

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

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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, BELOW GRADE TANKS, CLOSED LOOP SYSTEMS AND OTHER ALTERNATIVE METHODS TO THE FOREGOING, AND AMENDING OTHER RULES TO CONFORMING CHANGES STATEWIDE.

CASE NO. 14784
14785

**Oil and Gas Accountability Project Proposed Supplemental Findings of Fact, and
Conclusions of Law**

Pursuant to the New Mexico Oil Conservation Commission's ("Commission") oral order of January 10, 2013, Earthworks' Oil and Gas Accountability Project ("OGAP") hereby submits the following proposed Findings of Facts and Conclusions of Law.

FINDINGS OF FACT

1. On October 5, 2012, the Commission was informed by a third party, not the Petitioners, that the New Mexico Oil and Gas Association ("NMOGA") and the Independent Petroleum Association of New Mexico ("IPANM") (collectively, "Petitioners") had based their petitions for rulemaking in the above-captioned matter on a superseded version of the Pit Rule. Transcript ("Tr.") at 3754:12-14.
2. Because of Petitioners' mistake, the Commission announced that it would hold a supplemental hearing to address the problem of Petitioners' petitions being based on a superseded rule. November 15, 2012 Transcript ("11/15 Tr.") at 3-5
3. In its order for the supplemental hearing the Commission stated:

There was a concern about the contaminant levels on the tables.

...
The issue with the [contaminant level] tables is more serious ... There is not sufficient testimony in the record about the measurement levels to allow us to correct the problems without getting more input from the parties.

...
The Commission should have concerns about the numerical limits in the tables that are part of Section 19.15.17.13.

...
[S]ince these tables are integral to the closure and reclamation requirements in 19.15.17.13, and since that section is an essential part of the rulemaking proposal before the Commission, the Commission must require that an amended set of tables be submitted and that testimony must be taken on the amended tables before the Commission can complete deliberation on the rulemaking proposal.

11/15 Tr. at 3-5.

4. The public notice of the supplemental proceeding provided:

[T]he Oil Conservation Commission entered an oral order requiring the applicants in the above cases to submit a revised set of tables related to applicants' proposed closure and reclamation requirements. The Oil Conservation Commission also orally ordered that testimony be taken on the revised tables ...

December 3 Public Notice at 1-2.

5. Both the November 15 transcript and the public notice clearly indicate that the Commission was concerned not only about how the contaminants in pits were measured, but also about the contaminant levels themselves.

6. At the supplemental hearing, based on Petitioners' Motion to Exclude Witnesses in OGAP's Notice of Intent to Present Technical Testimony, the Commission prohibited any testimony that addressed any issue other than: 1) whether waste concentrations should be measured in milligrams per kilogram ("mg/kg") or milligrams per liter ("mg/l") and 2) whether Petitioners' proposed amended testing methods were appropriate to test for contaminants in soils beneath pits and below grade tanks and in pits. Tr. at 3848.

7. The New Mexico District Court for the First Judicial District determined that the above-captioned proceeding is a rulemaking. Order Quashing Writ of Prohibition, Case No. D-0101-CV-2012-00106 at ¶ 2.

8. Notwithstanding the Commission's order restricting the supplemental hearing's scope, the Commission's questions to Petitioners' witness and New Mexico Citizens for Clean Air and Water's ("NMCCAW") indicated that the Commission was ultimately concerned in the supplemental hearing with the concentration limits and their impact on public health and the environment.

9. Petitioners' technical witness, Dr. Clay Robinson, testified that chlorides should be measured in mg/kg in Table I because dry soils were being tested. Testimony of Dr. Clay Robinson ("Robinson Testimony"), Tr. at 3879:1-4.

10. Dr. Robinson testified that in pits, chlorides should be measured using mg/l because pit wastes are mixed phase media. *Id.*, 3849:4-10; 3890.

11. Dr. Robinson testified that using mg/l for measuring chlorides in pit waste is more appropriate because regulators should be concerned about chlorides' mobility in the subsurface. *Id.*, Tr. at 3894-3895.

12. Both Dr. Robinson and NMCCAW expert witness Dr. Donald Neeper testified that hydrocarbons such as benzene and BETEX are mobile in the subsurface. Robinson Testimony, Tr. at 3944-3945; Neeper Testimony, Tr. at 4059-4060.

13. Contaminant mobility was the focus of much of the supplemental hearing. Tr. at 4059, 3976, 3984-85, 3987-3993.

14. Petitioners' offered no evidence that benzene and BETEX concentrations in pit wastes covered by Table II should be measured in mg/l.

15. Witnesses for Petitioners testified throughout this proceeding using different units of measurements for pit waste concentrations to support Petitioners proposed amendments, including the proposed waste tables. Testimony of Bruce Gantner, Tr. at 127; Testimony of Dan Arthur, Tr. at 701-702; Testimony of Bruce Buchanan, Tr. at 891.

16. Dr. Robinson conceded that mixed phase media could be oven dried and subjected to EPA testing method 300.0 and therefore could be measured in mg/kg. Robinson Testimony, Tr. at 3938.

17. Dr. Robinson also conceded that soil could be subjected to EPA method 1312 and contamination levels in soil could be expressed in mg/l. *Id.*, Tr. at 3938-3939.

CONCLUSIONS OF LAW

18. OGAP submitted conclusions of law in the hearing in chief in the above-captioned matter on DATE. OGAP hereby incorporates those conclusions of law by reference herein. In addition, OGAP proposes the additional conclusions of law below.

19. Neither the rules of evidence nor the rules of civil procedure apply to this proceeding. 19.15.3.12.A.1 NMAC.

20. The Petitioners' Motion to exclude OGAP's witnesses relies on applying evidentiary rules.

21. As a result of the Commission's determination that the scope of the supplemental hearing was limited to the two areas of concern cited in paragraph 6, above, the testimony OGAP intended to present would have raised issues of contaminant mobility and impacts of pit pollution on public health and water. Proffering those witnesses would have been futile given the Commission limited the scope of the supplemental hearing to whether mg/kg or mg/l is a preferable measurement.

22. As a matter of law, the Commission's supplemental hearing failed to cure the notice defect caused by the Petitioners' use of a superseded rule as the basis for its rulemaking petitions.

23. Substantial evidence in the record fails to support Petitioners' contention that different units of measurement should be used to measure chloride concentrations in the two waste tables that Petitioners propose. Indeed, substantial evidence supports the conclusion that all mobile pollutants should be measured in mg/l. Robinson Testimony, Tr. at 3944-3945; Neeper Testimony, Tr. at 4059-4060.

24. Substantial evidence in the record fails to support Petitioners' contention that chlorides should be measured in different units from other mobile contaminants such as benzene or BETEX.

25. The lack of evidence notwithstanding, the testimony Petitioners proffered has no bearing whatsoever on the issue of whether the proposed waste concentrations in proposed Tables I and II will protect human health and the environment.

26. The evidence Petitioners' offered through its expert, Dr. Clay Robinson, is insufficient to cure the numerous instances in the record where Petitioners use different units of measurement to obscure the environmental and public health impacts of the proposed waste concentrations in Tables I and II. Testimony of Bruce Gantner, Tr. at 127; Testimony of Dan Arthur, Tr. at 701-702; Testimony of Bruce Buchanan, Tr. at 891.

27. Substantial evidence indicates Petitioners' proposed choice of contamination measurement was dictated not by any reasoned technical or policy basis, but rather simply by their arbitrary choice of method.

28. The waste concentrations in Tables I and II are therefore unsupported by substantial evidence in the record.

29. For all the foregoing reasons, NMOGA's and IPANM's petitions should be denied.

Submitted this 16th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2013, I have delivered a copy of the foregoing pleading in the above-captioned case via electronic mail and/or US Mail, First Class to the following:

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