

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

IN THE MATTER OF THE APPLICATION OF THE NEW MEXICO OIL AND GAS ASSOCIATION FOR AMENDMENT OF CERTAIN PROVISIONS OF TITLE 19, CHAPTER 15 OF THE NEW MEXICO ADMINISTRATIVE CODE CONCERNING PITS, CLOSED LOOP SYSTEMS, BELOW GRADE TANKS, SUMPS AND OTHER ALTERNATIVE METHODS RELATED TO THE FOREGOING AND AMENDING OTHER RULES TO CONFORMING CHANGES, STATEWIDE.

CASE NO. 14784

CASE NO. 14785

**PETITIONERS' MOTION TO EXCLUDE WITNESSES IDENTIFIED IN
OGAP'S NOTICE OF INTENT TO PRESENT TESTIMONY**

Petitioners New Mexico Oil & Gas Association (NMOGA) and the Independent Petroleum Association of New Mexico (IPANM) jointly move the Commission to preclude the additional witnesses identified in the Notice of Intent to Present Technical and Non-Technical Testimony filed by Earthworks' Oil & Gas Accountability Project ("OGAP") on January 2, 2013. As grounds for this motion, Petitioners states

1. OGAP has informed the Commission that it intends to present at least 8 hours of testimony through two witnesses on the impact to groundwater, public health and the environment from "the proposed waste concentrations in NMOGA's and IPANM's petitions...". OGAP Notice at p. 4. OGAP proposes this testimony on the pretense that the Commission intends to address at the January 9th hearing "proposed revisions to the concentrations of wastes permitted for onsite burial in their entirety" and that Petitioners have recently proposed changes to the "waste concentrations" under consideration by the Commission. *Id.* at p. 2. OGAP's pretenses are false.

2. At the Commission's November 15, 2012, public hearing, which OGAP did not attend, the Commissioners voted in favor of an order that required Petitioners to submit a revised

set of tables that use a consistent method of measurement, and to hold a public hearing “for the limited purpose of receiving testimony on the revised set of tables submitted by the petitioners.” Tr. 11/15/12 at p. 6, lines 1-15. At the close of the November 15th hearing, the Commissioners reiterated that the public hearing set for January 9, 2013, was for the limited purpose of addressing the requested revisions to the method of measurement in the proposed tables. Tr. 11/15/12 at p. 9, lines 3-6.

3. Pursuant to the Commission’s instructions, Petitioners filed on November 29, 2012, limited revisions to the “Method” column and associated asterisk for chlorides in proposed Tables I and II. *See* Notice Of NMOGA’s Corrections To Its Proposed Amendments To Title 19, Chapter 15, Part 17; Submission by IPANM on 11/29/12. Specifically, Petitioners submitted four revisions to the “Method” column for chlorides in the tables:

First, Petitioners inserted EPA Method 300.0 in place of EPA Method 300.1;

Second, they moved the asterisk from the entire Method column to chlorides only;

Third, they changed the asterisk to read “or other test methods approved by the Division”; and

Fourth, they moved the reference to EPA SPLP and SW 846 form the asterisk directly to the Method column for chlorides in Table II.

Compare Attachment A hereto (page 41 of NMOGA Exhibit 1) *with* Attachment B hereto (page 41 of NMOGA’s Exhibit 20 filed on November 29th). **Petitioners did not make any revisions to the concentration levels reflected in the “Limit” column of Tables I and II. *Id.***

4. The concentration levels proposed in the “Limit” column in Tables I and II were first filed with the Commission in September of 2011. OGAP had over eight months to review the proposed limits and prepare for the hearings that commenced in May of 2012. The

concentration levels were the subject of weeks of extensive, painstaking testimony before the Commission from May through August of 2012. During these hearings OGAP, like any other party, was afforded the opportunity to present evidence on the impacts of these concentration levels to groundwater, the public health or the environment during its case in chief. OGAP indeed presented a witness during its case in chief and had at counsel table Ms. Kathy Martin to assist in the preparation, presentation and cross examination of witnesses. Over objections by the parties, the Commission adjourned for two months to afford OGAP another opportunity in August to present Ms. Martin as a “rebuttal” witness. Ms. Martin testified about the concentration levels proposed by Petitioners and ultimately offered opinions on the subject. *See, e.g.,* Tr. 2178. In September, OGAP submitted findings of fact and conclusions of law, as well as closing arguments, on the concentration levels proposed by the Petitioners. **The concentration levels that were the subject of these extensive hearings have not changed since the hearing closed on August 29, 2012; they have not been changed since findings and conclusions were submitted in September of 2012; the Commission did not instruct any party to propose changes to these concentration levels; and Petitioners have not submitted any changes to these concentration levels.**

5. There is simply no basis for OGAP to now suggest that they can take yet another bite at submitting evidence on the “the proposed waste concentrations in NMOGA’s and IPANM’s petitions” by calling two witnesses to testify for eight hours based on their “experience,” undisclosed “peer-reviewed literature” and undisclosed “published data.” OGAP Notice at p. 4. The Commission has already afforded OGAP ample opportunity to present evidence on the concentration levels first proposed by the Petitioners well over a year ago.

These waste concentration levels have been fully vetted by the parties and Commission in these proceedings.

6. OGAP's additional proposed witnesses do no purport to offer any testimony on the limited corrections to the testing methods Petitioners have filed at the request of the Commission. Instead, OGAP seeks to offer duplicative testimony on the concentration levels that have been proposed since September of 2011. OGAP's actions seek to eclipse the limited purpose of the January 9th hearing, and to improperly and unfairly extend the scope and duration of the hearing. Accordingly, the additional witnesses OGAP seeks to call at the January 9th hearing should and must be precluded.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January 2013, I served a copy of the foregoing **Petitioners' Motion to Exclude Witnesses Identified in OGAP's Notice of Intent to Present Testimony** upon following counsel of record via Hand Delivery; Electronic Mail, and U.S. Mail, postage pre-paid to:

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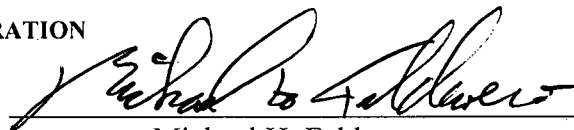

Michael H. Feldewert

Table I, 19.15.17.13 NMAC
Closure Criteria for Soils Beneath
Pits & Below Grade Tanks

<u>Depth to Unconfined Groundwater less than 10,000 mg/1 TDS</u>	<u>Constituent</u>	<u>Method*</u>	<u>Limit**</u>
<u>≤50 feet</u>	<u>Chloride</u>	<u>EPA 300.1</u>	<u>5,000 mg/kg</u>
	<u>TPH (GRO+DRO)</u>	<u>8015M</u>	<u>100 mg/kg</u>
	<u>BTEX</u>	<u>8021B or 8015M</u>	<u>50 mg/kg</u>
	<u>Benzene</u>	<u>8021B or 8015M</u>	<u>10 mg/kg</u>
<u>>50 feet-100 feet</u>	<u>Chloride</u>	<u>EPA 300.1</u>	<u>10,000 mg/kg</u>
	<u>TPH (GRO+DRO)</u>	<u>8015M</u>	<u>1,000 mg/kg</u>
	<u>BTEX</u>	<u>8021B or 8015M</u>	<u>50 mg/Kg</u>
	<u>Benzene</u>	<u>8021B or 8015M</u>	<u>10 mg/kg</u>
<u>> 100 feet</u>	<u>Chloride</u>	<u>EPA 300.1</u>	<u>20,000 mg/kg</u>
	<u>TPH (GRO+DRO)</u>	<u>8015M</u>	<u>5,000 mg/kg</u>
	<u>BTEX</u>	<u>8021B or 8015M</u>	<u>50 mg/kg</u>
	<u>Benzene</u>	<u>8021B or 8015M</u>	<u>10 mg/kg</u>

*Per EPA SW 846 or other EPA Approved Methods

**Numerical limits or natural background level, whichever is greater

Table II, 19.15.17.13 NMAC
Closure Criteria for Wastes Left in Place
in Temporary Pits & Burial Trenches

<u>Depth to Unconfined Groundwater less than 10,000 mg/1 TDS</u>	<u>Constituent</u>	<u>Method*</u>	<u>Limit**</u>
<u>25-50 feet below trench/pit</u>	<u>Chloride</u>	<u>EPA 300.1</u>	<u>2,500 mg/L</u>
	<u>TPH (GRO+DRO)</u>	<u>8015M</u>	<u>100 mg/kg</u>
	<u>BTEX</u>	<u>8021B or 8015M</u>	<u>50 mg/kg</u>
	<u>Benzene</u>	<u>8021B or 8015M</u>	<u>10 mg/kg</u>
<u>> 50 below trench/pit</u>	<u>Chloride</u>	<u>EPA 300.1</u>	<u>5,000 mg/L</u>
	<u>TPH (GRO+DRO)</u>	<u>8015M</u>	<u>1,000 mg/kg</u>
	<u>BTEX</u>	<u>8021B or 8015M</u>	<u>50 mg/kg</u>
	<u>Benzene</u>	<u>8021B or 8015M</u>	<u>10 mg/kg</u>

*Per EPA SPLP and SW 846 or other EPA Approved Methods

**Numerical limits or natural background level, whichever is greater

**Table I, 19.15.17.13 NMAC
Closure Criteria for Soils Beneath
Pits & Below Grade Tanks**

Depth to Unconfined Groundwater less than 10,000 mg/1 TDS	Constituent	Method	Limit**
≤50 feet	Chloride	EPA 300.0*	5,000 mg/kg
	TPH (GRO+DRO)	8015M	100 mg/kg
	BTEX	8021B or 8015M	50 mg/kg
	Benzene	8021B or 8015M	10 mg/kg
>50 feet-100 feet	Chloride	EPA 300.0*	10,000 mg/kg
	TPH (GRO+DRO)	8015M	1,000 mg/kg
	BTEX	8021B or 8015M	50 mg/Kg
	Benzene	8021B or 8015M	10 mg/kg
> 100 feet	Chloride	EPA 300.0*	20,000 mg/kg
	TPH (GRO+DRO)	8015M	5,000 mg/kg
	BTEX	8021B or 8015M	50 mg/kg
	Benzene	8021B or 8015M	10 mg/kg

* Or other test methods approved by the Division

**Numerical limits or natural background level, whichever is greater

**Table II, 19.15.17.13 NMAC
Closure Criteria for Wastes Left in Place
in Temporary Pits & Burial Trenches**

Depth to Unconfined Groundwater less than 10,000 mg/1 TDS	Constituent	Method	Limit**
25-50 feet below trench/pit	Chloride	EPA SW-846 Method 1312 (SPLP) and EPA Method 300.0*	2,500 mg/L
	TPH (GRO+DRO)	8015M	100 mg/kg
	BTEX	8021B or 8015M	50 mg/kg
	Benzene	8021B or 8015M	10 mg/kg
> 50 below trench/pit	Chloride	EPA SW-846 Method 1312 (SPLP) and EPA Method 300.0*	5,000 mg/L
	TPH (GRO+DRO)	8015M	1,000 mg/kg
	BTEX	8021B or 8015M	50 mg/kg
	Benzene	8021B or 8015M	10 mg/kg

* Or other test methods approved by the Division

**Numerical limits or natural background level, whichever is greater

Attachment - B