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## Western Environmental Law Center

*Via Facsimile (505.476.3462)*

December 3, 2008

Florene Davidson  
Commission Clerk  
Oil Conservation Division  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87505

*Re: Comments on Galisteo Basin Rulemaking, Case No. 14255, Docket No. 43-08*

Dear Ms. Davidson:

Thank you for the opportunity to comment on the Oil Conservation Division's (OCD's) Application For Rule Amendment, Case No. 14255 ("Application") for the Galisteo Basin. At the outset, we would like to express our support for OCD's changes, which generally require a more comprehensive approach to oil and gas leasing in the Galisteo Basin and begin to take into consideration protection of our environment as a whole. We are also pleased to see the inclusion of provisions providing for greater public involvement in the oil and gas leasing process. In addition to our general support, we submit the following comments on the proposed rulemaking:

1. On July 14, 2008, Governor Richardson issued Executive Order 2008-038, which called for several agencies to submit reports to the Energy, Minerals and Natural Resources Department (EMNRD) regarding oil and gas drilling in the Galisteo Basin. We appreciate Governor Richardson's call for state agencies to work together, and we ask that OCD continue this cooperation by including provisions in its rules that require consultation between the agencies mentioned in that Executive Order: New Mexico Environment Department, Office of the State Engineer, Department of Cultural Affairs, Indian Affairs Department, New Mexico Department of Transportation, and New Mexico Economic Development Department, as well as New Mexico Department of Game and Fish, which was not mentioned, to ensure that the resources of these agencies are used efficiently to protect the "rich cultural heritage and the fragile ecology" of the Galisteo Basin, which is of "significant value" to the citizens of New

Mexico. We also recommend that the state agencies coordinate their efforts with any federal land management agencies with lands and minerals management responsibilities in the area; in particular, US Forest Service and US Bureau of Land Management. A lack of coordination between state and federal agencies in New Mexico has proven to be a recipe for adverse impacts to our communities and our natural and cultural heritage.

2. As we stated in our Notice of Recommended Modifications to the proposed rules, we would like to see greater protections for the natural environment, including wildlife. In particular, we ask that OCD include protections for wildlife, including seasonal restrictions during breeding periods and critical wintering times. It is also imperative that agency personnel in charge of protecting wildlife in areas of oil and gas development are required, and given the time and resources, to ground-truth data in the field to ensure that there is not a disconnect between data on paper and wildlife needs on the ground. In addition, as mentioned above in comment 1, we ask that OCD require consultation with Game and Fish to ensure that oil and gas development does not interfere with important wildlife corridors, habitat, or breeding grounds. In particular, OCD should defer to Game and Fish regarding well spacing and density to help ensure that oil and gas development is not given a priority over wildlife protection. With dramatic changes already challenging wildlife in New Mexico, we must ensure that oil and gas development does not add yet another obstacle to wildlife survival.
3. Given predicted droughts in New Mexico due to climate change, we must also ensure that we protect our already limited fresh water resources. We appreciate OCD's inclusion of "watercourses" in section (B)(5)(e) in its "Notice of Recommended Modifications" to the proposed rule. However, as we indicated in our Notice of Recommended Modifications, submitted on November 24, 2008, we request that OCD require not only an identification of "watercourses" as defined in OCD rules, 19.15.1.7(W)(8), but also mapping of "flood plain designations, water courses, watersheds, drainages, ditches, intermittent, and ephemeral water bodies (including but not limited to playa lakes, arroyos and draws)."
4. In addition to ensuring that waters in and around oil and gas development are properly identified, we are concerned about potential pollution caused by chemicals used by the oil and gas industry to fracture rock to reach the oil and gas below. In particular, we call upon OCD to be a leader in requiring the oil and gas industry to disclose the chemicals used in the hydraulic fracturing process and to work with the other appropriate state agencies to regulate these chemicals. A recent report on this process revealed serious groundwater contamination as a result of oil and gas drilling.<sup>1</sup> We recommend that OCD require the oil and gas industry to use the

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<sup>1</sup> See Abrahm Lustgarten, *Does Natural-Gas Drilling Endanger Water Supplies?*, BusinessWeek, Nov. 11, 2008, available at: [http://www.businessweek.com/magazine/content/08\\_47/b4109000334640.htm](http://www.businessweek.com/magazine/content/08_47/b4109000334640.htm).

standards developed by the American Water Works Association for use in drilling drinking-water wells.<sup>2</sup> Industry claims that the mixture of chemicals used is proprietary cannot stand in the face of human health and safety.

5. Oil and gas development not only threatens groundwater, but it also can have serious impacts on surface water quality. As such, we request that OCD include, as a prerequisite to approval of an oil and gas development plan, a showing that the developer has procured the necessary National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency (EPA), if appropriate. We note that, in the context of stormwater discharges, the federal Energy Policy Act of 2005 provided the oil and gas industry with an exemption from NPDES permit requirements, amending section 402(l)(2) (33 U.S.C. § 1342(l)(2)) of the Clean Water Act. Section 402(l)(2), contrary to industry perceptions, does not create an unconditional exemption from discharge permitting requirements for stormwater runoff from oil, gas, and mining operations from discharge permitting requirements. The exemption is, in fact, narrow and conditioned upon the guarantee that runoff is “not contaminated by contact with, or do[es] not come into contact with, and overburden, raw material, intermediate products, finished product, or waste products located on the site of such operations.” 33 U.S.C. § 1342(l)(2). Accordingly, OCD should ensure that oil and gas operations satisfy this statutory command. This is critical, in particular, given the fact that the legal status of the NPDES exemption is up in the air in the wake of the Ninth Circuit Court of Appeals decision striking down the EPA’s regulations implementing the 402(l)(2) exemption. The Court held that EPA had overreached in its interpretation of the exemption and had departed from its own long-standing positions regarding water quality protection. *See Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 526 F.3d 591 (9th Cir. 2008). Oil and gas operators may, in fact, be liable for water quality violations if they fail to adhere to the narrow, conditional nature of the exemption. Of course, oil and gas operators would be provided a greater degree of certainty if they simply sought an NPDES permit. Such good-faith action would also provide the public with assurances that oil and gas operations are not using a politically inspired loophole to degrade our state’s water resources.
6. In addition to threatening our water resources, oil and gas development has serious impacts on air quality. Although the downstream burning of oil and gas has impacts, we are concerned about the impacts of the development processes used to extract the oil and gas. Given the impacts on human health and the environment and the addition of serious greenhouse gases, which contribute to climate change, we ask that OCD require mitigation measures to reduce harmful emissions to our shared atmosphere. One example is to require developers to participate in the EPA’s Natural Gas STAR program. Other measures would be to prohibit venting and flaring at oil and gas wells, except in extreme circumstances. Such requirements would be consistent with

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<sup>2</sup> American Water Works Association, *A100-06 AWWA Standard for Water Wells*, (2006), available at: <http://www.awwa.org>.

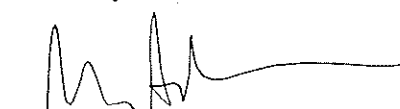
the Oil and Gas Act, which not only prohibits waste but allows for the imposition of penalties for waste of oil and gas resources.

7. As we stated in our previous Notice of Recommended Modifications, we commend OCD on its creation of a more holistic approach to oil and gas drilling in that an operator must submit a plan for foreseeable development. Consistent with that requirement, we ask that OCD include provisions requiring that impacts not only be considered plan-by-plan, but that cumulative impacts are considered from development throughout the Galisteo Basin and in the greater context of the tremendous oil and gas development throughout New Mexico.
8. In addition to the comments we have submitted, we request that if OCD engages in any sort of task force, mediation, or negotiation with interested parties regarding the rulemaking for the Galisteo Basin, the undersigned conservation organizations are included so as to ensure a proper balance and stakeholder buy-in in such a process.

Again, thank you for the opportunity to submit comments on the proposed rules for the Galisteo Basin. We commend OCD in its efforts to provide for a more holistic approach to oil and gas development in the Galisteo Basin. We urge OCD to use this opportunity to ensure that oil and gas development is conducted responsibly and does not impair our environment or contribute unnecessarily to climate change. In addition, we again note that such protections are not only needed in the Galisteo Basin, but throughout New Mexico, and we would welcome any opportunity to work with OCD on such state-wide changes.

If you have any questions or would like to discuss these comments, please do not hesitate to contact us.

Sincerely,



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