney for the Oil and Gas Accountability Project

Donald A. Neeper, Ph.D
New Mexico Citizens for Clean Air & Water, Inc.
2708 B. Walnut St.
Los Alamos, New Mexico 87544-2050

Rebecca G. Percy-Pipin
135 Rincon Valverde
Ponderosa, New Mexico 87404



William F. Carr