



INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO

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Mark Fesmire
Director
Oil conservation Division
New Mexico Energy, Minerals and
Natural Resources Department
1220 South Saint Francis Drive
Santa Fe, NM 87505

Re: Pre-hearing comments

Case No. 14255 Application of the New Mexico Oil Conservation Division, through the Environmental Bureau Chief, for Adoption, of an amendment to 19.15.39 NMAC adding new sections to be codified at 19.15.39.9 and 19.15.39.10 NMAC addressing special provisions for Santa Fe county and the Galisteo Basin; Santa Fe, Sandoval and San Miguel Counties.

Dear Mr. Fesmire:

Pursuant to Oil Conservation Division Rule 19.15.14.1203 NMAC, the member companies of the Independent Petroleum Association of New Mexico (IPANM) file these comments concerning the proposed Santa Fe County Rule (Case No. 14255) and the Oil Conservation Division's proposed modifications posted on the OCD web site on December 1, 2008.

IPANM is comprised of 230 member companies who employ on average of 25 individuals each and, as such, are considered 'small businesses' under the Small Business Regulatory Relief Act §14-4A NMSA (2005). The majority of IPANM companies are upstream independent oil and gas operators with facilities and operations in the State of New Mexico. Tecton Energy Operating LLC, who is currently seeking to commence operations in the geographic area under consideration in the case, is a member of IPANM.

Under the Oil and Gas Act, §70-2 NMSA 1978, which is the empowering legislation for the Oil and Gas Division and Commission, the Legislature has stated “The division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof. ”§70-2-11.A NMSA 1978. Waste is defined “as generally understood in the oil and gas business, and in any event to embrace the inefficient, excessive or improper, use or dissipation of the reservoir energy, including gas energy and water drive, of any pool, and the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool, and the use of inefficient underground storage of natural gas” §70-12-3(A) NMSA 1978. Thus, under its statutory **duty**, the Division must propose regulations that ultimately will prevent the inefficient or improper operating or producing of any oil or natural gas well.

In the section following the granting to powers to the agency, subsection B notes that the Division is authorized to “make rules, regulations and orders for the purposed and with *respect* to the subject matter stated in this subsection”. § 70-2-12.B NMSA 1978, which include the regulation of the disposition of non-domestic waste “to protect the human health and the environment”. §70-2-12.B(21). Clearly, the mandate to protect the environment falls to the Division only in the instance of disposition of non-domestic¹ wastes and not as an equal weight on the balance against the protection of correlative rights or prevention of waste. Moreover, the Court, in its review of the Commission’s

¹ ‘Nondomestic wastes’ is not defined in the Oil and Gas Act, however, in the Solid Waste Act [Section 74-9-1 to -43], it is defined as “waste associated with the exploration, development, production, transportation, storage, treatment or refinement of crude oil, natural gas ... *but does not include* drilling fluids, produced waters, petroleum liquids, petroleum sludges, or *except in an emergency* declared by the director of the oil conservation division ... petroleum-contaminated soils associated with the exploration, development, production, transportation, storage, treatment or refinement of crude oil or natural gas” §74-9-43 NMSA 1978.

Surface Waste Management Rule 36 has held that “ Subsection B’s language is not mandatory but ‘authorizes’ the OC Division to make rules and regulations for the various purposes with response to the subject matter included in the paragraphs of that section *Burlington Resources Oil & Gas., LP, et al v. NMOCC*, D-1-1-CV-2006-02841, Memorandum Opinion at 16, D.J. Sanchez (February 16, 2008).

The rules of statutory construction as well as the plain reading of the Act require that the over arching responsibility of the Division is to prevent waste and protect correlative rights when creating rules or regulations. As the Court noted in *High Ridge Hinkle Joint Venture v. City of Albuquerque*, sections of an Act are to be read together so that all parts of the statute are given the full effect.” 126 NM 413, 415, 970 P.2d 599, 601 (1998). Further, the Court will “attempt to harmonize statutes ‘in a way that facilitate their operation and the achievement of their goals” *Tyrone v. NMWQCC and NMED*, 2006-NMCA-115, 140 NM 464, 143 P.3d 502 (2006) citing *state ex rel. Quintanaa v. Schnedar*, 115 NM 575, 575-76 (1993). Therefore, when the Commission considers the statutory responsibilities of protection of correlative rights and prevention of waste it is ‘its function to conserve a very vital natural resource’ *Continental Oil Co. v. Oil Conservation Com’n*, 70 N.M. 310, 373 P.2d 809 (1962) and all rules that flow from this statutory responsibility must seek to protect our natural energy resources. Moreover, in the statutory creation of the Water Quality Control Commission and the Department of the Environment, the Legislature vested in those entities the protection of waters under the Water Quality Act §74-6 NMSA 1978 and the Environment Improvement Act §74-1 NMSA 1978. Since the Legislature has not changed the primary responsibility of the Division to prevent waste and protect correlative rights, clearly the Division must seek to, at a minimum, achieve a “comparative evaluation” of potential conflicts arising from its mandatory duties and other authorized actions.

In the Division’s application for the adoption of new sections addressing special provisions for Santa Fe County and the Galisteo Basin, the rule clearly seeks to impose environmental protection responsibilities on any operator seeking to drill for mineral resources in the area under consideration. In the application itself, there is no mention of balancing the prevention of waste or protection of correlative rights, but the requirements

of additional studies and costs to the operator make it clear that protection of the environment is the only basis for the proposed rule. If the Division had sought to follow its statutory mandates under both the Oil and Gas Act and the Small Business Regulatory Relief Act, it would have filed a notice with the Small Business Advisory Commission as well as completed some study to demonstrate that valuable mineral resources will not be lost, left in the ground or wasted due to this proposed rule.

Moreover, the Division's expected response that it is only responding to Governor Richardson's Executive Order 2008-038 which extends a drilling moratorium in Santa Fe County and directs the Division to 'investigate and begin drafting, if appropriate, rules, regulations and statutory changes ... and the adoption of special rules concerning Galisteo Basin, all in an effort to protect this fragile and ecologically sensitive area'

A review of the New Mexico Annotated Code and Statutes demonstrates that the concept of a special rule for Santa Fe and the Galisteo Basin are new in our state. Traditionally, the Executive branch has used the limited power of the executive order in cases of an emergency whereby "[i]t is the duty of all political subdivisions of the state and their coordinators of the civil emergency preparedness programs appointed pursuant to the provisions of the State Civil emergency preparedness Act [12-10-1 NMSA 1978] to comply with and enforce all executive orders and regulations made by the governor or under his authority pursuant to law" *12-12-10(A) NMSA 1978*. Under the same Act, there is a limit on executive orders such that "[i]n no event shall any executive order issued pursuant to the powers granted in Subsection B of Section 3 [12-12-3 NMSA 1978] of the Energy Emergency Powers Act continue in effect for more than one hundred twenty days unless extended, restricted or suspended by joint resolution of the legislature in regular, extraordinary or special session." *12-12-6 NMSA 1978*. In this case, the original executive order 2008-004, imposing a six month moratorium on New Oil and Gas drilling in Santa Fe County and the Galisteo Basin was signed January 24, 2008 and therefore expired June 24, 2008. While the Governor did seek to exercise his police powers to provoke an 'emergency' situation, the order was not extended by the Legislature in any form. Therefore, Executive order 2008-0038, signed July 14, 2008 extending the Moratorium another six months has little force, if any should a party seek to controvert it. In addition, the Division, as the agency responsible for issuance of

permits could be liable for prevention of extraction of resources and therefore causing waste under the most recent Executive Order.

Nevertheless, while an executive order “may be viewed as some evidence of public policy considerations in New Mexico, the Order alone, without parallel action by the legislature, is not sufficient proof of the public policy of New Mexico. The predominant voice behind the declaration of public policy of the state comes from the legislature, with an additional supporting role played by the courts and the executive department” *Hartford Insurance v. Cline*, 2006-NMSC-033, __ NM __, __ P.3d __ (June 20, 2006). “The Constitution of the State of New Mexico commands that “the powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others. . . .” N.M. Const. art. III, §1; *State ex rel. Taylor v. Johnson*, 125 NM 343, 346, 961 P.2d 768, 1998-NMSC-015. “It is the function of the judiciary . . . to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution.” *State v. Mechem*, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), *overruled on other grounds by Wylie Corp. v. Mowrer*, 104 N.M. 751, 726 P.2d 1381 (1986). Article III, Section 1 of the New Mexico Constitution prohibits any branch of government from usurping the power of the other branches: “This provision articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty” *Taylor, supra at 349* citing *Gregory v. Ashcroft*, 501 U.S. 452, 458-59, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); *The Federalist* No. 47, at 332 (James Madison) (M. Walter Dunne 1901) (discussing Montesquieu). Further, within our constitutional system, each branch of government maintains its independent and distinct function. *State v. Fifth Judicial Dist. Court*, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932) (noting that “the Legislature makes, the executive executes, and the judiciary construes the laws.”). We have said that only the legislative branch is constitutionally established to create substantive law. *See State ex rel. Sofeico v. Heffernan*, 41 N.M. 219, 230-31, 67 P.2d 240, 246 (1936) (stating that the Legislature, rather than the State Game Commission, has the power to define what constitutes a game animal, because only the Legislature constitutionally “can create substantive law”); *State v. Armstrong*, 31 N.M. 220, 255, 243 P. 333, 347 (1924) (stating that the Legislature possesses the sole power of creating law). “We also have recognized the unique position of the Legislature in creating

and developing public policy. 'It is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, [but] to a lesser extent, [and only] as authorized by the constitution or legislature.'"

Taylor, id citing Torres v. State, 119 NM 609, 612 (1995). In this instance, the question of whether the Galisteo Basin is in need of a special rule to prevent oil and gas drilling, is a question of policy, as the voice of the People and not the extension of the use of police powers as Governor Richardson has sought to do with Executive orders 2008-004 and 2008-0038.

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

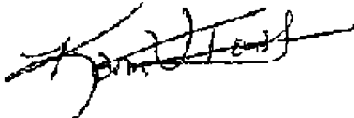
"Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform." *See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). "The administrative agency's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

Thus, in the case of this proposed special rule, the Division, as an Executive Agency is seeking to improperly extend the Governor's use of the police powers of the initial Executive Order which expired June 24, 2008. Moreover, the Governor's subsequent extension of the order to to force special rules on this particular geographic area was improper and not supported by the Legislature as the policy making body of the state. Finally, creating a policy that will impact all the citizens State of New Mexico by forcing 'waste' and

subsequent reductions in tax revenues to the State, is clearly outside the Division's statutory jurisdiction to protect correlative rights and prevent waste.

Thank you for the opportunity to comment on this very important proposed rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Karin V. Foster", written over a horizontal line.

Karin V. Foster
Director of Government Affairs
IPANM