NEW MEXICO
ENVIRONMENTAL LAW CENTER

December 6, 2007



**VIA HAND DELIVERY**

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

RE: **Repeal of Rule 50 and the adoption of a new rule governing regulation of pits, below grade tanks, closed loop waste systems and alternatives to those waste disposal methods; Case No. 14015**

Dear Mr. Chairman:

Please find enclosed the Oil & Gas Accountability Project's Brief on Surface Owner and Commerce Clause issues in the above matter.

If you have any questions, please feel free to contact me.

Sincerely,

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

**IN THE MATTER OF THE APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION FOR REPEAL OF EXISTING RULE 50 CONCERNING PITS AND BELOW GRADE TANKS AND ADOPTION OF A NEW RULE GOVENING PITS AND BELOW GRADE TANKS, CLOSED LOOP SYSTEMS AND OTHER ALTERNATIVE METHODS TO THE FOREGOING, AND AMENDING OTHER RULES TO CONFORMING CHANGES STATEWIDE.**

**CASE NO. 14015**

**Oil and Gas Accountability Project's Brief on Surface Owner and Commerce Clause Issues**

Pursuant to the Oil Conservation Commission's ("Commission") order dated November 1, 2007[1], ordering the parties to brief two legal issues relating to the proposed rule in the above-captioned matter ("Pit Rule"), the Oil and Gas Accountability Project ("OGAP") hereby submits its brief.

**Introduction**

The Commission asks the parties to brief two legal issues:

1) whether the proposed Subparagraph (c) of Paragraph (1) of Subsection F of 19.15.17.13 NMAC, which provides that surface owner consent is one of the requirements for on-site closure, violates the sub-surface owners right to reasonable use of the surface and whether the Oil Conservation Commission has the authority to require surface owner consent; and

2) whether the proposed Subparagraph (a) of Paragraph (1) of Subsection F of 19.15.17.13 NMAC that limits use of on-site closure to those situations where the proposed pit's location is outside of a 100-mile radius of a division-approved facility or an out-of-state waste management facility violates the Commerce Clause of the United States Constitution.

[1] The Commission's order initially set November 13, 2007 as the deadline for submission of briefs. Nov. 1 Order at 1. The Commission subsequently ,by oral order, changed the brief filing deadline to December 6, 2007.

November 1 Order at 1. The Commission seeks briefing on these issues because of issues raised by the New Mexico Industry Committee ("Industry Committee") and the Independent Petroleum Association of New Mexico ("Independent Producers") (collectively, "the Industry"). See, Industry Committee Recommended Modification to Proposed Rule Change at 2, 11-12 (Oct. 22, 2007); Independent Producers Comments on Propose Rule Change at 16-17 (Oct. 29, 2007). For the reasons explained below, the proposed Pit Rule does not violate the sub-surface owner's right to reasonable surface use and does not violate the Commerce Clause. Moreover, the Commission clearly has the authority to issue the proposed Pit Rule

## II. Argument

In their respective comments on the proposed Pit Rule, both the Industry Committee and the Independent Producers assert, without citation to any legal authority, that proposed rule 19.15.17.13.F(1)(c) NMAC impermissibly attempts to adjust the contractual relationship between surface and subsurface owners. Industry Committee Recommended Modification to Proposed Rule Change at 2, 11-12; Independent Producers Comments on Propose Rule Change at 16-17.[2] Likewise, both assert, again without citation to legal authority, that the "100 mile rule" in 19.15.17.13.F(1)(a) NMAC violates the Commerce Clause of the U.S. Constitution. Id. Neither argument has merit and should be rejected.

[2] The Independent Producers recite the Commission's statutory authority in the New Mexico Oil and Gas Act, but fail to adequately explain how this authority supports its assertions. Independent Producers Comments at 16-17.

A. The Proposed Pit Rule Does Not Impermissibly Change the Contractual Relationship Between Surface and Subsurface Estate Owners

Essentially, Industry appear to assert that 19.15.17.13.F(1)(c) NMAC, which provides in relevant part, "[t]he operator shall obtain the surface owner's written consent to the operator's proposal of an on-site closure method", is an improper attempt to alter the balance between the surface and subsurface owners' rights as delineated by the New Mexico Legislature in the Surface Owner Protection Act ("SOPA"), 1978, NMSA § 70-12-1 *et. seq.* The Industry's argument fails because 1) the proposed Pit Rule provision is consistent with SOPA and 2) if the OCC were to ignore a surface owner's wishes with respect to on-site waste burial, it would constitute an interference with contract, in violation of the Contracts Clause of the United States Constitution.

1. The Proposed Pit Rule Provision is Consistent with the Surface Owners Protection Act

The Surface Owners Protection Act ('SOPA') provides that prior to entry upon land to conduct oil and gas operations, an operator must notify the surface owner of the planned oil and gas operations. 1978, NMSA § 70-12-5(B). This notice must include a proposed surface use and compensation agreement. Id. at § 70-12-5(B)(4). The surface owner may either accept or reject the proposed surface use and compensation agreement, and if the surface owner rejects it, she may enter into negotiations with the operator. Id. at 70-12-5(D). Based on the statute's plain language, it is clear that the New Mexico Legislature intended to give surface owners and oil and gas operators latitude to negotiate contracts, i.e. surface use agreements, that reflect the positions of both parties. General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985) (Plain

language of a statute is the primary indicator of legislative intent, which must be given its full effect).

The provision in the proposed Pit Rule simply reflects the Oil Conservation Division's ("OCD") unwillingness to disturb the contractual relationship between surface owners and operators as established by the Legislature. There is therefore no basis for Industry's assertion that the proposed rule will alter the relationship between surface owners and operators.

Furthermore, the SOPA provides that "an operator shall reclaim all the surface affected by the operator's oil and gas operations." 1978, NMSA § 70-12-4 (C). In § 70-12-3(C), the SOPA defines "reclaim" as "to substantially restore the surface affected by oil and gas operations to the condition that existed prior to oil and gas operations, or as otherwise agreed to in writing by the operator and surface owner". Based upon the plain language of the statute, the legislature has required that an operator obtain the surface owner's consent if an operator intends to leave the surface in a condition other than that which existed prior to oil and gas operations. Burying the contents of drilling pit, some of which may be toxic, is certainly not substantially restoring the surface to its pre-disturbance condition. Therefore, the SOPA requires the written agreement of the surface owner for such a disposal method. The provision in the Pit Rule requiring written consent of the surface owner, therefore, is simply putting into effect the plain language of the statute.

2. The Commission is Prohibited from Allowing On-Site Waste Disposal Against Surface Owner Wishes

Not only does the proposed rule not alter the relationship between surface owners and operators as established by the Legislature, but failure to abide by the terms of a

surface use agreement that prohibit on-site waste burial may violate the Contracts Clause of the U.S. Constitution.

The Contract Clause provides, "No State shall ... pass any ... Law impairing the Obligation of Contracts ...". U.S. Const., Art. I, § 16, clause 1. The U.S. Supreme Court has interpreted this clause to accommodate the states' inherent police power to "safeguard the vital interests of its people". Energy Reserves Grp. v. Kansas Power & Light Co., 103 S.Ct. 697, 704 (1983), quoting Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 434 (1934). The threshold question in analyzing a Commerce Clause claim is whether the state law has operated as a substantial impairment of a contractual relationship. Id. State regulation need not completely destroy contractual expectations to run afoul of the Commerce Clause. Id. If the regulation constitutes a significant impairment, the state may still justify its regulation by showing that it serves a legitimate public purpose, such as remedying a broad and general social or economic problem. Id. at 704-705. Once a legitimate purpose has been established, the next inquiry is whether the adjustment of the rights and responsibilities of the contracting parties is reasonable and related to the regulatory purpose. Id. at 705.

In this case, if the proposed rule allowed on-site burial where a surface use agreement did not, the regulation would substantially impair the contractual relationship between the surface owner and the operator. It would effectively remove a substantial item for surface owners from the negotiating table.

Moreover, prohibiting surface owners from negotiating on-site closure serves no legitimate public purpose. The Industry has presented no credible evidence that prohibiting on-site closure in certain circumstances has any economic or social effect.

Indeed, the evidence presented to date in the hearing on the above-captioned matter demonstrates that a broad problem, i.e. the contamination of soil and groundwater and the risk to public health, would be served by prohibiting on-site waste burial.

Allowing on-site burial in conflict with a surface use agreement would also be unreasonable because it would undermine the intent of the Legislature to allow surface owners and operators to negotiate surface use terms. Moreover, it would put surface owners at a distinct disadvantage in negotiations.

Finally, allowing on-site burial in conflict with a surface use agreement would not be related to the purpose of the proposed Pit Rule. The proposed Pit Rule's purpose is to "protect fresh water, public health, and the environment." Application for Rulemaking at 2. Allowing on-site waste burial is not related to this purpose; indeed, it would undermine the purpose of the proposed rule by jeopardizing fresh water, public health and the environment.[3] Therefore, the Commission should not disturb the proposed surface owner consent provision in 19.15.17.13.F(1)(c) NMAC.

B. The Commission has the Authority to Require Surface Owner Consent

The Commission has clear authority to require surface owner consent. The New Mexico Oil and Gas Act ("the Act") provides that the Commission has the authority 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." 1978, NMSA § 70-2-12(B)(21). Furthermore, the Commission has

[3] This Contract Clause analysis would not be the same when applied to Industry. When analyzing contractual impairment when applied to a regulated industry, a reviewing court must consider the nature and extent to which the industry has been regulated. Kansas Power & Light, 103 S.Ct. at 704 (citations omitted). In that case, the Court observed that when an industry is subject to state restriction, it cannot remove those restrictions by making a contract about them. Id., citing Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

the authority to "require wells to be drilled, operated and produced in such a manner as to prevent injury to neighboring leases or properties." Id. at § 70-2-12(B)(7). By its plain language, the Act clearly provides that the Commission can require surface owner consent for onsite waste burial, even in the absence of legislation that allows surface owner consent. However, if the Commission determines that it does not have the authority to provide for surface owner consent, the Act undoubtedly allows the Commission to prohibit on-site waste burial entirely.

C. The "100 Mile Rule" Does not Violate the Commerce Clause

The Commerce Clause of the United States Constitution provides that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. I, § 8, cl. 3. Although the Constitution does not expressly limit the power of states to regulate commerce, the Supreme Court of the United States has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." United Haulers Association, Inc. et al. v. Oneida-Herkimer Solid Waste Management Authority et al., 127 S. Ct. 1786, 1792 (2007). Because no "conflicting federal statute has been cited," OGAP assumes that the challenge is based on the "so-called dormant aspect of the Commerce Clause." Id. at 1793. The first question, therefore, is whether the state regulation "discriminates on its face against interstate commerce." Id. "Discrimination" in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Id. (*quoting* Oregon Waste Sys. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994)).

In the instant case, Section 19.15.17.13 (F)(1)(a) does not discriminate between (or even mention) out-of-state and in-state goods, interests or entities; therefore, the challenged regulation is clearly not "subject to the 'virtually *per se* rule of invalidity.'" Id. (*quoting* Philadelphia v. New Jersey, 98 S. Ct. 2531 (1978)). On the contrary, because the challenged rule is "designed to serve legitimate state interests and [is] applied without discrimination against interstate commerce," it would not violate the Commerce Clause "even [if] it affects commerce."[4] Raymond Motor Transportation, Inc. et al. v. Rice, 98 S. Ct. 787, 793 (1978). Because the Pit Rule is designed to protect the health, safety, and environment of New Mexico residents, clearly a legitimate state interest, and states "traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) (internal quotation marks omitted); *cf.* Rice, 98 S. Ct. at 795 ("Nevertheless, it also is true that the Court has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized'") (*quoting* Pike v. Bruce Church, Inc., 90 S. Ct. 844, 848 (1970)). Accordingly, the Pit Rule does not violate the Commerce Clause.

Furthermore, where state law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike, 90 S. Ct. at 847. In the instant case, the Pit Rule regulates the disposal of potentially dangerous waste by, among other things, prohibiting

[4] In this case, moreover, no effect on interstate commerce has been demonstrated, nor has it been demonstrated that the waste in question is even an "article of commerce."

onsite disposal under certain circumstances, and the effect on interstate commerce (if any) is purely incidental. 19.15.17.13 (F)(1)(a). Because the rule would regulate the disposal of **all** oil field wastes even-handedly, without regard to origin, there simply is no basis for a challenge under the dormant Commerce Clause. Chemical Waste Management, Inc. v. Hunt et al., 112 S. Ct. 2009, 2015-2016 (1992) ("To the extent Alabama's concern touches environmental conservation and the health and safety of its citizens, such concern does not vary with the point of origin of the waste, and it remains within the State's power to monitor and regulate more closely the transportation and disposal of *all* hazardous waste within its borders"); Philadelphia v. New Jersey, 98 S. Ct. 2531, 2537 (1978) ("And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected."). Moreover, OCC's regulation remains constitutional even if it incidentally burdens some interstate companies. CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637, 1649 (1987).

Proposed Section 19.15.17.13 (F)(1)(a) would apply to the disposal of all waste in an even-handed manner and would not discriminate based on the origin of the waste. Moreover, the proposed rule is designed to protect the health, safety, and environment of New Mexico residents, and therefore, the OCC has substantial latitude to regulate within this traditionally local area of concern. Accordingly, there is no basis for a challenge to the proposed rule under the dormant Commerce Clause.

## III. Conclusion

For the foregoing reasons, the proposed Pit Rule neither alters the negotiating relationship between surface owners and operators as established by the Legislature nor

violates the Commerce Clause of the U.S. Constitution. The Commission should therefore adopt 19.15.17.13.F(1)(a) and (c) NMAC as proposed in the OCD's Application for Rulemaking. Alternatively, if the Commission finds that the proposed Pit Rule provisions do alter the negotiating relationship between surface owners and operators or violate the Commerce Clause, the Commission should exercise its broad authority to protect public health and the environment and completely prohibit on-site waste burial.

Respectfully submitted this 6th day of December.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of December, 2007, I have delivered a copy of the foregoing pleading in the above-captioned case via email, facsimile, or U.S. mail to the following:

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