

**First Judicial District
County of Santa Fe
State of New Mexico**

**Boling Enterprises, Inc.,
Burlington Resources Oil & Gas Co. L.P,
Chesapeake Energy Corp., ConocoPhillips Co.,
Devon Energy Corp., D.J. Simmons, Inc.,
Dugan Production Corp., Energen Resources Corp.,
Williams Production Co., XTO Energy, Inc.
Yates Petroleum Corp.,**

D-0101CV2008-01863

and

Independent Petroleum Association of New Mexico,

Petitioners,

v.

The New Mexico Oil Conservation Commission,

Respondent,

and

Oil and Gas Accountability Project,

Intervenors.

OIL AND GAS ACCOUNTABILITY PROJECT’S STATEMENT OF REVIEW ISSUES

Pursuant to New Mexico Rule of Civil Procedure Rule 1-075, the Oil and Gas Accountability Project (“OGAP”) hereby submits its Statement of Review Issues. OGAP’s Statement of Review Issues addresses both the Industry Committee’s and the Independent Petroleum Association of New Mexico’s (“Independent Producers”) arguments opposing the Oil Conservation Commission’s (“Commission”) adoption of standards for oil and gas field waste disposal.

I. INTRODUCTION

On September 11, 2008, the Oil Conservation Division (“Division”), submitted proposed oil and gas field waste management regulations for public comment. *In the Matter of 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 Governing Pits, Below Grade Tanks, Closed Loop Systems and other Alternative Methods to the Foregoing, and Amending Other Rules to Make Conforming Changes Statewide* (“Pit Rule”) Record of Appeal (“RA”) at 5603. Prior to submitting the Pit Rule for public hearing, the Commission convened a Task Force of stakeholders, including the Petitioners in this appeal, and representatives of the public, including an OGAP representative, to establish points of consensus and dispute regarding the proposed Pit Rule. *See, e.g.*, Division Exhibit (“Ex.”) 13, pp.1-4, RA at 5817-5821.

After the public notice of the Pit Rule rulemaking was issued, the Commission held a public hearing on the proposed rule. During that hearing, both the Industry Committee and Independent Producers presented witnesses and evidence in opposition of the proposed Pit Rule. The Industry Committee presented both hydrogeological evidence and risk assessment evidence. Order of the Oil Conservation Commission, Order No. R-12939 (“Final Order”) at ¶ 10, RA at 3. The Independent Producers presented evidence about the economic impact of the proposed Pit Rule on small petroleum producers. *Id.* at ¶ 12.¹ Both the Division and OGAP presented expert testimony in favor of the proposed Rule. *Id.* at ¶¶ 9,14.

¹ The proceeding before this Court is a proceeding on the record. N.M.R.A. 1-075(H). All factual assertions must be supported by citation to the record. *Id.* at 1-075(K)(2),(3). The Independent Producer’s Statement of Review relies substantially on factual assertions not supported by record citations. *See, e.g.*, Independent Producer’s Statement at 3 (“With an estimated cost increase of at least 10% per well location, most small operators, who operate marginal wells will either stop production or sell their business”). Any factual statement not supported by a record citation must be disregarded. Moreover, all of the factual assertions presented by the Independent Producers that occurred after the Pit Rule hearing are extra-record evidence. Independent Producers Statement at 6-7. These factual assertions must likewise be disregarded.

On May 9, 2008 the Commission issued its Final Order adopting the Pit Rule. RA 1-84. On July 10, 2008, the Industry Committee filed its appeal of the Final Order. Industry Committee Petition for Writ of Certiorari to the Oil Conservation Commission, No. D-0101CV2008-01863, RA at 13120-13125. The Independent Producers also filed an appeal of the Final Order. Independent Petroleum Association's Petition for Writ of Certiorari to the Oil Conservation Commission, No. D-0101CV2008-01874, RA at 13136-13143. The two appeals were consolidated on August 13. Order Consolidating Cases at 1 (Aug. 13, 2008).

II. ARGUMENT

A. Standard of Review.

Under Rule 75, the District Court may only reverse an agency decision if:

- (1) the agency acted fraudulently, arbitrarily or capriciously;
- (2) based upon the whole record on review, the decision of the agency is not supported by substantial evidence;
- (3) the action of the agency was outside the scope of authority of the agency; or
- (4) the action of the agency was otherwise not in accordance with law.

N.M.R.A. 1-075(Q)(1)-(4). An administrative agency decision is arbitrary and capricious only if there is no rational connection between the facts found by the agency and its decision or the agency entirely omitted consideration of relevant factors. *Atlixco Coalition v. Maggiore*, 125 N.M. 786, 794, 965 P.2d 370, 378 (Ct. App. 1998) (citations omitted). The Court reviews the whole record to determine whether the decision is supported by substantial evidence, meaning that the decision must be based on such relevant evidence as a reasonable mind might accept as adequate to support the conclusions reached by the agency. *Attorney General v. PNM*, 101 N.M. 549, 553, 685 P.2d 957, 961 (1984), (citations omitted). Finally, the court reviews the evidence in the light most favorable to the agency's decision. *Id.*

Administrative agencies are creatures of statute and cannot act outside the authority delegated to them. *Public Svc. Co. v. New Mexico Env'tl Improvement Bd.*, 89 N.M. 223, 226, 549 P.2d 638, 642 (Ct. App. 1976); N.M.R.A. 1-075(Q)(3). However, “[t]he authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy.” *Id.* (citations omitted). Regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes they implement. *Tenneco Oil Co. v. New Mexico Water Quality Control Commission*, 107 N.M. 469, 473, 760 P.2d 161, 165 (Ct. App. 1987).

When an agency action is contrary to law, such action may include acting outside its scope of authority or otherwise failing to follow statutory mandates. *El Vadito de los Cerillos Water Users Ass’n v. New Mexico Pub. Svc. Comm’n*, 115 N.M. 784, 787, 858 P.2d 1263, 1266 (N.M. 1993).

B. The Commission Acted Within Its Authority in Applying § 3103 Standards to Waste Pit Leachate to Protect Groundwater.

The Industry Committee argues that the Commission exceeded its statutory authority by requiring that the waste in temporary pits meet groundwater quality standards, codified at NMAC 20.6.2.3103 (“§ 3103 standards”), before being buried in on-site trenches. The Committee argues, without any supporting citations to the record, that the Commission is inappropriately applying groundwater standards to the pit waste. Statement of Review of the Industry Committee (“Industry Committee Statement”) at 7. The Industry Committee’s argument fails because contrary to the assertion that the Pit Rule applies the § 3103 standards to soil or solids in pit waste, the Record is clear that the standards apply to the liquid leachate generated by pit wastes.

The plain language of the Water Quality Act demonstrates that its purpose is to protect ground and surface waters of New Mexico. *See*, NMSA 1978, §§ 74-6-4 (C), (D) (the Water Quality Control Commission shall adopt groundwater standards that “at a minimum” protect public health or welfare and enhance the quality of water); 74-6-13 (Water Quality Act supplements common law to “prevent, abate and control” water pollution); *Bokum Resources Corp. v. New Mexico Water Quality Control Comm’n*, 93 N.M. 546, 555, 603 P.2d 285, 294 (N.M. 1979). Further, the Water Quality Act provides that the Water Quality Control Commission may assign responsibility for administering the act and its regulations to “constituent agencies”. NMSA 1978, § 74-6-4(E). Under the Water Quality Act, the Commission is such a constituent agency and has the responsibility of administering the Water Quality Act and New Mexico Environment Department (“NMED”) regulations in oil and gas operations. *Id.* at § 74-6-4(K)(4), § 74-6-8.

The NMED regulations implementing the Water Quality Act likewise demonstrate that the purpose of the Act and its regulations are to prevent ground and surface water pollution. *See, e.g.*, 20.6.2.3101 NMAC (“The purpose of Sections 20.6.2.3000 through 20.6.2.3114 NMAC controlling discharges onto or below the surface of the ground is to protect all ground water of the state of New Mexico which has an existing concentration of 10,000 mg/l or less TDS, for present and potential future use as domestic and agricultural water supply...”).

Here, the Commission is not requiring solid pit waste to meet groundwater standards, as argued by the Committee, but is instead sensibly requiring that the liquids leached from buried pit waste meet groundwater standards, consistent with the mandates of the Water Quality Act and NMED regulations. The final Pit Rule is clear that the § 3103 standards apply to leachate from pit wastes. The final Pit Rule provides:

Using EPA SW-846 method 1312 or other EPA **leaching** procedure that the division approves, the operator shall demonstrate that ... the concentrations of the water contaminants specified in Subsection A of 10.6.2.3103 NMAC as determined by appropriate EPA methods do not exceed the standards specified in Subsection A of 10.6.2.3103 NMAC, unless otherwise specified above.

19.15.17.13.F.(2)(c), RA at 60 (emphasis added). By the regulation's plain language, the standards in 20.6.2.3103 NMAC apply to leachate that might be discharged from pit wastes because of water infiltration from either surface or subsurface sources. Final Order ¶¶ 73, 74 , RA at 12 (experts opposing and supporting the Pit Rule all determined that pit wastes would eventually leach from pits or trenches and reach groundwater and therefore waste could only be buried onsite if it would not result in groundwater contamination); *see also* Division Ex. 13B, pp. 2-24, RA at 5953-5975; Division Ex. 13C, RA at 5977-6004 (showing failed pit liners).

Moreover, contrary to the Industry Committee's argument that the Pit Rule strips a permit applicant of any ability to show that its method of waste disposal will not contaminate groundwater, the Pit Rules allow a permit applicant to demonstrate that its method of disposal will protect groundwater, public health and the environment. Industry Committee Statement at 8. This "exception" procedure allows the Commission to take into account site-specific conditions, industry technology, or other circumstances to determine whether waste at a specific pit might be treated in a manner that deviates from the Pit Rule's requirements, but that still protects public health and the environment. Final Order at ¶¶ 242-246, RA at 37-38, 64-65.

Accordingly, the Pit Rule is consistent with the Water Quality Act's purpose of protecting groundwater and the Commission, therefore, acted within its authority. The Pit Rule should be upheld.

C. The Commission's Final Order is Sufficient as a Matter of Law.

The Industry Committee also argues that the findings in the Commission's Final Order are contrary to law. Industry Committee Statement at 9. The Industry Committee first argues that the Commission's findings of ultimate facts are insufficient because the Commission made no findings regarding waste and correlative rights, nor did it make a finding to support its alleged decision to "elevate" its waste disposal obligations over its duty to prevent waste and protect correlative rights. *Id.* at 10-12. The Industry Committee then argues that the facts found with respect to on-site trench burial and chloride limitations bear no rational connection with the Commission's ultimate decision on these matters. *Id.* at 12-15. Neither argument has merit.

1. The Commission's Ultimate Findings are Sufficient.

The Industry Committee asserts that the Commission's decision is contrary to law because the Commission did not make findings of fact that reflect its "paramount" duty to prevent waste and protect correlative rights. *Id.* at 10. To support its argument, the Industry Committee relies heavily on *Continental Oil Co. v. Oil Conservation Comm'n* and *Fasken v. Oil Conservation Comm'n*. *Id.* These cases are inapposite to the issues before the Court, and the Industry Committee's application of the cases in any event is incorrect.

In *Continental Oil*, the New Mexico Supreme Court reviewed an adjudicatory order of the Commission, which prorated a natural gas pool between individual companies. 70 N.M. 310, 314, 373 P.2d 809, 811 (N.M. 1962). In reaching its decision, the Court found that the Commission failed to make findings regarding the allowable production from a gas pool, which directly related to waste prevention and the protection of correlative rights. *Id.* at 317-319, 814.

Continental Oil is distinguishable from the instant case in two important ways. First, in *Continental Oil*, the Court was reviewing an adjudication of individual rights that directly related

to waste prevention and protection of correlative rights, and accordingly, the Court included findings about waste and correlative rights. *See, Fasken v. Oil Conservation Comm'n*, 87 N.M. 292, 294, 532 P.2d 588, 590 (N.M. 1975). Groundwater protection was not at issue in that case.

In contrast to *Continental Oil* and *Fasken*, the instant case involves a Commission rulemaking that deals with pit waste regulation and groundwater protection. Final Rule at ¶¶ 16-18, RA at 4. Although important concepts, the prevention of waste and protection of correlative rights are not relevant to this case and nothing in *Continental Oil* requires the Commission to make findings regarding waste prevention and correlative rights be discussed in every Commission decision, irrespective of the issues involved.²

Indeed, the only general proclamation by the Court in *Continental Oil* was that “[a]dministrative findings by an expert administrative commission should be sufficiently extensive to show not only the jurisdiction but also the basis for the commission’s order.” *Id.* at 321, 816. This the Commission has done. *See* Section II.D, below. Moreover, the fact finding requirements for rulemakings are much more relaxed than those for adjudications. *Wylie Bros. Contracting v. Alb.- Bernalillo Co. Air Quality Ctrl. Bd.*, 80 N.M. 633, 644, 459 P.2d 159, 170 (Ct. App. 1969).

Second, *Continental Oil* is distinguishable from the instant case because the Court in *Continental Oil* was interpreting an earlier version of the Oil and Gas Act (“Act”), which did not contain the Act’s current provisions that express the legislative policy of environmental and public health protection. When the Court interpreted *Continental Oil*, the Act’s primary purpose was indeed to prevent waste and protect correlative rights. *Id.* at 318-319, 814. However, even

² The Industry Committee’s interpretation of *Continental Oil*, taken to its logical conclusion, would lead to absurd results. If the Industry Committee’s reasoning were adopted, every single adjudication and rulemaking decision would be required to include extensive findings regarding waste prevention and protection of correlative rights, no matter how far removed that adjudication or rulemaking might be from actually addressing waste prevention or protection of correlative rights.

the Court in *Continental Oil* acknowledged that the legislature may amend statutes to embody policy changes by noting that the Act's original purpose had been almost entirely to prevent waste, but was later amended to include protection of correlative rights. *Id.* at 318, 814.

Since *Continental Oil* was decided, the Act has been further amended to reflect the legislature's additional policy that oil and gas field wastes should be regulated to protect the environment and public health. The Legislature has specifically delegated to the Commission the power to promulgate rules to regulate oil and gas waste to protect the public health and environment. NMSA 1978, § 70-2-12(B)(21). The Commission's findings specifically address the disposition of oil and gas wastes to protect public health and the environment and are therefore legally sufficient. Final Order at ¶¶ 74-76, RA at 12-13.

2. The Commission's Findings Regarding On-Site Trench Burial and Chlorides are Sufficient.

The Industry Committee also argues the Commission is required to disclose its reasoning in concluding that pit waste must meet § 3103 standards for chlorides for on-site trench burial and the limits on chlorides imposed throughout the rule. Industry Committee Statement at 12, 14-15.³ However, the Industry Committee appears to ignore key findings in the Final Order and its arguments are therefore without merit.

As noted in Section II.B.2, above, the Commission supplied ample reasons to support the requirement that leachate from pit waste meet § 3103 groundwater standards. In its Final Order, the Commission found that the primary purpose of siting requirements was to protect groundwater. Final Order at ¶ 47, RA at 8. The Commission also found that the Record

³ In the section of its Statement challenging the Commission's disclosure of its reasoning, the Industry Committee also asserts that the Final Order was arbitrary and capricious. Industry Committee Statement at 12. This argument requires a different analysis than whether the Commission's reasoning was properly disclosed. Moreover, the Industry Committee makes the arbitrary and capricious argument at length in Point III. Industry Committee Statement at 15. OGAP addresses the Industry Committee's arbitrary and capricious arguments in Section II.D, below.

revealed that pit waste would leak into groundwater. *Id.* at ¶ 74, RA at 12. Finally, the Final Order indicates and the Record amply reflects that pit waste has in fact leached into groundwater. *Id.* at ¶ 57, RA at 10; Division Ex. 6, p. 15, RA at 5681; Testimony of Wayne Price, RA at 461-462. The Commission’s Final Order clearly thus explains why the Commission adopted the § 3103 standards for chlorides and other pollutants, and therefore, it should be upheld.

D. The Pit Rule is Not Arbitrary and Capricious.

An administrative agency decision is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors. *Atlixco Coalition v. Maggiore*, 125 N.M. at 794, 965 P.2d at 378. Here the Industry Committee alleges there is no rational connection between the facts the Commission found and its decision to apply § 3103 standards to on-site trench burial or its application of chloride standards to various methods of pit and below-grade tank closures. Industry Committee Statement at 15, 17. Neither contention has merit.

1. The Standards for On-site Trench Burial are Rationally Connected to the Evidence Showing a Likelihood of Groundwater Contamination.

The Industry Committee goes to great lengths to cite to its experts’ testimony to support its contention that Commission’s decision to apply § 3103 standards to on-site trench burial is not supported by substantial evidence in the record. Industry Committee Statement at 15-16. The testimony cited by the Industry Committee purports to show that when waste is diluted (“stabilized”) with clean soil and enclosed in a liner, their experts’ modeling indicates that no contamination will occur. *Id.* at 16. However, the Industry Committee assumes that liners never leak or get damaged and ignores the evidence demonstrating that pit wastes have caused groundwater contamination and that pit liners regularly fail.

Division witness Ed Hansen presented testimony, based on data collected by both industry and the Division, showing the sludge contents of pits exceeded § 3103 groundwater standards for nearly twenty regulated pollutants, RA at 552, 558-559. Division witness Wayne Price presented data showing that discharges from numerous oil and gas waste pits across New Mexico have, in fact, caused soil contamination and groundwater contamination in excess of § 3103 standards. RA at 447-448; Division Ex. 6, p. 15, RA at 5681. Mr. Hansen further testified that the pollutants in pit waste could be released into the environment via pit liner leaks and waste spills. RA at 566; *see also*, testimony of Wayne Price, RA at 196-198; Division Exhibit 21, RA at 8968-9008. Division witness Carl Chavez presented evidence demonstrating that pit liner failures occur regularly. Testimony of Carl Chavez, RA at 2651, 2681-2682, 2740; Division Ex. 13B, pp. 2-24, RA at 5953-5975; Division Ex. 13C, RA at 5977-6004; Division Ex. 30, pp. 38-39, RA at 9193-9194. Finally, Mr. Hansen testified that, based on Division groundwater model results, requiring the leachate from pit wastes to meet § 3103 standards assured that liner leaks would not pollute groundwater above standards. RA at 844-845.

Thus, there is ample evidence in the record to support the Commission's decision to require that pit waste that is buried in trenches meet § 3103 standards. Moreover, given the highly technical nature of this factual determination, this Court should defer to the expertise of the Commission. *Pickett Ranch v. Curry*, 140 N.M. at 63, 139 P.3d at 223.

2. The Pit Rule's Chloride Standards are Rationally Related to the Protection of Groundwater.

The Industry Committee argues that the chloride standards for pits and below-grade tanks are arbitrary because those standards do not conform with their experts' opinions and are based not on evidence, but rather the Commission's alleged desire to conform the Pit Rule to the

Surface Waste Management Rules. Industry Committee Statement of Reasons at 17. Neither argument has merit.

a. The Chloride Standards are Supported by Substantial Evidence.

The Pit Rule's chloride standards are supported by substantial evidence. The Pit Rule provides that chloride levels in temporary pit waste proposed for onsite burial cannot exceed 500 mg/kg or background concentrations, whichever is greater, when groundwater is between 50 and 100 feet from the pit's bottom and cannot exceed 1000 mg/kg or background concentrations, whichever is greater, when groundwater is greater than 100 feet from the pit's bottom. NMAC 19.15.17.13.F.2.(b), (c), RA at 60. For on-site trench burial of waste, chloride concentrations may not exceed 250 mg/l. *Id.* at 19.15.17.13.F.3.(c).

The Division's witness, Mr. Hansen, gave extensive testimony demonstrating that chloride concentrations commonly found in pits can and has polluted groundwater. RA at 830-843. Mr. Hansen modeled three scenarios predicting chloride release and transport: one involving an unlined pit, one involving a poorly constructed deep trench burial, and one involving a well constructed deep trench burial. *Id.* at 838; Division Ex. 7, RA at 5698-5744; *see also*, Division Ex. 10A, RA at 5770-5776 (explaining rationale for Pit Rule chloride standards). In all cases, there was chloride release after liner failure and groundwater contamination. RA at 841-842. The only difference was the amount of time until groundwater was contaminated and the extent of that contamination. *Id.*

Further, New Mexico Citizens for Clean Air and Water ("New Mexico Citizens") expert Dr. Donald Neeper presented testimony and exhibits further demonstrating that chlorides leached from waste pits would contaminate groundwater above the standard over varying time frames. RA at 1891-1892. Dr. Neeper also presented groundwater sampling data showing that a pit in

southeast New Mexico may have actually contaminated groundwater with chlorides up to 2400 mg/l, far above the § 3103 standard of 250 mg/l. *Id.* at 1907. Thus there is substantial evidence in the record to support the Commission’s chloride standard.

b. Referring to the Surface Waste Rule Chloride Limits is Rational.

The Industry Committee asserts that the chloride limits in the Pit Rule are based exclusively on the chloride limits established in the Surface Waste Rule. Industry Committee Statement at 18. In support of its assertion the Industry Committee cites to the Commission’s Final Order, Findings 213 and 224, which note that the chloride standards in the Pit Rule will ensure consistency with the standards in the Surface Waste Rule. *Id.*

However, the Industry Committee’s citation to the record is incomplete. While Findings 213 and 224 do refer to consistency with the Surface Waste Rules as a basis for adoption of the Pit Rule chloride standards, both findings also incorporate by reference Findings 74 through 76. RA at 33, 35. Finding 74 specifically finds that “[b]ecause waste constituents over time will leach to groundwater, the waste should only be buried on-site if the constituents in the waste are at levels that will not result in groundwater contamination.” RA at 12. Findings 75 and 76 demonstrate that there is nothing improper about partially basing the Pit Rule’s chloride standard on the Surface Waste Rule, since both rules are intended to prevent waste leachate from polluting groundwater above standards. In particular, the Commission, in Finding 75, found that wastes disposed of at land farms, which are not required to have liners between the waste and the ground, will not pollute groundwater above standards, when chloride concentrations in the waste do not exceed 500 mg/kg when the wastes are between 50 and 100 feet to groundwater and do not exceed 1000 mg/kg when the wastes are more than a 100 feet to groundwater. *Id.* at 12-13 (Finding 75 and 76). In Finding 76 the Commission reasoned that because wastes at land farms

treated to the same chloride standard adopted in the Pit Rule, which are not contained within geomembrane liners, do not pose a threat to groundwater, then similarly treated wastes that are enclosed and buried should also not pose a threat to groundwater. *Id.* at 13.⁴

Moreover, Mr. Hansen testified that without better treatment than currently practiced, more groundwater pollution from pits would be likely. RA at 830-843. In reaching this conclusion, Mr. Hansen assumed pit contents with chloride levels that are consistent with measured pit chloride levels. *Id.* at 826. Based on the evidence presented, the Commission determined that the chloride levels used in the Surface Waste Rules could rationally be extended to the Pit Rule and would prevent groundwater pollution in the context of waste pits. The Pit Rule should therefore be upheld.

E. The Industry Committee Fails to Identify any Constitutional Provision the Pit Rule Might Violate and Fails to Identify Any Right Affected.

The Industry Committee argues that the Pit Rule is “statutorily and constitutionally” defective because it fails the constitutional rational basis test. However, the Industry Committee’s argument must be disregarded because it fails to identify any New Mexico or United States Constitutional provision that the Pit Rule allegedly violates. Moreover, the Industry Committee also fails to identify any right that the Pit Rule adversely affects.

A party asserting that a statute or regulation violates either the New Mexico or the United States Constitutions cannot simply make general assertions to that effect. *Richardson v. Carnegie Library Restaurant*, 107 N.M. 688, 692, 763 P.2d 1163, 1167 (N.M. 1988). Indeed, the complaining party must identify with specificity how his or her rights have been violated. *Id.*

⁴ This conclusion is also supported by the testimony of Wayne Price, where Mr. Price documented the case of a pit that leaked, but where the leak was discovered soon enough to substantially mitigate and contain contamination of groundwater 50 feet below the pit, thus justifying a minimum 50 foot buffer zone. RA at 461-462; Division Ex. 5, pp. 15-18, RA 5762-5764.

citing *State v. Hines*, 78 N.M. 471, 474, 432 P.2d 827, 830 (1967). Moreover, the “rational basis review” standard under which this issue must be reviewed, “is the most deferential to the constitutionality of the legislation and the burden is on the party challenging the legislation to prove that it “is not rationally related to a legitimate governmental purpose.” *Breen v. Carlsbad Mun. Schs.*, 138 N.M. 331, 336 (N.M. 2005) (citations omitted).

The Industry Committee has failed to identify any provision of the New Mexico or United States Constitution that the Pit Rule allegedly violates, just as it has failed to identify any right that has been adversely affected by the mere promulgation of the Pit Rule. Instead, the Industry Committee offers the Court broad, unsupported assertions that the contamination standards are somehow “arbitrary” and “unreasonable”. Industry Committee Statement at 20. These general assertions cannot sustain a constitutional claim.

The Industry Committee, moreover, has also failed to meet its burden of demonstrating that the Pit Rule is not rationally related to any legitimate governmental purpose, because the Rule is clearly intended to protect public health and the environment—a legitimate governmental interest—by imposing standards and limitations on the onsite disposal of toxic and hazardous oil field wastes. Such broad and general assertions are inadequate to meet the Industry Committee’s burden under the rational review standard. Accordingly, the Industry Committee’s argument that the Pit Rule is unconstitutional must be disregarded.

F. The Independent Petroleum Association’s Arguments are Wholly Without Merit.

The Independent Producers argue that the Division and the Commission violated the Small Business Regulatory Relief Act (“SBRRA”) and the Water Quality Act in passing the Pit Rule. However, the Independent Producers misinterpret both statutes and their arguments are without merit.

1. The Independent Producers Misinterpret the Small Business Regulatory Relief Act.

The Independent Producers argue that the Division (not the Commission) violated the SBARRA because it did not consider what effect the Pit Rule would have on small businesses, as defined by the SBARRA. Independent Producers Statement at 9-10⁵. The Independent Producers also argue that the Division (not the Commission) failed to consider the factors in NMSA 1978, § 14-4A-6(C)(1)-(5). *Id.* at 10-11. Finally, the Independent Producers argue that the Pit Rule is too “complex” to administer and amounts to an anti-degradation standard in violation of the Water Quality Act *Id.* at 11-12. All of the Independent Producers’ arguments are without merit and should be disregarded.

a. The Division Cannot and Did Not Adopt the Pit Rule

The SBARRA provides that:

Prior to **adoption** of a proposed rule that the agency deems to have an adverse effect on small business, the agency shall consider regulatory methods that accomplish the objectives of the applicable law while minimizing the adverse effects on small business.

1978, NMSA § 14-4A-4(B) (emphasis added). Further, the SBARRA defines “agency” as “every department, agency, board, commission ..” of the executive branch of state government. *Id.* at § 14-4A-3(A).

In this case, the Division is not the agency, as defined under the SBARRA, which must comply with the SBARRA’s requirements because it cannot and did not adopt the proposed Pit Rule. 1978, NMSA § 70-2-6(B) (“any hearing on any matter may be held before the commission.”); 19.15.14.1201, 1205 NMAC (outlining Commission authority

⁵ The Independent Producers’ Statement has no page numbers. Citations to the Independent Producers’ Statement in this document will be based on counting the pages starting with the first page of the Statement.

and process for rulemaking hearings). The Division was merely a proponent of the proposed Pit Rule and had no more authority to adopt the Pit Rule than any other proponent of a proposed rule that comes before the Commission. Thus, the Division was under no obligation pursuant to the SBRRA to conduct any analysis of the Pit Rule's effect on small businesses, and the Independent Producers' demand that it was required to do so is misplaced.

b. The Commission Considered the Pit Rule's Effects on Small Businesses

The Independent Producers complain that small businesses were not permitted to give input on how the Pit Rule would affect them and that the Division⁶ failed to consider the factors in NMSA 1978, § 14-4A-6(C)(1)-(5). Independent Producers Statement at 10-11. However, the Independent Producers ignore ample evidence in the record that refutes both arguments.

i. *The Independent Producers Had Ample Opportunity to Comment on the Pit Rule.*

During the course of the eighteen day hearing on the Pit Rule, the Independent Producers proffered both expert and non-expert testimony about how the Pit Rule might affect small petroleum producers. Final Order, ¶ 12, RA at 3. *See also*, Independent Producers Statement at 5-6. However, OGAP also proffered testimony that demonstrated that the Pit Rules would have a negligible adverse effect on small petroleum producers and indeed could actually save independent producers money. Testimony of Mary Ellen Denomy, RA at 1575. Moreover, irrespective of what testimony and evidence was

⁶ Again, the Division is not the appropriate "agency", as defined by the SBRRA, to consider the five SBRRA factors or procedural requirements mandated by the SBRRA. *See* Section II.F.1, above. The one requirement the SBRRA arguably imposes on the Division, that the Division send a copy of the proposed regulation to the Small Business Administration, was clearly fulfilled. *See*, The New Mexico Oil Conservation Division's Response to IPANM's Motion to Compel (Oct. 29, 2007), RA 12856-12857.

actually presented to the Commission prior to adoption of the Pit Rule, the Independent Producers had ample **opportunity** to submit ideas and comments on the Pit Rule both in the course of the hearing and in the context of the Pit Rule Task Force prior to the hearing.

ii. *The Commission Considered the Relevant Factors Under the SBRRA.*

The record contains ample evidence that the Commission considered the relevant factors under the SBRRA and, in the end, did not “deem” the Pit Rule “to have an adverse effect on small business.” With respect to the first factor under the SBRRA – whether the proposed Pit Rule is needed – the Commission found that the former Rule 50, which the current Pit Rule replaces, was difficult to enforce and led to wasted resources. RA at 4, ¶ 18. Thus, the Pit Rule is needed.

The record also demonstrates that the Commission considered the nature of the complaints and comments from the public. *See, e.g.*, Testimony of Dana McGarrh (small business owner) RA at 236-241; Testimony of Bill Hawkins (oil and gas producer employee) RA at 379-380; Testimony of Irvin Boyd (rancher) RA at 1261-1262 ; Testimony of Johnny Micou (Galisteo Basin resident) RA at 1245-1246. The Commission considered the complexity of the Pit Rule as well as how it might duplicate or conflict with existing federal, state or local government rules. Division Ex. 13, RA at 5817-5843. And finally, the Commission considered how recent technology and economic conditions have changed in regards to oil and gas field waste management. For example, the Commission explicitly considered the use of closed-loop waste treatment systems as a means of waste treatment other than pits. Final Order at ¶ 26, RA at 5. Because the Commission considered all the factors required by the SBRRA, and did not

“deem” that the Pit Rule adversely affected small businesses, the Pit Rule should be upheld.

c. The Pit Rule Does not Violate the Water Quality Act.

Finally, the Independent Producers challenge the Pit Rule based on alleged violations of the Water Quality Act. The Independent Producers first assert that the Commission failed to consider the Pit Rule’s economic impact, as required by the Water Quality Act. The Independent Producers further assert that the Pit Rule amounts to an anti-degradation rule, because it prohibits any degradation of naturally occurring groundwater quality. Independent Producers Statement at 12. Both arguments are without merit.

i. *The Commission Considered Economic Impacts.*

The Independent Producers assert that the Commission failed to consider the economic impacts of the Pit Rule in violation of the Water Quality Act. Independent Producers Statement at 12. However, the Record is clear that the Commission extensively considered the Pit Rule’s economic impact

The Commission’s Final Order states that the Commission considered the following evidence presented by the Independent Producers: “Mr. [Sam] Small testified concerning **operational costs** associated with dig and haul of waste and use of closed-loop systems. Mr. [John] Byrom testified about safety concerns and **economic impacts of the proposed rule.**” Final Order at ¶ 12, RA at 3 (emphasis added). The Commission also considered the following evidence from OGAP: “Ms. [Mary Ellen] Denomy testified about the **economic competitiveness** of closed-loop systems with temporary pits and reviewed government and industry reports that evaluated the **economic costs and**

benefits of temporary pits and closed-loop systems.” *Id.* at ¶ 14, RA at 4 (emphasis added). Indeed, the Final Order illustrates that the Commission rejected portions of the Division’s proposed rule because it would have place an undue financial burden on the industry. *Id.* at ¶¶ 124-126, RA at 20 (rejecting proposed rule relating to below-grade tank design because it would require retrofitting current below grade tanks at great expense to operators). The Independent Producers’ argument should be disregarded.

ii. *The Independent Producers’ Anti-degradation Argument is Unsupported by Record Citations.*

The Pit Rule is intended to prevent groundwater pollution above standards (or above existing groundwater concentrations, if those concentrations are higher than the standards—see NMAC 20.6.2.3103) and nowhere in their Statement do the Independent Producers explain exactly how the Pit Rule constitutes an anti-degradation regulation. Independent Producers Statement at 12. The rule of civil procedure governing this appeal specifically requires that the petitioner’s statement of review shall include an argument, which “shall contain the contentions of the petitioner with respect to each issue presented in the statement of review of issues, with citations to the authorities, statutes and **parts of the record** on review relied upon.” N.M.R.A. 1-075(K)(3) (emphasis added). Here, the Independent Producers do not cite to any provision of the Pit Rule, any finding or conclusion by the Commission or any evidence to support its contention the Pit Rule is an anti-degradation regulation. Because there is no explanation of how the Pit Rule amounts to an anti-degradation nor any citation to the record to support such an assertion, this argument must be disregarded.

IV. CONCLUSION

The Commission's Pit Rule provides a sensible balance between protection of the environment and public health and the economic impacts on oil and gas producers. The Commission's Final Order is well reasoned and its conclusions are amply supported by record evidence. None of the Industry Committee's or Independent Producers' arguments against the Pit Rule have demonstrated otherwise. The Pit Rule should therefore be upheld.

Respectfully submitted this 20th day of October, 2008.

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