Ordinance

Diane Bloom <history13@aol.com>

Sat 10/13/2018 2:38 PM

To:Public Comment <PublicComment@sandovalcountynm.gov>;

My name is Diane Bloom and I live in Rio Rancho.Reading and hearing about the last Commission Meeting reports, I was very suprized that not all citizen group ordinances were not is the opting for consideration. I urge you to consider all the ordinances developed by the citizens groups. Upon my review, it seems to me that the Ordinance Team's proposal is the most comprehensive in input, fact and specificity. This one deserves consideration.

PUEBLO OF LAGUNA

October 15, 2018

Sandoval County Planning & Zoning Commission
1500 Idalia Road, Building D
P.O. Box 40
Bernalillo, NM 87004

RE: Tribal Representation and Participation in Oil and Gas Ordinance Development

Dear Commissioners:

The Pueblo of Laguna is formally requesting that the Sandoval County Planning and Zoning Commission fully consider Tribal interests during its development and consideration of the several draft Oil and Gas Ordinances that will be presented at the October 18th Commission Meeting. Of the several teams that worked on the ordinance, only the citizens working group reached out to the Pueblo of Laguna. The Pueblo of Laguna has lands and ancestral claims to land located in areas of Sandoval County.

We attempted to send Pueblo officials and representatives to meetings, however, there was no opportunity afforded to those individuals to speak and share our concerns. Almost no effort has been put forth by the Commission to solicit input from the Pueblos that may be impacted by the ordinance (other than again, the citizens working group).

Time should be allocated at the meeting on October 18th and at future meetings for Pueblo leadership to speak of their concerns on this important topic and its potential to cause lasting harm to our culture, our heritage, and the environment.

Sincerely,

PUEBLO OF LAGUNA

Virgil Siow
Governor

cc: Ethel Abeita, Director, Government Affairs Department
Adam Ringia, Director, Environmental & Natural Resources Department

Oil and Gas Regulation in Sandoval

Tue 10/16/2018 7:44 AM

To: Public Comment <PublicComment@sandovalcountynm.gov>;

Dear Residents and Leadership of Sandoval County,
Allow me to address the important issue of oil and gas regulation in Sandoval County.

3 Ordinance Drafts
There are two Sandoval County Citizen Working Group (CWG) Ordinance drafts that were submitted to the County Planning and Zoning (P&Z) Commission; the *Science Team* (ST) draft and the *Ordinance Team* (OT) draft. The *Baseline Ordinance,* AKA *Block Ordinance* is a third, industry–friendly, P&Z Staff promoted draft.

At the September 25th P&Z meeting commissioners voted to recommend two of the three drafts to the Board of Sandoval County Commissioners (SCC) to be considered for ratification; 1) the CWG *ST Ordinance* draft that bans fracking in the section of the Rio Grande Basin (RGB) that lies within the County, and 2) the *Baseline Ordinance.*

The CWG *OT Ordinance* draft was rejected! Not one P&Z commissioner even motioned to move it forward for a vote! This letter will explain the major differences between the two CWG ordinance drafts and why the OT Ordinance deserves review and ratification by the SCC.

A comparison chart of the three ordinances, the OT Ordinance Draft in its entirety, and NM Law Clinic legal memos are available at; https://drive.google.com/drive/folders/1kCbyXWiT55dtG4Yy-ey72mr93tV7Jgbs?usp=sharing.

On October 18th at the SCC Board meeting all three ordinances will be presented and discussed. Public will be allowed to comment. Please attend the meeting and use the following facts in your comments!

A Site-Specific Approach
The OT Ordinance protects the waters of RGB with a *"Site-Specific"* approach. A major concern is that the Site-Specific approach in the OT draft is being passed over for a 'fracking ban'. While the ST fracking ban is touted as protective of the RGB, vertical drilling would still be permitted. Horizontal fracking certainly presents greater risks than vertical drilling, however, because vertical drilling would still be permitted in the RGB under the provisions of the ST Ordinance draft, surface spills will continue to commonly take place. At the P&Z meeting on September 25th a representative from the Jicarilla oil and gas regulatory agency stated "the source of the majority of spills are *surface"*, this is a well-known fact. Banning fracking in any one district will not address surface spills from vertical drilling as a source of groundwater contamination.

Additionally, there are areas in the County, outside of the RGB, that contribute to the overall groundwater flow, a gradient which generally moves in a north to south direction and ultimately through the greater middle Rio Grande region. Banning fracking in the RGB is not a fail-safe in the prevention of groundwater contamination from fracking in areas of the County outside the boundaries of the RGB and the migration of ground water from these areas to the RGB.

Site-Specific, as laid out in the OT Ordinance draft, would regulate specific well location based on surface geologic, hydrologic, and seismologic structural factors as well as cultural considerations and Tribal input. Site-Specific regulations cover well and bore location as they relate directly to ground water resources for *each site proposed* across the County. No other ordinance draft or state regulatory agencies such as OCD or the Environment Department look at site specific characteristics when permitting oil and gas drilling. A Site-Specific approach is more protective of *all* water resources throughout the County including the RGB.

A Fracking Ban is Risky

A fracking ban will most certainly trigger a lawsuit from the industry. Over the course of its work the OT has been fortunate to retain legal counsel from an expert land use attorney and from the NM Law Clinic. These two independent legal consultants have weighed in on the proposed ban and given sound legal opinion against a ban. A county does not have the legal authority to ban fracking. In 2014, the Mora County Ordinance that banned fracking was legally challenged by industry groups and, in 2015; it was ruled unconstitutional by a federal district court judge.

A fracking ban must be undertaken by a higher authority such as the State of NM, or possibly a regional coalition of the four counties of the middle Rio Grande, i.e. Bernalillo, Valencia, Torrance, and Sandoval, including Edgewood. This effort is certainly on the horizon through regional governing bodies such as the Mid Region Council of Governments (MRCOG). In fact, this topic was on the agenda for their Executive Board Meeting on October 11th, 2018.

One could reasonably justify a ban based solely on principle, even in the face of a likely lawsuit, *if* there were no other way to protect the RGB, but given a Site-Specific approach, that is simply not the case. Unfortunately, a ban and likely legal battle will unnecessarily burden taxpayers, use tax dollars for legal defense, and short change community development and services resources.

Public Hearings a Must!

Of great concern to many of us, including Bernalillo Mayor Jack Torres is the lack of public hearings in the NW sectors of the county under the provisions of the ST and Baseline drafts. The absence of a public hearing requirement is an important legal issue that was addressed in one of the New Mexico Law Clinic memos. It is *as* important to address the concerns of many residents of the NW sector of the county who prefer to be consulted about drilling in the vicinity of their homes, ranches, etc. as it is to address community concerns in all other parts of the county. The San Juan Basin groundwater may be "naturally" more protected by geology, but noise, roads, emergency services, waste management and setbacks are among the issues of concern to many residents in the San Juan Basin, Cuba and Navajo Tri-Chapter areas of the county.

How does any elected official justify foregoing a public hearing when permitting a heavy industry with the kinds of risks to the health, safety and welfare of residents that oil and gas development poses to communities? Unfortunately, the ST draft *would not* require public hearings before issuing an oil and gas permit in the NW area of the county, nor does the industry-friendly Baseline draft. Alternatively, the OT draft is the only draft that would require public hearings across the county, a permitting process requirement afforded to every community and to every citizen. Mayor Torres stated at the P&Z meeting in September, public hearings are an absolute; assure "an open public process and ability for the community to comment" and, "the duty of every elected official".

Ordinance Team Missed the Deadline...What?!

Some commissioners have stated that the OT draft was submitted after the deadline and that's what hurt its chances of being recommended to the SCC. The deadline for submittal was July 15th, 2018. The OT draft was submitted on August 10th and subsequently updated. The ST ordinance draft has also been updated since its submittal. The Baseline draft was not introduced until September. Practically speaking none of the drafts were finalized by the July deadline and all are still works-in-progress.

Throughout the months of drafting, the OT had face to face meetings with SCC Chair Dave Heil with reports of the Team's progress. The OT was careful and detailed in their reports to the Chair about the task at hand as extremely complicated for lay citizens and, given the Team's commitment to inclusiveness of all stakeholders, would take time. The OT believed it was more important to do it right than to cut corners on essential components such as public participation and legal and Tribal consultation.

The OT is comprised of a group of citizen volunteers who met intensively, 3 hours twice a week for four months, conducted outreach trips to rural parts of the County and had numerous meetings and telephone consults with technical resource experts both public and private.

Throughout the process, the OT working principles stayed true to the specific language and spirit of the original CWG Proposal passed by the SCC in March of 2018; 1) to draft a legally and technically sound document 2) solicit maximum public input 3) engage Tribal consultation and, 4) protect water.

The OT had serious legal concerns about dividing the County into Districts based solely on geology. Those concerns remain, as there are hydrological, seismological, cultural and other factors and conditions as well as geology to be considered. Matters such as dividing the county into districts, right to public hearings, and treatment of Tribes as States, among other complex legal issues had to be researched thoroughly by counsel before the OT could address these aspects in their draft ordinance.

Caution and debate at each step of the draft lead the OT to take a stance in favor of a Site-Specific approach, where in each applicant's proposed drilling site shall be characterized and approved or negotiated by expert consultants, hired at industry expense, for its specific location, or 'site' within the County, not only in terms of science but, just as importantly, in terms of cultural preservation and respect, Tribal input and community right to know.

Right to Revoke
Additionally, the OT is the only draft that provides for County jurisdiction to suspend or revoke a permit if there is found to be harm to public health, welfare and safety, to the environment or to Cultural Properties. Such a provision is of county legal jurisdiction that does not preempt the State.

2021 Mandated Review
The OT Ordinance is the only draft that provides for a review by March of 2021 where the P&Z Director shall report to the Planning and Zoning Commission the experiences and challenges of the oil and gas ordinance and whether the Commission should consider any additions or modifications to discuss and recommend to the Board of County Commissioners.

In sum, it is my hope that county residents and leadership will take a close look at the OT Ordinance draft and consider supporting this ordinance for the county. This is the most important decision we will make for decades to come!
Water is life!

Respectfully,
Donna Dowell

--
Donna Dowell
505-250-9293

Fracking

Tue 10/16/2018 6:20 PM

To: Public Comment <PublicComment@sandovalcountynm.gov>;

To whom it may concern:

As a practicing physician in emergency medicine in New Mexico for forty years, who raised his children in Sandoval County, and keeps abreast of science, environment, and health matters, I oppose all fracking in Sandoval County. Health risks, including risks of drinking water contamination, are so high and so unnecessary to take, that this proposal to frack in Sandoval County must be rejected entirely.

Thank you.

Sincerely,

Robert M. Khanlian, MD
Corrales

CWG Ordinance

J Campbell <jnr200396@yahoo.com>

Tue 10/16/2018 10:37 PM

To: Public Comment <PublicComment@sandovalcountynm.gov>;

Dear County Commissioners,

It is imperative that the CWG ordinances be the ONLY basis for energy development in Sandoval Co. There must be NO fracking in the the Rio Grande valley! Water is life!

Roger Southward
165 Camino Barranca
Placitas
Sent from my iPad

Fracking

Sahnta DiCesare-Pannutti <sahnta@cybermesa.com>

Wed 10/17/2018 4:15 AM

To: Public Comment <PublicComment@sandovalcountynm.gov>;

No Fracking! Water is precious and we need water to survive. We cannot survive if our water is contaminated by fracking.

Sahnta DiCesare-Pannutti
Corrales, New Mexico
sahnta@cybermesa.com

Oil and gas ordinance

Lynn Montgomery <sunfarm@toast.net>

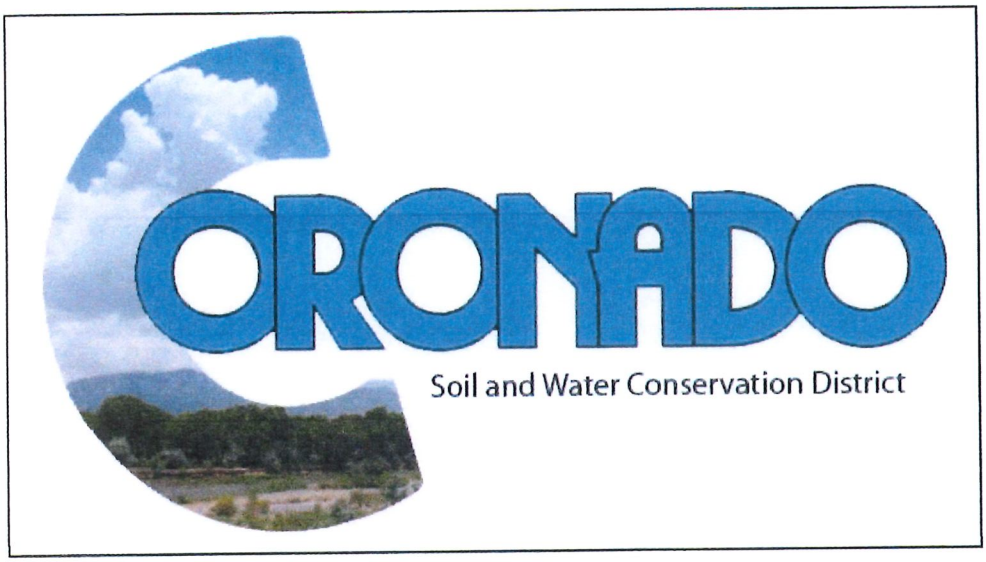
Wed 10/17/2018 9:31 AM

To: Public Comment <PublicComment@sandovalcountynm.gov>;

2 attachments (2 MB)

attachment 1.pdf; ATT00001.txt;

Dear Commissioners,
My name is Lynn Montgomery. I am chair of the Coronado Soil and Water Conservation District, which has its office in the Administration Building.
Coronado has adopted a resolution on fracking, which is attached.
I would like to bring your attention to a new development. Last week, the Mid-Region Council of Governments tasked its Water Resource Board to form a group of experts to come up with a universal template for a oil and gas ordinance that could be used by all counties in the Region.
This would make such ordinances more durable, as resources could be pooled to defend them. We need solidarity on this issue. Such an arrangement would enhance that.
I sit on the WRB, representing Coronado. The WRB consists of all local governments, not just counties, so government input is expanded, which expands public involvement and can only make such a template more inclusive.
I encourage you to hold off passing any ordinance until this initiative is complete.
Thank you for your attention,
Lynn Montgomery



1500 Idalia Rd, Bldg. C
P.O. Box 69
Bernalillo, New Mexico 87004
505-867-9580 or 505-867-2853

Email: info@coronadoswcd.org
Web: www.coronadoswcd.org

RESOLUTION SUPPORTING A COMPREHENSIVE SANDOVAL COUNTY OIL AND GAS ORDINANCE

Resolution No. 2017-01

WHEREAS, the Coronado Soil and Water Conservation District (SWCD) is an independent local governmental political subdivision of the State of New Mexico, located in Sandoval County, New Mexico; and

WHEREAS, in enacting the Soil and Water Conservation District Act, NMSA §§ 73-20-25 - 73-20-48, the New Mexico Legislature declared that "the land, waters and other natural resources are the basic physical assets of New Mexico, and their preservation and development are necessary to protect and promote the general health and welfare of the people of the state" and "the improper use of land and related natural resources, soil erosion and water loss result in economic waste in New Mexico through the deterioration of the state's natural resources"; and

WHEREAS, pursuant to the Act, Coronado SWCD is authorized to promote and preserve "the conservation, development, beneficial application and proper disposal of water" and to "conserve and develop the natural resources of the state, provide for flood control, preserve wildlife, protect the tax base and promote the health, safety and general welfare of the people of New Mexico"; and

WHEREAS, the Act defines natural resources as "land, except for oil, gas and other minerals underlying the land; soil; water; air; vegetation; trees; wildlife; natural beauty; scenery; open space; and human resources, when appropriate" [§ 73-20-27(I)];

WHEREAS, in accordance with its purpose and mission, Coronado SWCD recognizes the need for a comprehensive Sandoval County ordinance that takes into consideration all potential aspects of the oil and gas exploration and development processes in order to protect the health, safety and general welfare of the people, the land and water, the watersheds and the entire ecosystem, for all current and future inhabitants; and

WHEREAS, neither federal regulations nor New Mexico regulations and enforcement procedures adequately address the impacts of oil and gas exploration and development at the local government level;

NOW, THEREFORE, BE IT RESOLVED BY THE CORONADO SOIL AND WATER CONSERVATION DISTRICT that:

1. The District actively supports the enactment by Sandoval County of a comprehensive oil and gas ordinance; and

2. The District specifically supports the inclusion of the following requirements in the ordinance:

- Control public nuisances – traffic, dust, pipeline routing, worker housing;
- Adequately address pollution possibilities – water, air, land, noise, light;
- Strongly protect the Albuquerque Basin Aquifer;
- Require detailed, pre-permit assurances of safe behavior by all contractors, subcontractors and personnel;
- Require pre-development baseline testing for soil, air and water;
- Require regular, independent monitoring and inspections;
- Control ancillary impacts – waste disposal, abandoned wells;
- Cover impact costs – road maintenance, review and inspections, law enforcement, emergency services, etc.; and
- Include meaningful violation penalties.

Lynn Montgomery, Chair
Coronado Soil and Water Conservation District

May 18, 2017

This resolution passed upon motion by Lynn Montgomery and seconded by Patricia Bolton.

VOTE AS FOLLOWS:

Lynn Montgomery, Chair	(Yes)/No
Alfred Baca, Vice Chair	(Yes)/No
Patricia Bolton, Secretary-Treasurer	(Yes)/No
Gary Miles, Supervisor	Yes/(No)
Marvin Mendelow, Supervisor	(Yes)/No

ATTEST:

Carolyn Kennedy, District Manager — 5/18/17 Date

Pending Oil and Gas Ordinance

Homan, Mary E. <Mary.Homan@nmgco.com>

Wed 10/17/2018 5:47 PM

To:Public Comment <PublicComment@sandovalcountynm.gov>;

Cc:Domme, Thomas <thomas.domme@nmgco.com>;

New Mexico Gas Company (NMGC) would ask the Sandoval County Commission to consider inclusion of a definition of Natural Gas Utility Service so as to distinguish it from the oil and gas drilling and exploration which the proposed ordinance is really intended to address. Natural gas utility service in New Mexico, such as that which is provided by New Mexico Gas Company, is governed by the NM Public Regulation Commission, the NM Pipeline Safety Bureau, the Federal Energy Regulatory Commission (FERC), and local franchise agreements. We would ask that NMGC be given the opportunity to address an appropriate definition.

NMGC worked with the Santa Fe County Commission on its Oil and Gas Ordinance during its development. A mutually agreed upon phrase was included in that Ordinance that reads "*Oil or Gas Facility or Facilities* definition which includes, but is not limited to":
" (x) A pipeline for transportation of oil, gas or water with the sole exception of facilities used for the transportation of natural gas under a tariff regulated by the New Mexico Public Regulation Commission ("NMPRC") or the Federal Energy Regulatory Commission ("FERC")."

It is NMGC's desire to include a similar phrase in the Sandoval County Commission's Oil and Gas Ordinance that would enable NMGC to continue providing safe, reliable natural gas service to its current and future customers in Sandoval County. We stand ready to discuss this matter further with the Sandoval County Commission.

Mary E. Homan
Economic Development and Community Affairs Manager
New Mexico Gas Company, Inc.
7120 Wyoming NE, Ste. 20
Albuquerque, NM 87109
P.O. Box 97500
Albuquerque, NM 87199-7500
Mary.Homan@nmgco.com
Office: 505-697-3833
Cell: 505-269-5952

New Mexico
GAS COMPANY
AN EMERA COMPANY

NO to horizontal drilling and fracking in the Rio Grande Basin

Manon Robyn Cote <rcote@unm.edu>

Thu 10/18/2018 4:53 PM

To: Public Comment <PublicComment@sandovalcountynm.gov>;

Cc: manonrobyn@yahoo.com <manonrobyn@yahoo.com>;

To the Sandoval County Commissioners:

This past weekend I saw the documentary "Sacred Land, Sacred Water" and was horrified to learn about the grave danger that could occur if Sandoval County and the Oil and Gas industry in New Mexico follow through with plans to begin horizontal drilling and fracking in the Albuquerque Basin. The geologist who explained what would happen should fracking take place, Donald T. Phillips, made it abundantly clear that the subsurface geology of the Rio Grande Rift and the techniques used in horizontal drilling and subsequent hydraulic fracking would place the drinking water of the entire Albuquerque Basin's continuous aquifer, which provides 85% of the drinking water to over 800,000 residents, myself included, at serious risk for contamination. This would make all of our drinking water undrinkable, and would be carried over into all crop production in the Albuquerque Basin – you simply cannot grow healthy and even good crops using contaminated water.

Anything in and below Sandoval County would be contaminated. We are talking about more than half of the population of New Mexico. Currently about half of the population of New Mexico lives in the Albuquerque Basin, but people living below Albuquerque, including the communities along the Rio Grande – Isleta Pueblo, Belen, Socorro, Truth or Consequences, Hatch, down to Las Cruces, into Texas and Mexico, would be affected. We are talking about contaminating our important Hatch chile industry and pecan industry. We are talking about almost the entire economy of New Mexico being destroyed, and lawsuits by legislators in Texas who expect to receive a certain allocation of water from the Rio Grande, which is already contentious and which would be exacerbated should the aquifer be contaminated.

The Oil and Gas industry is already fracking - in my opinion to excess - in the northwestern quadrant of the State of New Mexico, putting the precious archaeological and culturally significant Chacoan Culture sites at risk. There is already a cloud of methane the size of the State of Delaware over the northwest corner of our state. The State of New Mexico needs to become a leader in sustainable energy instead of polluting the air, land, and water of our state and destroying precious cultural treasures which are part of the ancestral history of the Pueblo and Navajo tribes which live in the State of New Mexico and which indeed were here long before we even became part of Mexico, let alone a US Territory and then State.

Please use your intelligence, judgment, and conscience to vote against this horrible initiative. Most New Mexicans love our state for the things we have here now, relatively clean air, low pollution, vibrant agriculture in the Rio Grande Valley, and a strong Native American culture. We are already struggling with economic deficiencies. Let us expand on wind and solar energy and become leaders in this area. I already have changed my PNM account to be using 100% wind energy. I have a well, on which I and my family rely for our drinking water and irrigation of my family-sized garden. I know we can do better in the state of New Mexico, we do not need to make it worse. We are inviting new industry such as Netflix to invest in our economy, to begin a horizontal drilling and fracking operation in the Rio Grande Valley would NOT be an incentive to bring new businesses here. It would destroy the state of New Mexico – the population would leave and there would be nothing left. Please do not let greed and money make your decision. Please use your heart and your conscience to do the right thing.

Thank you for taking the time to read my email.

Manon Cote
2639 Pajarito Rd SW

Albuquerque, NM 87105
505-301-8650
manonrobyn@yahoo.com

SANDOVAL COUNTY OIL & GAS DRAFT ORDINANCE COMMENTS -- CWG Ordinance Team ordinance and concerns about Oct 18 commission meeting agenda document postings

David Craig <dtc.bayern@gmail.com>

Thu 10/18/2018 1:52 PM

To: Public Comment <PublicComment@sandovalcountynm.gov>;

Cc: Dave Heil <dheil@sandovalcountynm.gov>; James Holden-Rhodes <jholden-rhodes@sandovalcountynm.gov>; Jay Block <jblock@sandovalcountynm.gov>; Don Chapman <dchapman@sandovalcountynm.gov>; Kenneth Eichwald <keichwald@sandovalcountynm.gov>; Aparcio C. Hererra <ahererra@sandovalcountynm.gov>; Peter J. Adang <padang@sandovalcountynm.gov>; James G. Maduena <JMaduena@sandovalcountynm.gov>; Keith Brown <kbrown@sandovalcountynm.gov>; Daniel J. Stoddard <DStoddard@sandovalcountynm.gov>; Geoffrey Stamp <gstamp@sandovalcountynm.gov>; Dennis R.. Trujillo <DTrujillo@sandovalcountynm.gov>; Robin S. Hammer <rhammer@sandovalcountynm.gov>; Dianne Maes <dmaes@sandovalcountynm.gov>;

2 attachments (16 MB)

CWG Ordinance Team Ordinance October 10, 2018 -- ORDINANCE_.pdf; CWG Ordinance Team Ordinance October 10, 2018 -- LEGAL REVIEWS_.pdf;

Commissioners,

Attached is a copy of the CWG Ordinance Team ordinance that was submitted to the county on October 10 (Wednesday). Specifically, commission chairman Heil was sent a copy as were the P&Z director and P&Z deputy director.

Am sending you this ordinance and its legal review materials in case these were not forwarded by the county to all the county commissioners. Given that the upcoming commission meeting on Thursday lists a CWG Ordinance Team presentation, I thought it may be beneficial for all the county commissioners to at least have access to this ordinance.

The CWG Ordinance Team recently created a web site which includes all the materials for the commission's Oct 18 meeting so people can more easily access these materials. Trying to find these materials from the county meeting agenda or the county's oil & gas information site is very difficult. The CWG Ordinance Team ordinance and its legal reviews are also on this CWG web site.

https://sites.google.com/view/cwg-ordinance-team

I am also very concerned about the following items for the commission's October 18 meeting agenda;

- CWG Ordinance Team ordinance is not posted with the agenda
- NM Tech updated study is not posted with the agenda
- CWG Science Team ordinance and Baseline ordinance are not those forwarded by the P&Z commission
- Oil & Gas weekly public comments for week ending October 12, 2018 were changed

The different posted ordinances between the P&Z and County Commission meeting are very troublesome and show at best either staff confusion or ineptitude.

On the county's web site home page (https://www.sandovalcountynm.gov/about/) the following statement appears:

"the only way we can truly meet the needs of our communities is by hearing from you"

Given the county commission's continued failure to provide complete oil & gas ordinance information to the public which would have give the public information for its educated review of these ordinances and educated comments to the commission, same could say the county's "hearing from you" statement is at best disingenuous.

Details ...

- CWG Ordinance Team ordinance is not posted with the agenda

I must (again) to point out the October 18 commission meeting agenda does not include a post of the Ordinance Team ordinance as an attachment as it does for the other ordinances that will have a presentation. This ordinance was submitted to county on October 10. The agenda attachment page for this topic lists "No file(s) attached". If the county commission wants people with an interest in the county's oil & gas ordinance reviews to be able to review all the ordinances, then posting all of the presentation ordinances would provide people access to these materials before the meeting. Selectively posting ordinances may cause people to question the commissioner's county work transparency.

To be very candid, there was never an communication from the county P&Z staff or county commission Chairman Heil that the county would not post the CWG Ordinance Team ordinance. In a phone call to P&Z deputy director Makita Hill (505-867-7656, mhill@sandovalcountynm.gov) on October 15 Hill said this ordinance was not being posted because the P&Z commission had not forwarded this ordinance to the county commission. It is also understood that the county attorney Robin Hammer (505-404-5812, rhammer@sandovalcountynm.gov) advised the county commission to not post this ordinance. How hard is it for someone in the county to have informed someone in the CWG Ordinance Team that the county would not post this ordinance and the reason? Very unprofessional behavior by Heil, Hill and Hammer.

- NM Tech updated study is not posted with the agenda

The updated NM Tech study is also not posted with the meeting agenda. This update may be found on the county's web site page "Oil, Gas & Water Matter/Proposed Ordinance" (https://www.sandovalcountynm.gov/ogordinance/) under "New Mexico Tech Assessment Supplement Report – Oct 11, 2018". It is good that the county posted this update here, but not having it posted as part of the meeting agenda makes it nearly impossible for people to find. Again, if the county commission is serious about residents being able to know about the county's oil & gas efforts, then this study update would be posted with the agenda. This oil & gas info page does not mention for example at the top of this info page that this study is now present. Just adding an important file to the end of the page is rather lame without telling people about it, typical bureaucratic information control behavior.

- CWG Science Team ordinance and Baseline ordinance are not those forwarded by the P&Z commission

I also question the legal validity of the inclusion of several of the ordinances in the October 18 meeting agenda since these are not the same ordinances that the P&Z commission on September 25 forwarded to the county commission. The agenda states these ordinances are "As forwarded by the Planning and Zoning Commission". Look at the 1st page of each ordinance to see the differences.

If the county commission is OK with using documents that have not actually been approved by other commissions and using whatever documents the commission wants, then it seems appropriate for the county commission to issue a county ordinance saying the commission is not bound by any document submissions and can use whatever they like.

Having different ordinances for the Oct 18 commission than what were actually approved by the P&Z is extremely troubling from the perspective of me, a county resident, and I suspect other county residents. The commission may try to explain this as just sloppiness on part of the county P&Z and commission staff, but this seems like a lame excuse for what some would say is gross staff incompetence and minimal commission oversight at best.

Given that the P&Z forwarded specific ordinances to the county commission, it only seems reasonable that the presentations for the CWG Science Team and P&Z Baseline ordinances can only use the Sep 25 P&Z forwarded ordinances and not any newer ordinances.

- Oil & Gas weekly public comments for week ending October 12, 2018 were changed

After the weekly public oil & gas comments were posted for the week ending October 12, a few days later these comments were changed to include an ordinance. This ordinance is titled "CWG SCIENCE TEAM DRAFT: SWG-SC v3" which seems to be the latest CWG Science Team ordinance. I say "seems" since the title says "SWG" which I assume means Citizens Working Group. "SC" I assume really means "Science Team". Seems whoever added this title had no idea of the correct name for this team.

This Science team Draft was not part of these public comments when the comments were first posted. These comments originally began with an October 11 posting by Steve Palmer which now appears after the Science Team ordinance. This ordinance seems also to have just been added to the public comment PDF document since there is no email attached to this PDF entry.

The entry for this public comment file on the oil & gas information page now states "Public comment includes recent revisions of CWG Science Committee Draft and CWG Draft". This entry was changed after the Science Team ordinance was added to this comment file. Also "CWG Draft" is incomplete, seems like it should say instead "CWG Ordinance Team Draft". Another example of what appears to be county staff incompetence.

It seems to me that someone at the county wanted the Science Team's latest draft to be on the county web site somewhere. This public comment draft is not the draft that the county P&Z forwarded to the county commission on September 25 which whose first page is titled "AUGUST 2018 CWG DRAFT".

Someone at the county keeps playing immature and unprofessional games with the oil and gas ordinance review process.

The changed oil & gas weekly public comments are also very troublesome and seem to show an effort by I assume the county public information officer (PIO) [Melissa Perez, (505) 867-7640, mxperez@sandovalcountynm.gov] to change a public comment document for some unknown reason.

Thank you for your time.

- David Craig
- Cochiti Lake - New Mexico
- 505.465.0087 / dtc.bayern@gmail.com
-
- Sandoval County Aquifer Water Protection &
  Oil and Gas Citizens Working Group (CWG)
- CWG Secretary & CWG Ordinance Team member

---------- Forwarded message ---------

From: **David Craig** <dtc.bayern@gmail.com>
Date: Wed, Oct 10, 2018 at 12:35 PM
Subject: CWG Ordinance Team 10/10/2018 ordinance submission to Sandoval County Commission for Oct 18 commission meeting
To: David J. Heil (Sandoval County NM, Commissioner - Chairman) <dheil@sandovalcountynm.gov>
Cc: Michael Springfield (Sandoval County Planning & Zoning Department, Director, ph 505-867-7628) <mspringfield@sandovalcountynm.gov>, Makita Hill (Sandoval County Planning & Zoning Department, Deputy Director, ph 505-867-7656) <mhill@sandovalcountynm.gov>

Commissioner Heil,

Attached is the CWG Ordinance Team's oil & gas ordinance submission to the Sandoval County Commission for inclusion in the commission's October 18 ordinance review meeting.

There are 2 files attached; one is the ordinance itself and the other contains the team's legal reviews for this ordinance. We ask that the county please include both files on the county commission meeting web site.

If the county has any problems with these 2 files please let me know.

Thank you for your time.

- David Craig
- Cochiti Lake - New Mexico
- 505.465.0087 / dtc.bayern@gmail.com
-
- Sandoval County Aquifer Water Protection &
  Oil and Gas Citizens Working Group (CWG)
- CWG Secretary & CWG Ordinance Team member

Aquifer Water Protection & Oil and Gas Ordinance

Citizens Working Group (CWG) Ordinance Team

October 10, 2018

Submission for the Sandoval County New Mexico County Commission

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Citizens Working Group Ordinance Team
SANDOVAL COUNTY OIL AND GAS ORDINANCE

ARTICLE I. GENERAL.

A. Short Title.

This Ordinance shall be officially cited as the "Sandoval County Oil and Gas Ordinance".

B. Statutory Authority. Applicability.

This Ordinance is promulgated pursuant to the authority set forth in Art. X and XIII of the New Mexico Constitution (1912); N.M.S.A. 1978, § 4-37-1 (1975), N.M.S.A. 1978, §§ 3-21-1 et seq., N.M.S.A. 1978, §§ 3-19-1 et seq.; N.M.S.A. 1978, §§ 3-18-1 et seq., and N.M.S.A. 1978, §§ 19-10-4.1, 4.2 and 4.3. This Ordinance constitutes an exercise of the County's independent and separate but related police, zoning, planning and public nuisance powers for the health, safety and general welfare of the County and applies to all areas within the exterior boundaries of the County that lie outside of (1) the incorporated boundaries of a municipality; (2) any tribal trust lands owned by the Pueblo of Laguna, the Pueblo of Sandia, the Pueblo of Santa Ana, the Pueblo of San Felipe, the Pueblo of Cochiti, the Pueblo of Santa Domingo, the Pueblo of Zia, the Pueblo of Jemez, the Navajo Nation, and the Jicarilla Apache Nation; (3) lands owned by the state of New Mexico; and (4) lands owned by the United States, including, but not limited to, lands that are managed by the Forest Service and the Bureau of Land Management. Additionally, this Ordinance does not apply to the construction and operation of Oil or Gas Facilities where the mineral right(s) associated with such Facilities are owned partially or in their entirety by the United States government, the State of New Mexico, or a Tribe or Pueblo.

C. Scope

This ordinance is intended to address oil and gas exploration, drilling, production, transportation, abandonment and remediation within the County zoning jurisdiction as described above.

In the event that lands under State, Federal, or Tribal ownership are conveyed to private ownership, following the adoption of this ordinance, such lands are subject to the provisions of this ordinance.

D. Purpose

This ordinance is a zoning and public nuisance ordinance enacted to protect and promote the health, safety and general welfare of present and future residents of the County while at the same time providing for the responsible and economically viable extraction of oil and gas minerals. This ordinance is a police power, public nuisance and land use regulation designed to establish separate land use, environmental, traffic, cultural, historical and archeological, wildlife, emergency service and preparedness, health and safety, and other standards to protect the quality of life of Sandoval residents, to conserve the value of property and to protect the County from any possible adverse effects and impacts, including economic,

resulting from oil and gas exploration, drilling, extraction (production) or transportation in the County.

This ordinance ensures county public input into County oil and gas permitting decisions.

This ordinance acknowledges that the Tribes and Pueblos located within Sandoval County are sovereign nations and therefore it includes processes that require reasonable efforts for the County to collaborate and receive input from the Tribes and Pueblos in order to protect ground and surface water, the environment and Cultural Properties on and off the reservations.

No oil or gas development shall take place in the County without a permit or prior authorization in accordance with the provisions of this ordinance. Prior to authorizing any oil or gas development operation, the County shall require the Operator or the Mineral Estate Owner or oil or gas lessee of the mineral estate to apply for and obtain the approvals, permits, and/or authorizations required herein.

E. State and Federal Statutes.

This Ordinance does not replace, alter or amend any Federal and State statutes applicable to the oil and gas industry, including but not limited to the statutes listed below. This list includes, but is not limited to:

(1) The Surface Owners Protection Act, N.M.S.A. 1978, §§ 70-12-1 et. seq.;
(2) The Oil and Gas Act, N.M.S.A. 1978, §§ 70-2-1 et seq.;
(3) The Water Quality Act, N.M.S.A. 1978, §§ 74-6-1 et seq.;
(4) The Solid Waste Act, N.M.S.A. 1978, §§ 74-9-1 et seq.;
(5) The Rangeland Protection Act, N.M.S.A. 1978, §§ 76-7B-1 et seq.;
(6) The Emergency Planning and Community Right To Know Act, 42 U.S.C.A.§§ 11001 et seq.;
(7) The New Mexico Public Health Act, N.M.S.A. 1978 §§ 24-1-1 et seq.;
(8) The Wildlife Conservation Act, N.M.S.A. 1978, §§ 17-2-37 et seq.;
(9) The Cultural Properties Act, N.M.S.A. 1978, §§ 18-6-1 et seq.;
(10) The National Historic Preservation Act, 16 U.S.C.A §§ 470 et seq.;
(11) The Uniform Trade Secret Act N.M.S.A. 1978, §§ 57-3A-1 et seq.;
(12) The Prehistoric and Historic Sites Act, N.M.S.A. 1978, §§18-8-1 et seq.;
(13) The Cultural Properties Protection Act, N.M.S.A. 1978, §§ 1 8-6A- 1 et seq.;
(14) The Archaeological Resources Protection Act, 16 U.S.C.A. § 470 aa et seq.;
(15) The Energy Policy Act, 42 U.S.C.A. § 6201 et. seq.;
(16) The Clean Water Act 33 U.S.C.A §1251 et seq.;
(17) The Occupational Safety and Health Act, 1970, U.S.C.A. 651 et seq.;
(18) The New Mexico Night Sky Protection Act, N.M.S.A. 1978, 74-12-1 et seq.;
(19) The New Mexico State-Tribal Collaboration Act, N.M.S.A. §§11-18-1 et seq.;
(20) The National Environmental Policy Act, 42 U.S.C. § 4321 et seq.;
(21) The American Indian Religious Freedom Act, 42 U.S.C. ch. 21, subch. I §§ 1996 & 1996a

(22) The Native American Graves Protection and Repatriation Act, 25 U.S.C. ch. 32 § 3001 et seq.;
(23) National Scenic Byways Program 23 USC § Sec. 162 et seq.;
(24) Scenic Highway Zoning Act NMSA 1978 §§ 67-3-1 et seq.;
(25) Safe Drinking Water Act, 42 U.S.C.§300f et seq.1974.

F. Findings. Declarations. Determinations.

All forms of development have the potential to impact negatively County resources, the health, welfare, quality of life of residents, wildlife, livestock and the environment through the introduction of contaminants and surface disturbance, which can lead to habitat degradation, fragmentation, and loss as well as degraded qualities of air, soil, and water. Considering oil and gas activities as a form of development, the County designs this Ordinance as a means to allow for the economically feasible development of oil and gas resources, which benefits the economy of the County, while ensuring the least impact on the environment and fulfilling the County's interest in protecting the health, welfare, quality of life and value of property of County residents.

The Board of County Commissioners hereby finds, declares, and determines that this Ordinance:

(1) Promotes the health, safety, and welfare of the County, its residents, its environment, including its flora and fauna, by regulating the potentially adverse impacts and effects resulting from the exploration, drilling, operation and transportation of oil and gas;
(2) Ensures that decisions include our sovereign neighbors, the Tribes and Pueblos, who reside within the County and may be impacted by oil and gas development on private County lands;
(3) Ensures that decisions take into consideration the impact of oil and gas development on surrounding land uses, particularly in residential and agricultural areas, and that these decisions take into consideration impacts on the availability of public services and adequate infrastructure;
(4) Protects the County's unique and irreplaceable historic, cultural and archaeological resources;
(5) Protects wildlife habitats which are important County tourism and recreation revenue generators.
(6) Ensures that decisions regarding oil and gas development do not pollute our air and water;
(7) Ensures that oil and gas sites are properly restored to their natural state after the area is no longer actively used;
(8) Recognizes the rights of Surface Property Owners;
(9) Allows for the responsible and economically feasible development of oil and gas mineral resources;
(10) Implements the goals and objectives of, and is otherwise in accordance with, the County's Comprehensive Plan; and
(11) Attains the foregoing objectives while also promoting the efficient and appropriate regulation of the oil and gas industry in the County.

ARTICLE II. SANDOVAL COUNTY ZONING ORDINANCE AMENDMENT.

A. Repeal and deletion of Section 10.D.13.

The County Commission hereby amends Ordinance No. 10-11-18-7A Comprehensive Zoning Ordinance (CZO) of Sandoval County, to repeal and delete Section 10.D.13 on oil and gas exploration and production as a special use throughout the County.

ARTICLE III. RULES OF INTERPRETATION AND DEFINITIONS.

A. Rules of Interpretation

(1) Words, phrases, and terms defined in this Ordinance shall be given the meanings set forth below. Words, phrases, and terms not defined in this Ordinance shall be given their usual and customary meanings except where the context clearly indicates a different meaning.
(2) The word "shall" is mandatory and not permissive; the word "may" is permissive and not mandatory.
(3) Words used in the singular include the plural; words used in the plural include the singular.
(4) Words used in the present tense include the future tense; words used in the future tense include the present tense.
(5) Within this ordinance, sections prefaced "purpose" and "findings" may be included. Each purpose statement is intended as an official statement of legislative purpose or findings. The "purpose" and "findings" statements are legislatively adopted, together with the formal text of the ordinance. They are intended as a legal guide to the administration and interpretation of the ordinance. Additionally, such purposes and findings shall be considered part of the County's Comprehensive Plan.
(6) In computing any period of time prescribed or allowed by this ordinance, the day of the notice or final application, after which the designated period of time begins to run, is not to be included. Further, the last day is to be included unless it is a Saturday, Sunday or holiday recognized by the State of New Mexico or the federal government, in which event the period runs until the next day that is not a Saturday, Sunday or such holiday.

B. Definitions

Words with specific defined meanings are as follows:

Applicant: The owner of a mineral estate, oil and gas lessee, operator, or duly designated representative who shall have express written authority to act on behalf of the owner or oil and gas lessee for the purposes of submitting and representing an application for a permit for review and approval by the Director for a Preliminary Oil an d Gas Exploration Permit or to be reviewed and approved by the Planning and Zoning Commission an Oil and Gas Exploration Drilling Permit, or an Oil and Gas Development Permit.

Area of Review (AOR): The area surrounding an oil and gas well within a two-mile radius of the vertical well bore, except any Tribal, Federal, State, or Incorporated land.

Board: The Board of County Commissioners of Sandoval County, New Mexico

Clear and Convincing Evidence: A medium standard of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. In order to meet the standard and prove something by clear and convincing evidence, a party must prove that it is substantially more likely than not that it is true.

Closed Loop System: A system that uses above ground steel tanks for the management of drilling fluids.

Collocation: The placement of two or more well bores on a single well pad or well site, or the placement of two or more drilling pads, towers and sites contiguous to each other.

Completion: A well that has been completed and is ready for production.

Comprehensive Plan: The "Sandoval County Comprehensive Plan" adopted by the Board of County Commissioners, as amended from time to time.

Confining Zone: A geological formation, group of formations, or part of a formation that is capable of limiting fluid movement from a zone of stimulation and production.

County: Sandoval County, New Mexico

CZO: The Sandoval County Comprehensive Zoning Ordinance

Critical Habitat: Areas of habitat essential for the conservation of endangered or threatened species under the Endangered Species Act.

Cultural Properties – See **Cultural Property**

Cultural Property: A structure, place, site or object having historic, archeological, scientific, architectural, or other cultural significance.

Degradation of Water Quality: A change in ground or surface water chemical content that unreasonably reduces the quality of such water compared to the standards, as required pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 to 1387 and Regulations, 40 C.F.R. Part 130 or the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 et seq., whichever is stricter.

Development: Any man-made physical change in improved or unimproved sub-surface mineral and surface estates, including, but not limited to: construction and erection of buildings or other structures; oil and gas drilling, dredging, filling, extraction or transportation of oil and gas,

grading, paving, diking, berming, excavation, exploration, or storage of equipment or materials, whether in structures, ponds, containers, landfills or other detention facilities.

Director: Director of Sandoval County Planning and Zoning Department or any person or persons assigned or delegated to perform some portion of the functions exercised by the Director.

Drilling: The act of boring a hole (1) to determine whether minerals are present in commercially recoverable quantities or (2) to accomplish production of the minerals (including drilling to inject fluids).

Easement: A right to the use of, or access to, land owned by another.

Exploration Activities: Oil and Gas activities, excluding Drilling, that include geophysical surveys, seismic surveys, gravity surveys, magnetic surveys, and other exploratory activity that may cause surface disturbance for the purpose of ascertaining the existence of or location of hydrocarbons.

Floodplain: Any land area susceptible to being inundated by water from any source.

Flowback: A mixture of drilling, hydraulic fracturing and formation fluid that moves up the well bore to the surface after a well is completed.

Flowline: A segment of pipe transferring oil, gas, or condensate between a wellhead and processing equipment to the load point or point of delivery or a segment of pipe transferring produced water between a wellhead and the point of disposal, discharge, or loading. This definition of flowline does not include a gathering line.

Fracturing: A method of stimulating oil or gas production by opening new flow channels in the formation surrounding a production well. It may include pumping of crude oil, diesel, water, or chemical into a reservoir with such force that the reservoir rock is broken and results in greater flow of oil or gas from the reservoir. Also known as hydraulic fracturing or fracking.

Gas: Any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at standard temperature and pressure conditions and/or gaseous components or vapors occurring in or derived from petroleum or natural gas, or any gaseous derivatives of those extraction processes, such as carbon dioxide; whenever "gas" is used in this ordinance it includes "natural gas" and/or "methane."

Habitat Fragmentation: The partitioning of larger habitats into smaller more isolated parcels, usually as a result of development.

Hazardous Material: Any item or agent (biological, chemical, radiological, and/or physical), which has the potential to cause harm to humans, animals, or the environment, either by itself or through interaction with other factors as defined by the NMED Hazardous Waste Bureau, the NMED Occupational Health and Safety Bureau and the US Department of Transportation.

Hazardous Waste: A non-exempt waste that exceeds the minimum standards for waste hazardous by characteristics established in RCRA regulations, 40 CFR 261.21-261.24, or listed hazardous waste as defined in 40 CFR, part 261, subpart D, as amended.

Horizontal Drilling: A drilling technique where a well is drilled vertical to a certain depth and then drilled at a right angle so that the borehole penetrates a productive formation in a manner parallel to the formation.

Hydrocarbons: A compound formed from carbon and hydrogen including but not limited to oil and gas.

Injection Well: A well used for the injection of air, gas, water or other fluids into an underground stratum and regulated under the Underground Injection Control Program.

Lessee. A person, corporation or other legal entity that has been granted an oil or gas lease from the owner of a mineral estate or who has received an assignment of all or a portion of a previously granted oil or gas lease.

Livestock: All domestic or domesticated animals that are used or raised on a farm or ranch, including the carcasses thereof, and exotic animals in captivity and includes horses, asses, mules, cattle, sheep, goats, swine, bison, poultry, ostriches, emus, rheas, camelids and farmed cervidae upon any land in New Mexico. Livestock does not include canine or feline animals.

Lot: A tract, parcel, or portion of a subdivision or other parcel of land intended as a unit for the purpose, whether immediate or future, of transfer of ownership, or possession, or for development.

Lot Line: The boundary of a recorded lot.

Luminaire or fixture: See **Outdoor Lighting Fixture**

Major Release:

1. An unauthorized release of a volume of oil, produced water, condensate or oil field waste including regulated NORM, or other oil field related chemicals, contaminants or mixtures of those chemicals or contaminants that occur during drilling, producing, storing, disposing, injecting, transporting, servicing or processing, excluding gases, of 25 barrels or more;
2. An unauthorized release of a volume of oil, gases, produced water, condensate or oil field waste including regulated NORM, or other oil field related chemicals, contaminants or mixtures of those chemicals or contaminants that occur during drilling, producing, storing, disposing, injecting, transporting, servicing or processing that:
   (a) Results in a fire or a fire causes;
   (b) May with reasonable probability reach a watercourse;
   (c) May with reasonable probability endanger public health; or
   (d) Substantially damages property or the environment.

3. An unauthorized release of gases exceeding 500 MCF; or
4. A release of a volume that may with reasonable probability be detrimental to fresh water.

Mineral Rights Owner: The record owner of the fee sub-surface mineral estate, a contract purchaser holding equitable title, an oil and gas lessee, or a vendee in possession, including any person, group of persons, firm or firms, corporation or corporations, or any other legal entity having legal title to or sufficient proprietary interest in an oil or gas lease.

Mitigation: Actions taken to avoid, minimize, rectify, or compensate for any adverse effect or impact on the general welfare, public health, or the environment.

Monitoring: Periodic or continuous collection and analysis of air, soil, water, groundwater, or other samples to determine the level of contaminants in various media or in humans, plants, and animals.

Material Safety Data Sheet or "MSDS": A document containing important information about the characteristics and actual or potential hazards of a substance. It identifies the manufacturer of the material (with name, address, phone, and fax number) and usually includes (1) chemical identity, (2) hazardous ingredients, (3) physical and chemical properties, (4) fire and explosion data, (5) reactivity data, (6) health hazards data, (7) exposure limits data, (8) precautions for safe storage and handling, (9) need for protective gear, and (10) spill control, cleanup, and disposal procedures.

New Mexico State Historic Preservation Division: The Historic Preservation Division of the Department of Cultural Affairs of the State of New Mexico.

NMED: The State of New Mexico Environment Department.

NORM: The naturally occurring radioactive materials regulated by 20.3.14 NMAC.

OCD: The Oil Conservation Division of the Energy, Minerals and Natural Resources Department of the State of New Mexico.

Oil: Petroleum hydrocarbon produced from a well in the liquid phase and that existed in a liquid phase in the reservoir. This definition includes crude oil or crude petroleum oil.

Oil or Gas Facility (or Facilities): A new well or wells and the surrounding Well Site and well pad, constructed and operated to explore for or produce crude oil and/or gas: includes auxiliary and associated equipment and facilities, such as derricks, separators; dehydrators; pumping units; tank batteries; tanks; metering stations and equipment; any equipment for the reworking of an existing well bore; workover rigs; compressor stations and associated engines, motors, facilities and equipment; water or fluid injection stations and associated facilities and equipment; storage or construction staging yards; flowlines, gathering systems and associated facilities and equipment, collection lines, drip stations, vent stations, pigging facilities, chemical injection stations, transfer pump stations and valve boxes; any other structure, building or facility, temporary or permanent, mobile or stationary, associated with or used in connection with a new

oil or gas well or the installation, construction or operation of the oil or gas well; and the roads used for ingress and egress to and from a new oil or gas well or surrounding well site.

Oil and Gas Permits: Any Sandoval County oil and gas permit required by this ordinance, including: (1) Preliminary Oil and Gas Exploration Activities Permit or (2) Oil and Gas Exploratory Drilling Permit or (3) Oil and Gas Development Permit.

Oil and Gas Exploratory Drilling Permit ("Exploratory Permit"): A Sandoval County permit that is required to authorize an Applicant to drill a well for the purpose of securing geological or geophysical information to determine whether oil and gas mineral resources are present in commercially viable quantities.

Oil and Gas Development Permit: A permit that is required to authorize an Applicant to engage in oil and gas activities that include production and transportation of oil and gas but does not include Exploration Activities and Drilling.

Oil or Gas Well: Any hole or holes, bore or bores, to any sand, formation, strata or depth for the purpose of exploring for, producing, or recovering any oil, gas, liquid, hydrocarbon, or any combination thereof.

Onsite Visit: The meeting conducted at the proposed Oil or Gas Well Site before consideration of a decision on a development permit, exploratory permit, or special use permit.

Operator: A person who, duly authorized, manages a lease's development or a producing property's operation, or who manages an Oil and Gas Facility's operations.

Outdoor Lighting Fixture: An outdoor artificial illuminating device, whether permanent or portable, used for illumination or advertisement, including searchlights, spotlights and floodlights, whether for architectural lighting, parking lot lighting, landscape lighting, billboards or street lighting.

Permitee: The Applicant/Operator who has been approved for a (1) Preliminary Oil and Gas Exploration Activities Permit or (2) Oil and Gas Exploratory Drilling Permit or (3) Oil and Gas Development Permit.

Planning and Zoning Commission: The Planning & Zoning Commission of Sandoval County, State of New Mexico.

Planning and Zoning Department: The Planning & Zoning Department of Sandoval County, State of New Mexico.

Police Power: Delegated, or authorized legislative power for purposes of regulation to secure health, safety, and general welfare and to prevent public nuisances.

Pollution: Introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quantity and of such duration as may with reasonable

probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or property use.

Preliminary Oil and Gas Exploration Activities Permit ("Preliminary Exploration Permit"): A permit that is required for Oil and Gas Exploration Activities that may disturb the surface but do not include Drilling.

Produced Water: Water that is an incidental byproduct from drilling for, or the production of, oil and gas.

Public Hearing: A proceeding preceded by published notice and actual notice to certain persons and at which certain persons, including the Applicant, may present oral comments or documentation. In a quasi-judicial or administrative hearing, witnesses are sworn in and are subject to cross-examination.

Public Works Department: The Public Works Department of Sandoval County, State of New Mexico.

Pueblo and Tribal Leadership: The Governors of Pueblos and the Presidents of Tribes and Chapters.

Rangeland: A type of land on which the native vegetation, climax, or natural potential consists predominately of grasses, grasslike plants, forbs, or shrubs. Rangeland includes lands revegetated naturally or artificially to provide a plant cover that is managed like native vegetation.

Recycled water or Re-Use Water: Any water that is generated from an oil or gas well, undergoes significant treatment, and is used again in an oil or gas well prior to disposal in an underground injection well.

Registered Cultural Property: A cultural property that has been placed on the official register on either a permanent or temporary basis by the Cultural Properties Committee.

Scenic Historical Marker Easily recognizable, large brown roadside signs dotting the New Mexico landscape providing vignettes on local history, geographic marvels, notable persons and political events that shaped New Mexico's heritage.

Seismic Disturbance: An instance of agitation of the earth's crust such as earthquakes.

Seismic Vibrator: A truck-mounted or buggy-mounted device that is capable of injecting low-frequency vibrations into the earth.

Setback: The minimum allowable horizontal distance between a structure and every road or lot boundary line as measured perpendicularly from the edge of the road right-of-way or lot boundary line to the structure.

Shielded: A fixture that is shielded in such a manner that light rays emitted by the fixture, either directly from the lamp or indirectly from the fixture, are projected below a horizontal plane running through the lowest point on the fixture where light is emitted

Shielding: See **Shielded**

Significant Deterioration: An increase in the ambient concentrations of an air contaminant above the levels allowed by the federal act or federal regulations for that air contaminant in the area within which the increase occurs.

Slope: The ratio of elevation change to horizontal distance, expressed as a percentage computed by dividing the vertical distance by the horizontal distance and multiplying the ratio by one hundred (100).

Spill Light. The presence of lighted area(s) beyond the primary area which the source is intended to light. Also known as light trespass.

Storage Tank (or Tanks): Any tank, excluding sumps and pressurized pipeline drip traps, used for the storage of condensate and crude oil or other liquids produced by and/or used in conjunction with any oil or gas productions. There are below-grade tanks where a portion of the tank's sidewalls is below the surrounding ground surface's elevation, and above ground storage tanks where the tank is located above or at the surrounding ground surface's elevation and is surrounded by berms.

Substantial Modification: Any modification to an oil or gas well site or to an oil or gas facility beyond normal operation, reworking, recompleting, monitoring and maintaining that results in an increase in the size or area of the surface disturbance for which approval was granted under this Ordinance.

Surface Disturbance: Any activity that disturbs the surface of the land (a) as a result of exploration for, drilling for, and production of oil or gas or (b) as a result of the construction, development, operation, or abandonment and plugging of an Oil or Gas Facility.

Surface Owner: A person who holds legal or equitable title, as shown in the records of the county clerk, to the surface of the real property on which the operator has the legal right to conduct oil and gas operations.

Surface Use Agreement: An agreement between an operator and a surface owner specifying the rights and obligations of the surface owner and the operator concerning oil and gas operations.

Toxic gas emissions: The emission of gases that are harmful to humans when inhaled or ingested in various quantities.

Traffic: pedestrians, bicyclists, ridden or herded animals, vehicles, streetcars, and other conveyances either singularly or together while using for purposes of travel any highway or private road open to public travel.

Tribe or Pueblo: Any federally recognized Indian nation, tribe or pueblo located wholly or partially in New Mexico.

Underground Source of Drinking Water (USDW): An aquifer that supplies water for human consumption or that contains ground water having a TDS (total dissolved solids) concentration of 10,000 mg/l or less and that is not an exempted aquifer.

Watercourse: A river, creek, arroyo, canyon, draw or wash or other channel having definite banks and bed with visible evidence of the occasional flow of water.

Well Pad: A work area (surface location) that is used for drilling an oil and gas well or wells and producing from the well once it is completed.

Well Site: That portion of the surface of land used for the drilling, development, production, operation, abandonment, and plugging of an Oil or Gas Well or collocated oil and gas wells, including, but not limited to, the area of land in which all equipment, excavations, and facilities used for oil and gas operations are located. A Well Site shall include, at a minimum, the area of surface disturbance associated with such uses but excluding the area of surface disturbance necessitated for the construction and use of roads.

Wildlife Corridor: Tracts of land or habitat that are linked and allow wildlife to travel from one location to another to find food, shelter, a mate and a place to raise their young.

Wildlife Habitat: The area where an animal that is not domestic lives under natural conditions and which provides all requirements for food and shelter.

ARTICLE IV. PROVISIONS APPLICABLE TO OIL AND GAS PERMITS COVERED BY THIS ORDINANCE

A. Referrals.

At any time during the review process for a permit hereunder, the Director, Planning and Zoning Commission, or the County Commission may refer an application to other government agencies, cities, counties, Tribes, Pueblos or entities having a statutory or regulatory interest in the matter, or otherwise affected by the application, for review and comment. The application review process shall not be delayed by such a referral.

B. Consultants.

If at any time during the review process for a permit hereunder, the Director, Planning and Zoning Commission, the County Commission, the Public Works Department Director or the Fire Chief determines that the application for a permit for oil or gas development may result

in significant adverse impacts on Wildlife Habitat, Cultural Properties, ground or surface water quality, air quality, sound, traffic or otherwise believe that they require outside expertise to discharge their duties, they may, at the expense of the Applicant, hire experts to review an application or to evaluate specific technical issues related to those matters. If they determine that the County should retain such experts for a specified period of time, they shall notify the Applicant and the Applicant shall have the opportunity to provide recommendations of experts to the County; but the final decision on which consultant(s) to be used shall be that of the County official(s) involved. Fees shall be charged based on reasonable and actual expenses. The Applicant shall give the County a certified or bank check, wire transfer or letter of credit deposit in an amount to be determined by the requesting authority for each application submitted, to cover all of the County's necessary and appropriate expenses incurred to engage such consultants and experts.

C. Burden of Proof.

It shall not be the responsibility of the County to disprove any claims or assertions made by an Applicant or Operator under this Ordinance. In every case where an application is made for any permit hereunder, the Applicant shall demonstrate by clear and convincing evidence that any claim or assertion that it makes is true.

D. Compliance

Where the Director is charged in this ordinance with the responsibility of ensuring compliance with Oil and Gas Permits, the Director may, at the expense of the Operator, hire such experts, consultants, companies or agencies as are deemed necessary to perform this function. The Operator shall give the County a certified or bank check, wire transfer or letter of credit deposit in an amount to be determined by the Director to cover all of the County's expenses as are considered necessary to ensure compliance.

ARTICLE V. APPLICATION PROCESS FOR PRELIMINARY OIL AND GAS EXPLORATION ACTIVITIES PERMIT.

A. Preliminary Oil and Gas Exploration Activities Permit.

A Preliminary Oil and Gas Exploration Activities Permit ('Preliminary Exploration Permit") is required for all Preliminary Oil and Gas Exploration Activities including geophysical surveys, seismic surveys, gravity surveys, magnetic surveys, and other exploratory activity that may only cause surface disturbance and do not include Drilling. A Preliminary Exploration Permit is not required for aerial surveys, mapping activities, and other exploratory activities that do not result in surface disturbance.

B. Application Process for a Preliminary Oil and Gas Exploration Activities Permit

(1) The application shall include the following information:

(a) The name, address and contact information of the Applicant and the name, title and local contact information, if different.
(b) The name(s) and contact information for all companies that will conduct Exploration

Activities and documentation of their liability and workers compensation insurance coverage.

(c) A schedule describing the beginning and ending dates of the Exploration Activities.

(d) A map showing all areas to be explored, all access roads and the names and locations of any historical, archeological or cultural sites (Cultural Properties) listed in the Register of Cultural Properties of the New Mexico Historic Preservation Division and any cultural sites identified by Pueblo and Tribal Leadership within one (1) mile of the site.

(e) An emergency services map showing the name, description and location of all hazardous, flammable and explosive materials on the Oil or Gas Facility and their GPS coordinates. The map shall include the size, type and content of storage facilities for these materials The information the emergency services map contains shall be held confidentially by the County Fire Chief and shall only be disclosed in the event of an emergency. Any changes in the type and location of these materials shall be reported to the County Fire Chief within five (5) business days.

(f) A list of the surface exploration technologies and equipment to be used in carrying out the activities.

(g) Proof that Applicant has the legal right to access the subsurface minerals.

(h) A notarized letter from the Surface Owner(s) granting access for the Exploration Activities.

(i) Copies of Easement agreements including any such agreements with Tribes and Pueblos for all access roads to and from the area to be explored.

(j) If Cultural Properties exist within one (1) mile of the site the Applicant shall provide a description of preventive measures that shall be taken to protect Cultural Properties from damage during the Exploration Activities.

(k) Certification, signed by an officer of the Company, that the Applicant will comply with all applicable local, state and federal laws listed under Article I, Section E of this Ordinance regarding the protection of Cultural Properties located within one (1) mile of the site.

(l) A description of measures to be taken to mitigate any potential public nuisance or adverse impacts on public safety, Cultural Properties, wildlife habitat, livestock, roads, traffic or the County budget.

(m) A detailed description how storm water drainage will be managed within the project area to prevent runoff from leaving the well site.

(n) A description of measures to be taken so that all areas that have been disturbed will be restored and returned to their natural state.

(o) A description of how the area will be kept free of rubbish and trash.

(p) Notification of the request for a Provisional Exploration Activities Permit to all Pueblo and Tribal Leadership located within the County at the expense of the Applicant in a manner specified by the Director.

(2) Director may require:

(a) The Applicant to provide a cash bond security to cover any repairs or restoration of any Surface Disturbance or Cultural Property damaged during the Exploration Activities.

(b) A Road Improvement Agreement for use of County and private roads.

(c) The Applicant to provide Environmental Compliance History and verification of Financial Solvency, as described in Article VIII, Sections I and J in this ordinance.
(d) Public notice of the proposed Exploration Activities, specified by the Director and paid for by the Applicant.
(e) Any additional information reasonably necessary.

C. Review for Administrative Completeness of Application.

(1) The Director shall review all submitted materials and information for the Preliminary Exploration Activities Permit for completeness within ten (10) business days. If an application for a permit is deemed incomplete the Director shall provide a written determination to the Applicant explaining why the application is incomplete and the manner in which the application can be made complete.
(2) Applicants have thirty (30) days to submit the additional required materials unless the Director agrees in writing to a longer time period.
(3) If the required materials are not submitted within the given time period, the application shall be deemed withdrawn and the Applicant will not be entitled to a refund of any application fees.
(4) Upon submission of the additional materials, the application shall be reviewed again for completeness according to the appropriate review schedule and the Applicant shall have up to two other opportunities, if necessary, to complete the application.
(5) If the Director determines that there is a substantial change in the proposed development the Applicant shall file an amended application which shall be reviewed for completeness within ten (10) business days.

D. Review Process and Criteria for Preliminary Exploration Activities Permits.

(1) Completed applications for Preliminary Exploration Permits shall be reviewed by the Director within twenty (20) days.
(2) The Director shall consider the following criteria when making a determination for approval or denial of an application for a Preliminary Exploration Activities Permit.
  (a) Whether the Application includes all required documentation including proof of Mineral Rights Ownership, a notarized statement from the Surface Owner, proof of notice to Pueblo and Tribal Leadership, Easements and a map showing the location of NMED and NM Department of Transportation defined Hazardous Materials.
  (b) Whether the proposed Exploration Activity includes appropriate and sufficient measures to mitigate any public nuisance or adverse impacts on public safety, Cultural Properties, wildlife habitat, livestock, roads, traffic or the County budget.
  (c) Whether the Application demonstrates that any Surface Disturbance will not have a negative impact on storm water drainage, cause erosion or create long term damage.
  (d) Whether the Applicant has demonstrated how all areas that have been disturbed will be restored and returned to their natural state.
  (e) Whether the Applicant certifies that the area will be kept free of rubbish and trash.
(3) Any decision denying an application for a Preliminary Exploration Permit shall be in writing, and the Applicant shall be given a maximum of three opportunities to cure or correct, if possible, those grounds given as the basis for denial. In the event that the

Applicant cannot cure or correct the grounds of denial within the time frame established by the Director in the initial letter of denial, a final decision indicating denial shall be provided to the Applicant upon the expiration of that period.

E. Application Fee.

Each application shall be accompanied by a nonrefundable application fee in the amount of two hundred fifty dollars ($250.00). The application fee shall be paid by certified or bank check, wire transfer or certified funds.

F. Appeal.
A decision by the Director to approve or deny a Preliminary Exploration Activities Permit is subject to appeal in the same manner and in accordance with the procedures outlined in the CZO No. 10-11-18.7A, Section 22.

G. Duration of Preliminary Oil and Gas Exploration Activities Permits.

A Preliminary Exploration Activities Permit shall not exceed one hundred twenty (120) days and shall expire if the Exploration Activities have not commenced within that period.

H. Authority.

(1) The Director is granted the authority to impose any necessary conditions and mitigation requirements on a Preliminary Exploration Activities Permit to carry out the intent, purpose and the requirements of this ordinance.
(2) The Director is granted the enforcement authority as described in Article XVII of this ordinance to ensure Permitee's compliance with the conditions and mitigation requirements imposed in the Preliminary Oil and Gas Well Exploration Activities Permits.

I. Effect of Approval.

(1) When a Preliminary Exploration Activities Permit has been granted, such permit, along with any other required County permits and any conditions associated therewith, shall constitute sufficient authority for the commencement of the approved Preliminary Exploration Activities.
(2) Approval of a Preliminary Exploration Activities Permit provides no vested right in, or assurance of, the granting of any other permit for oil and gas activity by the County.

ARTICLE VI. OIL AND GAS EXPLORATORY DRILLING WELL PERMITS

A. Oil and Gas Exploratory Drilling Well Permit.
No oil and gas Exploratory Drilling Well shall be drilled, and no construction of such well, shall take place within the County unless an application in compliance with this ordinance has been filed and an Oil and Gas Exploratory Drilling Well Permit ("Exploratory Drilling Permit") for such activities has been approved by the Planning and Zoning Commission.

B. Onsite Visit.
(1) The Director may request or participate in an onsite visit as part of the consideration of an Exploratory Drilling Permit application.
(2) Upon submission of the completed application, the Director shall determine whether or not an onsite visit is necessary based on the site-specific information presented in the application.
(3) Where an onsite visit shall be required, the Director shall provide the Applicant with a written request for such visit.

C. Application Process for Exploratory Drilling Well Permit.
Applicants seeking to drill an Exploratory Drilling Well for hydrocarbons in areas of the County under county jurisdiction shall submit an application to the Director. The application shall include:
(1) The name, address and contact information of the Applicant and the name, title and local contact information, if different.
(2) The name and contact information of property owners, lease owners and mineral rights owners.
(3) Signed and notarized letter from the Surface Owner stating that the Applicant has complied with the Surface Owner Protection Act NMSA 1978, §§ 70-12-1 et. seq. (SOPA) or proof of bonding as required by SOPA.
(4) Proof that Applicant has the legal right to access the subsurface minerals.
(5) All required drilling permits from OCD.
(6) Copies of Easement agreements including any written Easement agreements with Tribes and Pueblos for all access roads to and from the Oil or Gas Facility.
(7) Copies of any other related agreements or permits requested by the Director.
(8) A schedule showing beginning and ending dates of Exploratory Drilling Well activities, including Well Site construction start-up dates.
(9) The name(s) and contact information for all companies that will conduct Exploratory Drilling Well activities and documentation of their liability and workers compensation insurance coverage.
(10) The Director may also require the Applicant to provide Environmental Compliance History and verification of Financial Solvency as described in Article VIII, Sections I and J in this ordinance.
(11) Property Details
(a) The legal property description and a map at a scale of 1:2,000 feet showing the location and size of the Lot on which one or more Well Pads will be located.
(b) The number and location of each Exploratory Drilling Well to be drilled on each Well Pad.
(c) The estimated depth of each proposed Exploratory Drilling Well.
(d) The location of occupied dwellings, schools, churches, hospitals, clinics, assisted living homes or cemeteries, parks, recognized open space and wildlife corridors, ranches and farms, within a one (1) mile radius of the Well Site.
(e) Fresh water supply wells, and fresh water storage reservoirs and Watercourses and lakes within a one (1) mile radius of the Well Site.
(f) Major geographic and topographic features including Slopes and Floodplains;
(g) The location of any historical, archeological or cultural sites listed in the Register

of Cultural Properties of the New Mexico Historic Preservation Division and those sites within a one (1) mile radius of the Oil or Gas Facility identified by Tribes and Pueblos in Sandoval County.

(h) All state, county, private, Tribal and Pueblo roads, including bridges, overpasses and culverts, that will be used to access the Well Site within a one (1) mile radius of the Oil or Gas Facility.

(i) The location of all fire, police, and emergency response service facilities. If these facilities are not located on the map, the Applicant shall provide the contact information, address, direction, and mileage to the nearest emergency response facility.

(j) Recorded utility and access easements.

(12) A site plan shall provide the following information for the Exploratory Drilling Well at a scale of 1:2000 feet:

(a) The estimated location of tanks, compressors, dehydrators and other equipment and facilities, including gates, pump stations, and pipelines. The site plan shall be updated as built and include the permanent location and the GPS coordinates for each well, all equipment and buildings on the Oil or Gas Facility.

(b) Existing pipeline routes, including flowlines, gathering lines and transport lines.

(13) An emergency services map showing the name, description and location of all hazardous, flammable and explosive materials on the Oil or Gas Facility and their GPS coordinates. The map shall include the size, type and content of storage facilities for these materials. The information the emergency services map contains shall be held confidentially by the County Fire Chief and shall only be disclosed in the event of an emergency. The map shall be updated as built after permit approval and submitted upon completion within five (5) business days to the County Fire Chief. Any changes in the type and location of these materials shall be reported to the County Fire Chief within five (5) business days.

(14) A narrative of proposed Exploratory Drilling Well activities that includes the following:

(a) Road Plan.

(i) The applicant shall submit an Oil and Gas road route plan that identifies roads for oil and gas related truck traffic for Exploratory Drilling Well activities, including the average and maximum gross weights of any trucks and other heavily laden vehicles. The Plan shall identify all access roads that are used including roads that will be upgraded or new roads that will be constructed. The Plan shall be reviewed and approved by the County Department of Public Works which may request revisions as needed.

(ii) The Plan must describe how all upgraded and new roads will comply with County Road Standards as specified in Article II, Section 32 of the Sandoval County, New Mexico Code of Ordinances.

(iii) The County shall require the applicant to secure Easements for County roads, for municipal, State and/or Tribal and Pueblo roads where needed.

(iv) The County may require the applicant to provide a cash bond security, a letter of credit, escrow deposit or other security acceptable to the County, and/or a Road Improvement Agreement for use of County roads.

(b) Terrain Management Plan.

(i) The Terrain Management Plan shall address the restoration of all areas of the development where there is Surface Disturbance should the Exploratory Well be plugged and abandoned or receive an approved temporary abandonment permit, as required by OCD.

(ii) The Terrain Management Plan shall include a narrative describing clear goals for post-production restoration, a schedule and description of how those goals are to be achieved, and how those restoration activities will return the well site to its natural state that existed prior to exploration. These goals shall include preventing the appearance or spreading of noxious and invasive plant species as specified in communications with the local agricultural extension office.

(iii) The Terrain Management Plan shall be approved by the Director. It shall include, but may not be limited to, the following information.

(aa) A schedule and description of terrain management activities to be conducted following a temporary abandonment approval or a final approval of plugging and abandonment of the Well Site.

(bb) A drainage map identifying natural drainage and a description how storm water will be managed within the project area to prevent the travel of runoff off the site. Where appropriate, the drainage map shall include a watershed map showing all the upper watershed area draining into or through the site. The map and the description shall be reviewed and approved by the County Engineer;

(iv) All restoration activities described in the Terrain Management Plan shall provide a Grading and Drainage Plan which shall include the following, where appropriate:

(aa) Configuration of the reshaped topography and restored drainage;

(bb) Soil treatments;

(cc) Reseeding materials and revegetation methods;

(dd) Backfill or grading requirements; and

(ee) Soil stabilization techniques.

(c) Cultural Properties Plan.

(i) The Applicant shall certify, signed by an officer of the company, that they will comply with all applicable local, state and federal laws listed under Article I, Section E of this ordinance.

(ii) The Applicant shall provide a description of the preventive measures that shall be taken to protect any Cultural Properties identified under Article VI Section C(11)(g) of this ordinance.

(iii) It is the responsibility of the Applicant to pay for any damages to Cultural Properties. Violations under applicable state and federal laws listed under Article I Section E of this Ordinance may be subject to the enforcement provisions of Article XVII in this Ordinance.

(d) Waste Management Plan.

All solid and liquid wastes must be managed in accordance with Federal, State and County law and in a manner so as to prevent pollution of the environment, conserve fresh water, and protect the public health and safety.

(i) Applicant must submit a waste management plan that identifies the type and volume of solid and liquid waste that will be generated at the Oil and Gas Facility and how and where that waste will be properly stored, transported and disposed of.

(ii) To the maximum extent practicable and in accordance with OCD Rules, as required in 19.15.34 NMAC as amended, the applicant must describe if any Produced Water generated at the Well Site will be recycled or reused for onsite reinjection purposes.

(iii) The applicant must include copies of the original agreements between the applicant and any OCD licensed waste disposal facilities, including injection wells, and copies of the OCD permits for such licensed waste disposal facilities.

(iv) The applicant must include the following information regarding the transportation off-site of any solid and liquid wastes.

(aa) Copies of the applicant's original agreements with companies that will transport solid and liquid wastes off-site; and copies of OCD permits authorizing the companies to transport solid and liquid wastes off-site to licensed OCD waste disposal facilities.

(bb) The Director may require that companies transporting solid or liquid wastes be fitted with GPS tracking systems in order to help identify responsible parties in the case of accidents or spills.

(v) Any additional information as determined by the Director.

D. Review for Administrative Completeness of Exploratory Drilling Well Permit Application

(1) The Director shall review submitted applications for Exploratory Drilling Well permits for completeness within ten (10) business days of receipt.

(2) If an application for a permit is deemed incomplete the Director shall provide a written determination to the Applicant explaining why the application is incomplete and the manner in which the application can be made complete.

(3) Applicants have thirty (30) days to submit the additional required materials unless the Director agrees in writing to a longer time period.

(4) If the required materials are not submitted within the given time period, the application shall be deemed withdrawn and the Applicant will not be entitled to a refund of any application fees,

(5) Upon submission of the required materials, the application shall be reviewed for completeness according to the ten (10) business day review schedule. The Applicant shall have up to two other opportunities, if necessary, to complete the application.

(6) After an application is deemed complete, the Director may nevertheless request additional information or studies if the Director determines that new or additional information is required in order to assess the application for compliance with this

ordinance

(7) If the Director determines during the review process that there is a substantial change in the proposed development the Applicant shall file an amended application which shall be reviewed for completeness within ten (10) business days.

E. Public Notice and Hearing Requirements for Exploratory Drilling Well Permits.

(1) Applicant shall provide notice of the hearing as required under Article X in this ordinance.
(2) The quasi-judicial hearing shall be held before the Planning and Zoning Commission.
(3) The hearing shall be held at a location within reasonable proximity to the proposed Exploratory Drilling Well location as determined by the Director so affected property owners may attend the meeting within a reasonable distance from the proposed Exploratory Drilling Well.

F. Review Process and Criteria for Exploratory Drilling Well Permits.

(1) Completed applications for Exploratory Drilling Well Permits shall be reviewed by the Director within sixty (60) days for compliance with the purpose, design and requirements of this ordinance.
(2) Upon completion of the review, the Director shall submit a written report, together with a recommendation, on whether the Exploratory Drilling Well Permit application shall be granted or denied, to the County Planning and Zoning Commission.
(3) Upon submission of the Director's report to the Planning and Zoning Commission, the matter shall then proceed through a review and final decision by the Planning and Zoning Commission.
(4) The Planning and Zoning Commission shall consider the following criteria when making a determination for approval or denial of an application for an Exploratory Drilling Well permit.
   (a) Whether the application is consistent with the goals and strategies of the Sandoval County Comprehensive Plan and the purposes and intent of the Sandoval County Comprehensive Zoning Ordinance.
   (b) Whether the application identifies appropriate and sufficient measures to be taken to mitigate any public nuisance or negative impacts on public safety, noise, glare, odors, property values, historic, cultural and archaeological resources, wildlife, livestock, roads, traffic or the County budget.
   (c) Whether the proposed Exploratory Drilling Well will cause harm to the public health, safety and welfare of the residents of the county.
   (d) Whether the application contains all required permits, agreements, including easements, and reports.
   (e) Whether the Applicant has received approval of a Road Plan from the County Public Works Department that complies with County road standards as described in Article II, Section 32 of the Sandoval County, New Mexico Code of Ordinances.
   (f) Whether the application demonstrates that the Oil or Gas Facility is able to handle emergency situations that may include explosions, fire, spills and leaks.
   (g) Whether the Applicant has provided to the County Fire Chief an emergency services

map that includes all potentially dangerous storage facilities and equipment on the Exploratory Well site, including a list of Hazardous Materials and where they are stored.

(h) Whether the Applicant certifies that the area will be kept free of rubbish and trash.

(i) Whether the application demonstrates that there are adequate protections for ground and surface water and which satisfactorily comply with the regulations of those Tribes and Pueblos that have TAS ("Treatment as a State") status as approved by the US Environmental Protection Agency.

(j) Whether the application has demonstrated that the Oil and Gas Facility will be properly restored to its natural state after OCD has granted a permit to temporarily abandon or permanently plug and abandon the Exploratory Drilling Well.

(k) Whether the Applicant has demonstrated through written documentation that he has consulted with and addressed concerns of Tribes and Pueblos in the area regarding the proposed Exploratory Drilling Well.

G. Effect of Approval.

(1) When an Exploratory Drilling Well Permit has been granted, such permit, along with any other required County permits and any conditions associated therewith, shall constitute sufficient authority for the commencement of the approved exploration well drilling activity.

(2) Approval of an Exploratory Drilling Well Permit provides no vested rights in, or assurance of, the granting of any other permit for oil and gas activity by Sandoval County.

H. Authority

(1) The Director is granted the authority to impose any necessary conditions and mitigation requirements on an Exploratory Drilling Well Permit to carry out the intent, purpose and the requirements of this ordinance.

(2) The Director is granted the enforcement authority as described in Article XVII

(3) of this ordinance to ensure Permitee's compliance with the conditions and mitigation requirements imposed in an Exploratory Drilling Well Permit.

I. Application Fee.

Each application shall be accompanied by a nonrefundable application fee in the amount of five thousand ($5,000). The application fee shall be paid to the County by certified or bank check, or wire transfer. The County shall have authority to adjust from time to time the fee set forth in this Section.

J. Appeal.

A decision by the Director to approve or deny an exploratory permit is subject to appeal in the same manner and in accordance with the procedures outlined in the CZO No. 10-11-18.7A, Section 22.

K. Expiration of Exploratory Drilling Well Permits.

An exploratory drilling permit issued pursuant to this ordinance shall expire if exploration activities have not commenced within one (1) year of the date on which the exploration

permit was issued. This one (1) year period shall be tolled pending the exhaustion of any administrative and judicial appeals.

ARTICLE VII. OIL AND GAS DEVELOPMENT PERMIT

A. No oil or gas drilling, and no construction of an oil and gas facility, shall take place within the County unless an application in compliance with this Ordinance has been filed and an Oil and Gas Development Permit ("Development Permit") has been approved and granted in accordance with this ordinance.

B. Pre-Application Meetings.

No less than thirty (30) days prior to the submission of an application for an oil and gas and gas development permit, the Applicant shall meet with the Director and such other County employees, consultants or representatives as the Director may designate, in order to discuss the anticipated application including, but not limited to, a discussion of the application process, the materials to be included in the application, the results of any prior exploration activities, including drilling, of the Applicant, the coordination of a required on-site visit, and the manner in which the Applicant intends to comply with the requirements for the submission and processing of the application.

C. Onsite Visit.

(1) All Oil and Gas Development Permit applications require an onsite visit to be arranged and conducted by the Applicant.
(2) Prior to the onsite visit, at the request of the Director the Applicant shall flag selected proposed access roads to and from the site.

D. Review for Administrative Completeness of Application.

(1) The Director shall review submitted applications for Development Permits for completeness within ten (10) business days of receipt.
(2) If an application for a permit is deemed incomplete the Director shall provide a written determination to the Applicant explaining why the application is incomplete and the manner in which the application can be made complete.
(3) Applicants shall have thirty (30) days within which to submit the additional required materials unless the Director agrees in writing to a longer time period.
(4) If the required materials are not submitted within the given time period, the application shall be deemed withdrawn and the Applicant will not be entitled to a refund of any application fees.
(5) Upon submission of the required materials, the application shall be reviewed again for completeness within the ten (10) business day review schedule. The Applicant shall have up to two other opportunities, if necessary, to complete the application.
(6) After an application is deemed complete, the Director may nevertheless request additional information or studies if the Director determines that new or additional information is required in order to assess the application for compliance with the

provisions of this ordinance.

(7) If the Director determines during the review process that there is a substantial change in the proposed development the Applicant shall file an amended application which shall be reviewed for completeness within ten (10) business days.

E. Review Process and Criteria for Oil and Gas Development Permits.

(1) Completed applications for Oil and Gas Development permits shall be reviewed by the Director within sixty (60) days for compliance with the purpose, design and compliance with the provisions of this Ordinance.

(2) Upon completion of his review, the Director shall submit a written report, together with a recommendation, on whether the oil and gas development permit application should be granted or denied, to the County Planning and Zoning Commission.

(3) Upon submission of the Director's report to the Planning and Zoning Commission, the matter shall then proceed through a review and final decision by the Planning and Zoning Commission.

(4) The Planning and Zoning Commission shall consider the following criteria when making a determination for approval or denial of an application for an Oil and Gas Development Permit.

(a) Whether the application is consistent with the goals and strategies of the Sandoval County Comprehensive Plan and the purposes and intent of the Sandoval County Comprehensive Zoning Ordinance.

(b) Whether the application identifies appropriate and sufficient measures to be taken to mitigate any public nuisance or negative impacts on public safety, noise, glare, odors, property values, historic, cultural and archaeological resources, on wildlife, livestock, roads. traffic, or on the County budget.

(c) Whether the proposed Oil or Gas Facility will cause harm to the public health, safety and welfare of the residents of the County budget.

(d) Whether the application contains all required permits, agreements, including easements, and reports.

(e) Whether the Applicant has received approval of a Road Plan from the County Public Works Department that complies with County road standards as described in Article II, Section 32 of the Sandoval County, New Mexico Code of Ordinance.

(f) Whether the application demonstrates that the Oil or Gas Facility is able to handle emergency situations that may include explosions, fire, toxic spills and leaks.

(g) Whether the Applicant has provided to the County Fire Chief an emergency services map that includes all potentially dangerous storage facilities and equipment on the Oil or Gas Facility, including a list of Hazardous Materials and where they are stored.

(h) Whether the application demonstrates that there are adequate protections for ground and surface water and which satisfactorily comply with the regulations of those Tribes and Pueblos that have TAS (Tribes as States) status as approved by the US Environmental Protection Agency.

(i) Whether the application has demonstrated that the Oil and Gas Facility will be properly restored to its natural state that existed prior to oil or gas development after OCD has granted a permit to temporarily abandon or permanently plug and abandon oil and gas wells on the Well Site.

(j) Whether the Applicant certifies that the area will be kept free of rubbish and trash.
(k) Whether the Applicant has demonstrated through written documentation that he has consulted with and addressed concerns of Tribes and Pueblos in the area regarding the proposed Oil or Gas Facility.

F. Authority.

(1) After receiving the Director's written report and recommendation, the Planning and Zoning Commission shall hold a hearing to determine whether to approve or deny an Oil and Gas Development Permit in accordance with the purpose, requirements and requirements of this ordinance.
(2) The Planning and Zoning Commission has the authority to impose any conditions and mitigation requirements, on an Oil and Gas Development Permit, as necessary, to carry out the intent, purpose, and the requirements and standards of this ordinance.
(3) The Director is granted the enforcement authority as described in Article XVII of this ordinance to ensure Permitee's compliance with the conditions and mitigation requirements imposed on the Oil and Gas Development Permit.

G. Effect of Approvals.

When an Oil and Gas Development permit has been granted within the County in accordance with this Ordinance, such permit, together with any other required County permits and any conditions associated therewith, shall constitute sufficient authority for commencement of drilling, operation, production, maintenance, repair and testing, and all other usual and customary activities associated with oil and gas development.

H. Application Fees.

Each application shall be accompanied by a nonrefundable application fee in the amount of Ten thousand dollars ($10,000.00). The application fee shall be paid by company check, cashier's check, wire transfer or certified funds. The County shall have authority to adjust from time to time the fee set forth in this Section.

I. Appeal.

The decision by the Planning and Zoning Commission to approve or deny an Oil and Gas Development Permit is subject to appeal in the same manner and in accordance with the procedures outlined in the CZO No. 10-11-18.7A, Section 22.

J. Expiration of Oil and Gas Development Permit.

A Development Permit issued pursuant to this ordinance shall expire if drilling and/or construction of at least one of the oil or gas facilities approved under the Oil and Gas Drilling Permit has not commenced within two (2) years of the date on which the permit was approved by the Planning and Zoning Commission. This two (2) year period shall be tolled pending the exhaustion of any administrative and judicial appeals.

ARTICLE VIII: OIL AND GAS DEVELOPMENT PERMITS REQUIRED APPLICATION AND DOCUMENTS

A. General Information

(1) The name, address and contact information of the Operator and the name, title and local contact information, if different.
(2) The names and contact information for all companies that will conduct any operation at the Oil or Gas Facility, and proof that each company carries sufficient liability and workers compensation insurance coverage. Names and contact information should be updated at least three days before a previously unlisted company begins operations at the well site.
(3) The name and contact information of property owners, lease owners and mineral rights owners.
(4) A list of all Oil or Gas Facilities owned or operated in New Mexico by the Applicant.
(5) A schedule showing beginning and ending dates for each major phase of operations at each well site including facility construction estimated start-up dates.

B. Required Permits and Agreements

(1) Approved permits to drill from OCD and an approved Oil and Gas Form C-104 (Request for Allowable and Authorization to Transport).
(2) If applicable, an approved Air Quality Permit from the Air Quality Division of the New Mexico Environment Department.
(3) Approval from the Office of State Engineer where required.
(4) Copies of Easement agreements including any written Easement agreements with Tribes and Pueblos.
(5) Signed and notarized letter signed from the Surface Owner stating that the Applicant has complied with the Surface Owner Protection Act NMSA 1978, §§ 70-12-1 et. seq. (SOPA) or proof of bonding as required by SOPA.
(6) Proof that Applicant has the legal right to access the subsurface minerals.
(7) Copies of any other agreements or permits requested by the Director.

C. Scope of Operations

(1) The number of wells to be drilled on each well pad.
(2) The estimated depth of each proposed well.
(3) If horizontal bores are to be used, the likely direction and proposed length of each bore.
(4) The number and function of any necessary ancillary facilities.

D. Property Details

The Application shall include a map of the Facility, drawn at a scale of 1:2000 feet and depicting the following features:
(1) The legal property description showing the location and size of the Lot on which one

or more Well Pads will be located.
(2) The location of the proposed well(s) and Oil or Gas Facility equipment.
(3) Major geographic and topographic features such as slopes, and floodplains.
(4) Fresh water supply wells, fresh water storage reservoirs and Watercourses and lakes within one (1) mile of the proposed Oil or Gas Facility.
(5) All state, county and private roads, existing and proposed, and bridges, overpasses and culverts, that will be used to access the Facility within a one (1) mile radius of the Oil or Gas Facility.
(6) Existing and proposed Flowline routes, including gathering lines and transmission lines.
(7) The location of all fire, police, and emergency response service facilities. If these facilities are not located on the map, the Applicant shall provide the contact information, address, direction, and mileage to the nearest emergency response service.
(8) The location of occupied dwellings, schools, churches, hospitals, clinics, assisted living homes or cemeteries, parks, recognized open space and wildlife corridors, ranches and farms, within a one (1) mile radius of the Oil or Gas Facility.
(9) Federal and state lands within a one (1) mile radius of the Oil or Gas Facility;
(10) Incorporated and unincorporated municipalities within a one (1) mile radius of the proposed Facility.
(11) The location of any historical, archeological or cultural sites listed in the Register of Cultural Properties of the New Mexico Historic Preservation Division and those sites within a one (1) mile radius of the Facility identified by Tribes and Pueblos in Sandoval County.
(12) Recorded utility and access easements.

E. Site Plan.

The site plan for the Oil and Gas Facility with a map showing the proposed location of:
(1) Oil or Gas Wells with GPS coordinates for each well.
(2) Tanks, pits, compressors, dehydrators, tank batteries, and other equipment.
(3) Parking facilities.
(4) Other ancillary buildings.
(5) Flowlines and gathering lines.

F. Emergency Services Map.
An emergency services map showing the name, description and location of all hazardous, flammable and explosive materials on the Oil or Gas Facility and their GPS coordinates. The map shall include the size, type and content of storage facilities for these materials. The information the emergency services map contains shall be held confidentially by the County Fire Chief and shall only be disclosed in the event of an emergency. The map shall be updated as built after permit approval and submitted upon completion within five (5) business days to the County Fire Chief. Any changes in the type and location of these materials shall be reported to the County Fire Chief within five (5) business days.

G. Easement.

In order to allow for the county's post-abandonment remediation the application shall include a 20-foot access Easement to the proposed well and a 30-foot radius Easement around each well. Within thirty days after the granting of a Development Permit, the Director shall have the easement recorded in the office of the County Assessor.

H. Housing.

The estimated number of non-local personnel for each phase of the Operation and a description of the housing plans for non-local personnel.

I. Environmental Compliance History.

The Applicant shall provide a list, certified by an officer of the company, of Oil and Gas Facilities where Applicant, or Applicant's parent company, has had a permit suspended or revoked or been cited for violations of any laws or regulations, both in- and out-of-state, during the past five years, and whether any of these violations are still outstanding.

J. Financial Solvency.

The Applicant must submit financial statements audited by a certified public accountant for each of the past five years to demonstrate financial solvency. If the Applicant is a subsidiary of another company, the information provided must include five-year financial statements for the parent company that have been audited by a certified public accountant.

K. Required Reports

The following reports must be submitted with the Application for the Application to be considered complete.

(1) Aquifer Protection Siting Report

(a) Process.
Unless it has been demonstrated to the satisfaction of the Director with the advice of the Consultant that there is no USDW present in the Area of Review, the Applicant shall submit an Aquifer Protection Siting Report describing the hydrology, geology, hydrogeology and seismology within the Area of Review. The Report shall demonstrate to the satisfaction of the Director, with the advice of the Consultant, that the proposed drilling site has adequate safeguards in place to ensure the proposed activity will not lead to Degradation of identified USDW (Underground Sources of Drinking Water) in the Area of Review.

(b) With the advice of the consultant the Director may specify a smaller Area of Review based on identified geological, hydrological and seismological information.

(c) Existing data: To perform the analyses required by Article VIII, Section K(2), the Applicant may use existing geological, hydrological and seismological data, which include academic and peer reviewed studies or government reports, and which are publicly available. If the applicable existing data is insufficient to perform the

analysis required by Article VIII Section K(2), the Applicant shall develop applicable data.

(d) If the proposed site lies in a known un-faulted region, a previously submitted Aquifer Protection Siting Report may be included in the Report instead of new analysis, provided that the prior Report pertains to an Oil or Gas Well sited within the Area of Review.

(e) The Director shall hire a Consultant, paid for by the Applicant, to review and evaluate the Applicant's report. Based on the information required to be submitted under Article VIII Section K(2)(b)(i) – (iii), the Consultant shall make a recommendation to the Director on the geological, hydrological, seismological suitability of the proposed Well Site for oil and gas development.

(f) Approval of Well Site: Based on the Report and the recommendation of the Consultant, the Director may approve the requested Well Site.

(g) The Report shall be included in the Application for final approval by the Planning and Zoning Commission.

(2) Aquifer Protection Siting Report - Analysis Requirement.

(a) The Aquifer Protection Siting Report shall contain an analysis performed by the Applicant, except when the proposed site lies in a known un-faulted region as described in Article VIII Section K(1)(d) or when there are no USDWs within the Area of Review as described in Article VIII Section K(1)(a). The analysis must demonstrate that geologically, hydrologically and seismologically the proposed Well Site has adequate safeguards in place to ensure the proposed activity will not lead to Degradation of the identified USDW (Underground Sources of Drinking Water) in the Area of Review. At the request of the Applicant the Director may determine that the analysis is confidential information as defined by Section 2–174 of the Sandoval County Code of Ordinances.

(b) The analysis performed by the Applicant shall include the following information:

(i) An analysis of the structural and stratigraphic geology, the hydrogeology, and the seismicity within the Area of Review.

(ii) An analysis of the local geology and hydrology of the Area of Review, including, at a minimum, detailed information regarding stratigraphy, structure and rock properties, aquifer hydrodynamics and mineral resources.

(iii)Based on the analysis provided under this subsection (b)(i) and (ii) the Report shall demonstrate that adequate safeguards are in place to ensure the proposed activity will not lead to Degradation of any USDW in the Area of Review. Such a demonstration can be made by showing:

(aa) the Confining Zone is laterally continuous and free of transecting, transmissive faults or fractures over the Area of Review sufficient to prevent the movement of fluids into USDW and;

(bb) the Confining Zone contains at least one formation of sufficient thickness and with lithologic and stress characteristics capable of preventing vertical propagation of fractures; and

(cc) the Confining Zone is separated from the base of the lowermost USDW by at least one sequence of permeable and less permeable strata that will provide an added layer of protection for USDW.

(3) Cultural Properties Report.

(a) The Applicant shall identify all Cultural Properties within a one (1) mile radius of the Facility and of any upgraded or new roads to and from the Facility, that are listed under the National Register of Historic Place and the State Register of Cultural Properties.

(b) The Applicant shall request from the New Mexico Historic Preservation Division a list of any registered and unregistered Cultural Properties that may be impacted by oil and gas development within a one (1) mile radius of the proposed Facility and by any upgraded or new roads to and from the Facility. Copies of the NM Historic Preservation Division's list of potentially impacted properties and written recommendations to address potential threats to these Cultural Properties shall be included in the Cultural Properties Report.

(c) The Applicant shall inform, by registered mail, return receipt requested, Pueblo and Tribal Leadership ("Leadership") within the County of the proposed development and request information about specific Cultural Properties that may be impacted. The letter shall include the specific location of the facility and all access roads as required under Article VIII, Section D(11). The Applicant shall also include information regarding estimated traffic and the type of drilling equipment that will be used, including vibrating equipment, during each phase of oil and gas development. The Applicant's written communication must contain the name, address and phone number of the individual with whom the Tribe or Pueblo shall communicate. Any responses from the Tribal or Pueblo Leadership must be in written form and submitted with the Application. If there is no response from a Tribe or Pueblo within twenty-one (21) calendar days, the Applicant shall include that information in the Cultural Properties Report.

(d) A Tribe or Pueblo concerned about unmarked sacred sites or any cultural sites that are confidential to that Tribe or Pueblo may work with the Director to develop a confidentiality agreement to ensure the protection of those sites and their non-public disclosure.

(e) When all required Cultural Property information and comments are received, as required in this Section, the Applicant shall describe how to protect the cultural, historical, archeological sites or unmarked burial grounds located on the Oil or Gas Facility and on improved and new roads from the impacts of oil and gas Development. This information shall be submitted in the Cultural Properties Report.

(4) Wildlife Habitat and Livestock Report.

(a) The Report shall include the following information:

(i) The Applicant shall contact the New Mexico Department of Game and Fish to request the location of key Wildlife Habitat and Critical Habitat areas, as mapped and defined by the New Mexico Department of Game and Fish and the US Fish and Wildlife Service, that are located within one half (½) mile of the perimeter of the proposed Oil and Gas Facility.

(ii) The identification of livestock and rangeland areas within ½ mile of the

perimeter of the Oil and Gas Facility.

(iii) A list of mitigation measures recommended by the NM Department of Game and Fish to the Applicant to address potential Habitat Fragmentation and other Wildlife Habitat concerns specific to the Facility location.

(iv) The Applicant shall contact the NM Livestock Board to request information about appropriate mitigation measures to address potential livestock concerns specific to the Facility location. The report shall include the written responses of the NM Livestock Board.

(v) The Applicant shall seek input from any Tribes and Pueblos that may have concerns and suggestions for addressing Wildlife Habitat and Livestock issues. Written communications between these Tribes and Pueblos shall be included in the application along with the Report.

(iv) Mitigation measures may include, but are not limited to, the following:

(aa) Limiting the total area of disturbed ground for well pads.

(bb) Limiting the number of and distance of new roads.

(cc) Reducing noise levels as required in Article IX, Section E

(dd) Fencing or other measures to protect wildlife and livestock from oil and gas operations.

(ee) Burying power lines, flowlines and gathering lines in or adjacent to roads to eliminate or reduce clearing of vegetation and habitat fragmentation.

(b) Based upon permit review, the Director shall include appropriate mitigation measures as a condition of the Permit to Drill.

L. Road Plan

The Applicant shall submit a Road Plan, prior to the beginning of Facility construction, to identify and mitigate the likely impacts of the proposed Oil and Gas Facility on existing roads, bridges, overpasses and culverts, including impacts on road capacity, traffic flow, the surface materials and conditions, safety, and any Cultural Properties in the area. The Road Plan shall include the following information:

(1) Plan Requirements:

(a) The proposed traffic route plan, including the number of daily and peak hour trips to and from the site, and the duration, for each phase of operations.

(b) The location of existing paved and unpaved private and public roads, highways, bridges, overpasses and culverts that will be used to and from the site during each phase of oil and gas operations including construction, drilling, production, transportation and closure.

(c) A list of the bridges, overpasses and culverts to be used to and from the site and a certification of their ability to handle vehicles carrying weights of 80,000 pounds.

(d) Identify roads that require upgrading to standards capable of handling vehicles carrying weights of 80,000 pounds.

(e) Identify any schools, licensed daycare or medical facilities, churches or public facilities, businesses, farms and ranches and wildlife corridors that are located within one half (½) mile of the proposed traffic route plan and mitigation actions that address the traffic and noise impacts in these areas.

(f) A description of existing traffic conditions of the proposed traffic circulation plan including weekday peak hours.
(g) The projected daily traffic impact on residential roads, including weekday peak hours and weekends.
(h) Identify existing traffic control measures on the traffic route plan, including speed limits, traffic signals, and identify any potential existing driveway and turning movement problems.
(i) Identify any location on the traffic route plan with a high accident frequency, as identified by the Director. For any location with a high accident frequency, include an assessment of whether oil and gas development is likely to increase accident frequency, and identify any mitigation measures to be implemented.
(j) Copies of right of way or easement agreements including any agreements with Tribes and Pueblos.
(k) An onsite Facility vehicle circulation plan, parking patterns and exits from the site.
(l) Identify maintenance and upgrading costs of existing county and private roads.
(m) The design and cost of any new roads projected to be constructed.
(n) Identify activities that may create dust, and proposed mitigation or remediation techniques to control the impacts of dust off of the well site.
(o) Any additional information required by the Director.

(2) Other Plan Requirements.

(a) The Plan shall include an identification of any Cultural Properties along the routes within one (1) mile leading to the Oil and Gas Facility. If such sites are identified, the Plan, with input from the affected Tribes and Pueblos and the NM Historic Preservation Division, shall describe how traffic will be controlled along with any other mitigation measures to avoid negative impacts to cultural sites along the route to the site. Written communications between the Applicant, the New Mexico Historic Preservation Division and affected Pueblos and Tribes shall be included in the application for an Oil and Gas Development Permit. It is the responsibility of the Applicant to ensure that any identified Cultural Properties are protected from any potential damages due to oil and gas Development including transportation.
(b) The Plan must identify any federally and state designated historic and scenic highways and by-ways near or on the routes to and from the Oil and Gas Facility and how to mitigate potential damages to those historic and scenic highways.
(c) The Plan must address how to minimize the impact of oil and gas Development related traffic in residential neighborhoods and near homes, schools, hospitals, churches, businesses, farms and ranches, and wildlife corridors.

(3) Road Plan Approval.

(a) The Plan shall be reviewed and approved by the County Department of Public Works which may request revisions as needed.
(b) All upgraded and new roads must be in accordance with the County road standards as required under Article II, Section 32 of the Sandoval County, New Mexico Code of Ordinance.

(c) The Director shall require the applicant to secure Easements for County roads, for municipal, State and/or Tribal and Pueblo roads where needed.
(d) The County may require the applicant to provide a cash bond security, a letter of credit, escrow deposit or other security acceptable to the County, and/or a Road Improvement Agreement for use of County roads.
(e) The Public Works Department Director shall accept or deny the Road Plan within thirty (30) business days of receipt of the Plan from the Planning and Zoning Department Director. The Applicant or the Public Works Director may ask the Planning and Zoning Department Director, in writing, for a reasonable amount of additional time. The Director shall grant a request for additional time unless there is a compelling reason for ruling that lack of approval is in effect a denial of the plan.
(f) Applicant may appeal the Public Works Director's denial of a Road Plan to the Planning and Zoning Commission.

M. Sound Management Plan

(1) Applicant must provide a Sound Management Plan that identifies hours of increased sound emissions due to oil and gas operations including the, type, frequency spectrum and intensity to be emitted and proposed mitigation measures for Oil and Gas Facility operations that include truck traffic, drilling and fracturing, well pumps and compressors.
(2) Sound emitted from Facilities shall be limited to a level which protects the public health, welfare and quality of life of residents, conserves property values and does not harm livestock and wildlife, as required under Article IX, Section E.
(3) The Plan shall identify any sound sensitive locations within a one-half (1/2) mile radius of the facility, including, schools, libraries, hospitals, group homes, recreation areas, Livestock and Wildlife Habitats.
(4) Sound mitigation measures shall ensure that sound sensitive locations shall not be subject to increases of more than five (5) A-weighted decibels (dBA) above site-specific ambient baseline sound levels, measured as specified in Article IX, Section E.
(5) Sound measurements shall be taken by a qualified sound Consultant approved by the Director and paid for by the Applicant.

N. Emergency Response Plan

The Emergency Response Plan shall include the following:
(1) Name, address and phone number, including a 24-hour emergency number of at least two local persons responsible for emergency field operations at the Facility.
(2) Describe any emergency services that will be available on-site.
(3) Identify all fire, police and emergency response services in or near the County that are within a two (2) mile radius of the Facility. Identify other possible fire, police and emergency response services outside the two-mile area.
(4) Letters from the local police, fire, and emergency services department heads confirming that they have the capacity, equipment and training needed to address potential emergencies that may occur including explosions, fires, gas or water pipeline leaks or ruptures, hydrogen sulfide, methane or other toxic gas emissions, or hazardous material vehicle spills or vehicle accidents.

(5) An Oil or Gas Facility emergency services map showing the name, description and location of all Hazardous Materials and equipment on the Facility and their GPS coordinates. The map shall also include the size, type and content of all Flowlines, gathering lines, wells and tanks. The information the emergency services map contains shall be held confidentially by the County Fire Chief and shall only be disclosed in the event of an emergency. The map shall be updated as built after permit approval and after completion submitted within five business days to the County Fire Chief.

(6) A written specific Emergency Response Plan for each type of potential emergency associated with the Oil and Gas Facility operations. These include: explosions, fires, gas or water pipeline leaks or ruptures, hydrogen sulfide, methane or other toxic gas emissions, or hazardous material vehicle spills or vehicle accidents. The Emergency Response Plan shall be site specific and take into account site topography and seasons. The Plan shall describe whether a reliable method of communication with these emergency services is in place or is planned and the circumstances that will cause the Applicant to seek outside emergency assistance.

O. Air Quality Protection Plan.

(1) The Applicant shall submit copies of any permits that have been approved by the Air Quality Control Bureau of the New Mexico Environment Department. If no Air Quality Permit has been obtained, Applicant shall provide written documentation as to why the Oil and Gas Facility does not need an Air Quality permit. The Air Quality Protection Plan shall also include specific regulated compounds projected to be released during each phase of the oil and gas operations and measures to be used to ensure air emissions will not exceed federal and state standards.

(2) Air Quality Plan Approval.

(a) The Director shall seek comments on the Air Quality Plan from the County Fire Chief, from County Health departments and other County departments, from municipalities and neighboring Tribes and Pueblos.

(b) The Director may approve the Air Quality Plan as submitted, request additional information, require changes before approval, or deny approval of the plan.

(c) The Applicant may appeal the Director's denial of the Air Quality Plan to the Planning and Zoning Commission.

(d) Once the Air Quality Plan is approved, the Director shall ensure that the plan is made available to County Departments, local municipalities and Tribes and Pueblos. The Fire Chief shall assist municipalities that request help in preparing for any potential air quality emergency identified in the plans.

P. Water Use and Protection Plan.

The Water Use and Protection Plan shall contain sufficient information to demonstrate to the Director with the advice of the Consultant that the proposed oil and gas Development activity protects surface and ground water for present and potential use as domestic, agricultural, and wildlife water supply.

(1) General requirements.

(a) The Applicant shall submit an Aquifer Protection Siting Report as required under Article VIII, Section K(1) that demonstrates that the proposed oil and gas Well Site has adequate safeguards in place to prevent Degradation of any USDW within the Area of Review.
(b) If, after receiving the Consultant's evaluation of the Aquifer Protection Siting Report, such demonstration has been made, the monitoring requirements described below may be waived by the Director with the advice of the Consultant.
(c) The Water Use and Protection Plan shall describe in detail how the Operator will meet the requirements of Article VIII, Section K(1) that include:
(i) Initial baseline testing of surface and ground water;
(ii) Ongoing testing and monitoring of on-site ground water during Drilling and Production;
(iii)Leak and spill protection measures; and
(iv)Any other protection measures as determined by the Director with the advice of the Consultant and in consultation with the Applicant.
(d) The Applicant shall demonstrate how the Plan complies with downstream water quality standards established by Tribes having "Treatment as a State" status.
(e) The Applicant shall include a certification signed by an officer of the company that it will comply with requirements of the OCD, NMED and the New Mexico State Engineer relating to water.

(2) Water Usage and Sources.

(a) The following information regarding water usage shall be submitted as part of the application:
(i) Volume of water to be used, the type of water to be used including fresh, effluent, brackish and produced, and the source of the water; and
(ii) Copies of written approvals from any public or private well owners from the appropriate governmental agencies, Tribes and Pueblos must be provided for all sources of water to be used in the drilling for, and the production of, oil and gas.
(iii) Non-potable water shall be used whenever possible.

(3) On-Site Ground Water Monitoring Measures.

The Water Use and Protection Plan shall describe the Applicant's proposed design and plans for baseline and on-site ground water monitoring to protect water quality, unless the Applicant has received a waiver as described in Article VIII, Section P (1)(b), or can demonstrate to the Director, with the advice of the Consultant, how existing monitoring wells provide adequate ground water monitoring. The Plan shall include the following:

(a) The number and placement of monitoring wells as determined by the Director with the advice of the Consultant and in consultation with the Applicant prior to the construction of the Oil or Gas Facility. The monitoring wells shall be designed and constructed according to the New Mexico Environment Department's Monitoring

Well Construction and Abandonment Guidelines (March 2011) and any additional below the surface requirements recommended by the Consultant.

(b) A system of prompt detection and reporting of leaks and spills that could potentially lead to the Degradation of ground water quality according to the requirements and standards of the New Mexico Water Quality Act.

(c) A set of analytes and measurements related to water quality and oil and gas drilling and production activities to be monitored for with the aid of monitoring wells. The final list of analytes will be selected by the Consultant with input from the Applicant, for baseline and ongoing measurement. For automated sensor systems a small sample of analytes and measurements, including methane or a methane surrogate, and specific conductance may be chosen by the Applicant and approved by the Consultant. Should the automated sensors indicate an above baseline measurement, a full sampling of the complete analyte and measurement list agreed to must be immediately taken.

(d) The set of analytes and measurements for baseline and ongoing measurement shall include but not be limited to Naturally Occurring Radioactive Materials (NORM), pH, specific conductance, total dissolved solids, methane, alkalinity, total dissolved gases including methane, major anions, major cations, total petroleum hydrocarbons and BTEX compounds (benzene, toluene, ethylbenzene and xylenes).

(4) The Plan shall include the methods the Applicant will use to perform an initial baseline sampling of any Watercourses and lakes within the Area of Review. With the approval of the Consultant the applicant shall select from the list of analytes and measurements used for groundwater sampling defined in Section O.(3)(d) above.

(5) The Plan shall include a description of measures that the Operator will implement to ensure the containment of any leaks or spills that could impact surface water and USDWs. These measures may include the following:

(a) Physical barriers to be installed and maintained under and around the facility or group of facilities.

(b) A description of the method and frequency of on-site inspections for spills or leaks that will be performed by the Operator.

Q. Waste Management Plan.

All solid and liquid wastes must be managed in accordance with Federal, State and County law and in a manner so as to prevent pollution of the environment, protect wildlife and livestock, conserve fresh water, and protect the public health and safety.

(1) Applicant must submit a waste management plan that identifies the type and volume of solid and liquid waste that will be generated at the Facility and how that waste will be properly stored, transported and disposed of.

(2) To the maximum extent practicable and in accordance with OCD Rules, as required in 19.15.34 NMAC as amended, the applicant must describe how any Produced Water

generated at the Facility will be recycled or reused for onsite reinjection purposes, if any.

(3) The Applicant must include copies of the original agreements between the Applicant and any OCD licensed surface waste management facilities, including injection wells, and copies of the OCD permits for such licensed waste disposal facilities.

(4) The Applicant must include the following information regarding the transportation off-site of any solid and liquid wastes.

(a) Copies of the applicant's original agreements with companies that will transport solid and liquid wastes off-site; and copies of OCD authorizing the companies to transport solid and liquid wastes off-site to licensed OCD waste disposal facilities.

(b) The Director may require that companies transporting solid or liquid wastes be fitted with GPS tracking systems in order to help identify responsible parties in the case of accidents/spills.

(5) The Plan shall describe all the roads that will be used to transport off-site the solid and liquid waste produced by the Oil or Gas facility and the estimated number of trips per week needed to remove that waste from the site. This information must be included in the Road Plan required under Article VIII, Section L to be reviewed and approved by the Department of Public Works.

R. Terrain Management Plan.

(1) The Terrain Management Plan shall include restoration activities that will be conducted before and after each phase of development with the site. The Terrain Management Plan shall include but not be limited to the following information:
(a) Number of acres disturbed during each phase of development and a description of current land use and reasonably foreseeable future land use on the property. The description of current land use should, at a minimum, list the current land use designation of the property as designated by the County Planning and Zoning Department.
(b) The pre-drilling grades of the entire site.
(c) A soil analysis describing the soil characteristics of the site and any limitations those characteristics may pose to the proposed development.
(d) A description of any erosion mitigation techniques to be used such as silt fencing, vegetative buffers, and berms.
(e) A description of the noxious and invasive plant species of concern within the vicinity of the Well Site and the proposed mitigation techniques to prevent the appearance or spread of these species. The Applicant shall consult with the local agricultural extension office and the local Natural Resources Conservation Service office for information about noxious and invasive plant species that exist in the area and the best methods available to contain or eliminate them. Any written recommendations from these offices shall be submitted with the Plan.

(f) A schedule and description of interim activities following the completion of each phase of Development within the Facility to include but not be limited to, grading, erosion control, revegetation methods and materials, and soil amending.

(g) A schedule and description of proposed final restoration activities to be completed once OCD final approval has been received for the plugging and abandonment of the well or for temporary abandonment. These restoration activities described in the Terrain Management Plan may include but are not limited to the following:

(i) Configuration of the reshaped topography and restored drainage to its natural state that existed on the site prior to development.

(ii) Soil treatments

(iii) Reseeding materials and revegetation methods

(iv) Backfill or grading requirements

(v) Soil stabilization technique

(h) A description of how those restoration activities will impact the anticipated future use of the property, including written approval from the surface owner and the owner of the mineral rights.

(i) A drainage map identifying natural drainage and a description how storm water will be managed with the project area to prevent the travel of runoff. Where appropriate, the drainage map shall include a watershed map showing all the upper watershed area draining into or through the site. The map and the description shall be reviewed and approved by the County Engineer.

(2) The Terrain Management Plan shall be submitted to the local Flood Control Authority and the Soil and Water Conservation Districts, if any, located near the Oil and Gas Facility for their review.

(3) The Terrain Management Plan shall be submitted to Pueblo and Tribal Leadership within the County located within a one (1) mile radius of the Oil or Gas Facility.

(4) The Applicant shall submit a certification signed by the chief officer of the company that the Applicant shall not deposit, drain or divert into or upon any public highway, street, alley, drainage ditch, arroyo, storm drain, sewer, gutter, creek, stream, river, lake or lagoon, any oil or liquid containing any chemicals, hydrocarbons, or any drilling mud, sand, water or saltwater, or in any manner permit, by any means, any of such substances to escape from any property owned, leased or controlled by the Applicant.

S. Proof of Plugging Bond.

Applicant must provide certification that OCD's financial assurance requirements, as set forth in 19.15.8 NMAC as amended, have been satisfied.

ARTICLE IX. GENERAL PROVISIONS FOR OIL AND GAS DEVELOPMENT PERMITS

A. Light Direction

(1) All lighting must comply with the New Mexico "Night Sky Protection Act", *NMSA 1978, supra.*

(2) The Oil and Gas Facility shall use lighting Fixtures or Luminaires that are hooded, shielded, directed downward and inward to prevent glare and Spill Light that goes

beyond the primary area where the light source is intended.
(3) Light sources should be chosen for energy efficiency, long life and low maintenance.
(4) Nothing in this section should be construed to compromise the safety of operations at the drilling site in accordance with the requirements of the Federal and State Occupational Health and Safety laws and rules.

B. Visual Impact

(1) Oil & Gas Facilities shall be painted or otherwise made to be harmonious with the surrounding environment in uniform or camouflaging non-contrasting, non-reflective color tones, similar to BLM Standard Environmental and Supplemental Colors coding system. Color matched to land, not sky, and slightly darker than adjacent landscape.
(2) To the extent possible, Oil and Gas Facilities shall not be located so as to impair or obstruct federally or state designated historic and scenic byways and sites designated as Scenic Historic Markers by the NM Historic Preservation Commission. Such sites and byways are significant to New Mexico and the County's visual beauty and are important to tourism and to local property owners. Any agreements with the Surface Owner as required under the SOPA shall be taken into consideration.

C. Setback Requirements

(1) No oil or gas facility shall be permitted within a floodplain as mapped and designated by the Federal Emergency Management Agency (FEMA).
(2) Setbacks shall not apply to roads used solely for the purpose of accessing oil or gas facilities.
(3) Setbacks shall be measured from the center of roads and from the seasonal high- water mark of watercourses, or the outer boundary of the affected surface water feature.
(4) No oil or gas facility shall be permitted within the following distances:

(a) Distance from lot line or property where a residential structure is present: 1,500 feet;
(b) Distance from lot line or property where schools or playgrounds: ½ mile;
(c) Distance from lot line or property where places of worship, hospitals or institutions are present: 1,500 feet;
(d) Distance from lot line of property where electrical, natural gas, solar, wind and related public water utility structures are present: 1 mile;
(e) Distance from lot line of property where non-residential occupied structures are used, excluding A (4) (b) and (c), including agricultural and livestock structures: 400 feet;
(f) Distance from existing water wells permitted by the NM Office of the State Engineer: 1,000 feet for individual wells; 2,000 feet for wells serving 5 or more households;
(g) Distance from Continuously Flowing Water Courses and Lakes: 1,000 feet;
(h) Distance from a cultural, historic, or archaeological resource as recommended by New Mexico Historic Preservation Division. This distance may be increased upon written request by a Tribe or Pueblo for the preservation of a Cultural Property;

(i) Distance from a county, state or federal designated trail or open space, whether part or not part of a state or federal forest or preserve: 500 feet;
(j) Distance from a public road or highway: 250 feet;
(k) Distance from lot line of property where non-occupied agricultural facilities are used including acequias, stock ponds and irrigation structures: 500 feet.

(5) These setbacks are minimal standards. The Director may recommend greater setbacks depending on topography, Cultural Properties, livestock, wildlife habitat and other factors.
(6) Surface Owner agreements establishing setbacks shall not be subject to A (4).

D. Fencing.

Unless provided for in an agreement with the applicable surface owner, all Facility locations shall have perimeter fencing and a locked gate to prevent harm to the public, Livestock and wildlife. The design and construction of the required fencing shall be a chain link fence to a minimum height of six (6) feet as approved by the Director. The Director shall have a key or other access mechanism to any locked gates on the site.

E. Sound Control Standards

(1) All operations during the construction, maintenance, and operation of the oil and gas facility shall be conducted in such a manner as to minimize to the greatest extent practical all types of sound emissions at the property boundary of the permitted Oil and Gas Facility.
(2) Intermittent operations including mobile vehicles or equipment, drilling and work-over rigs, will conduct their operations in a manner that does not create a noise nuisance to surrounding residents, schools, hospitals, group homes, public gathering areas, or to Livestock and wildlife.
(3) Continuous operations including well site compression and pump- jacks, shall use the following noise mitigation measures to minimize disturbance
(a) Exhaust from all engines, motors, coolers and other mechanized equipment shall be vented away from the closest existing residences unless otherwise specified by NMED permit restrictions.
(b) All facilities with engines or motors not electrically operated shall be equipped with hospital grade mufflers. Such equipment shall be installed and maintained in proper working condition.
(c) All mechanized equipment associated with the oil and gas facility shall be anchored or mounted on vibration dampeners so as to minimize transmission of vibration through the ground.
(d) All Oil and Gas Facilities that have compressors, engines or motors which generate sound will be placed behind a maintained, acoustically designed barrier or be contained within a maintained, acoustically insulated structure to further reduce sound and to provide less visual impact.

(e) The Director may require additional noise abatement measures, which include, but are not limited to, the following:
  (i) Installation of electric engines and/or motors.
  (ii) Vegetative screening consisting of trees and shrubs placed within the fenced enclosure.
  (iii) Solid wall or fence of acoustically insulating material surrounding all or part of the facility.

(4) Acceptable Sound Levels
  (a) Based on the default baseline limits on noise levels for areas zoned as rural, residential, commercial or industrial in the Sandoval County Comprehensive Zoning Ordinance, the following acceptable sound levels shall apply.
  (b) Sound levels during daytime hours from 7AM to 7PM shall not exceed 15 dB(A) above the following default baseline ambient noise levels for rural, industrial, commercial or industrial areas where the Oil and Gas Facility is located.

Zone	Default Baseline	Increase	Day Maximum
Rural	30 dB(A)	+15 dB(A)	= 45 dB(A)
Residential	40 dB(A)	+15 dB(A)	= 55 dB(A)
Commercial	50 dB(A)	+15 dB(A)	= 65 dB(A)
Industrial	60 dB(A)	+15 dB(A)	= 75 dB(A)

  (c) During nighttime hours from 7PM to 7AM, sound levels shall not exceed 5 dB(A) above the following default baseline ambient noise levels for rural, industrial, commercial or industrial areas where the Oil and Gas Facility is located.

Zone	Default Baseline	Increase	Night Maximum
Rural	30 dB(A)	+5 dB(A)	= 35 dB(A)
Residential	40 dB(A)	+5 dB(A)	= 45 dB(A)
Commercial	50 dB(A)	+5 dB(A)	= 55 dB(A)
Industrial	60 dB(A)	+5 dB(A)	= 65 dB(A)

(5) Sound Measurement.
  (a) Prior to the start-up of a new well or modification to an existing well, the operator shall demonstrate initial compliance with this section by requesting a site-specific ambient baseline sound level measurement from a qualified sound expert to be approved by the Director and paid for by the Applicant.
  (b) The sound pressure level shall be measured at the property boundary in the direction of the area receiving the noise, or as close as practical to this location.
  (c) In all sound level measurements, the existing ambient noise level from all other sources in the area shall be considered to determine the contribution to the sound level by the oil and gas operation.
  (d) Sound pressure levels shall be measured to determine average dB(A) over a period of

time in order to be able to compare the site specific ambient daytime and nighttime noise levels to the default baseline levels as described in Section E (4) (b) and E (4) (c).

(6) Emergencies.

The provisions of this section shall not apply to the emission of sound for the purpose of alerting persons to the existence of an emergency, or the emission of sound in the performance of emergency work.

(7) Complaints.

(a) Upon receipt of a noise complaint that appears to originate from the oil and gas facility, the Director shall within 24-hours investigate the complaint. The Director may hire a qualified sound consultant, who shall be paid for by the Operator, to set up an independent sound measuring system to verify the situation. The Operator shall be given 24-hours to correct the problem from the source.

(b) The Director shall maintain records of all noise complaints, the dates when filed and how the outcome, including any mitigation measures, the Operator may have been required to take.

F. Waste Disposal.

(1) On-site surface disposal of wastes of any kind is prohibited.

(2) The Operator shall ensure that all solid, liquid and sewage waste are securely contained on the site and properly disposed of according to all applicable Federal, State and County regulations. The Operator shall remove all on site Oil and Gas Facility Produced Water unless it is stored and used for reuse or recycling.

(3) All oil and gas produced solid and liquid waste must be transported and disposed of in permitted OCD Facilities.

(4) All solid Drilling Wastes including cuttings, spent drilling muds, membranes, filters and other solid wastes and Produced Water shall be tested and disposed of as required by OCD rules (19.15.35 NMAC as amended).

(5) To minimize the volume of waste, whenever possible the applicant shall reuse or recycle Produced Water on the pad site where the waste was generated in accordance with OCD rules. These include provisions requiring that the recycling or re-use of Produced Water not be permitted for any use which involves contact with fresh water zones. In addition, the permittee shall comply with the OCD rules regarding hydrogen sulfide gas and NORM (19.15.11 NMAC as amended and 19.15.35 NMAC as amended.)

(6) Closed-loop systems for Produced Water, fracturing fluids are required. The use of on-site injection wells, pits, temporary or permanent, and ponds will require that the applicant apply for a variance as described in Article XIII of the CZO and that includes the following information:

(a) A detailed statement explaining the need for a variance; and

(b) A detailed written demonstration that the variance will provide equal or better protection of fresh water, public health and the environment.

G. Flowlines and Gathering Lines

(1) Operator may construct Flowlines and gathering lines on the approved site but no pipeline shall exceed the size necessary for transporting oil and gas produced on the site. Applicant/Operator shall bury all permanent Flowlines and gathering lines no less than thirty-six (36) inches below the surface, include a leak detection system that includes pressure flow meters, flow balancing, and a computer alarm and communication system in the event of a suspected leak and restore the Surface as nearly as possible to its former condition. Operator shall use steel pipe in all pipelines in which pressure is anticipated to be in excess of 300 psi unless the material transported is highly corrosive, in which case other types of pipe meeting industry standards may be used.

(2) Applicant must ensure that all Flowlines and gathering lines are platted and filed as built within five days after completion in the office of the Sandoval County Assessor.

H. Storage Tanks

(1) Except as otherwise specifically mandated by OCD, tanks used for the storage of condensate, crude oil, or other liquid hydrocarbons produced by and/or used in conjunction with any Oil and/or Gas Facility or Facilities, shall be equipped with vapor recovery units and managed such that there are no emissions.

(2) All above ground storage tanks shall be equipped with a secondary containment system including lining to protect against leaks and spills, sufficient to contain the volume of fluid in the tanks, as approved by OCD.

(3) All below grade tanks shall be constructed and maintained according to applicable OCD regulations.

I. Trash and Debris.

Operator will maintain all locations and well sites upon which operations have taken place clear of all litter, trash, and other waste and shall not store unused equipment at the location or site.

J. Road and Traffic Standards.

(1) Road Improvements Agreement

In order for the County to be assured of the completion of required road improvements, the Operator shall agree to one of the following:

(a) The Operator shall install and construct such roads, bridges, overpasses and culvert improvements, if any, as are required by this ordinance and in the manner and to the design standards provided in Article II, Section 32 of the Sandoval County New Mexico Code of Ordinances. Prior to the construction of any improvements or the submission of any bond or other improvement guarantee, the Operator shall furnish the County with all plans necessary for the construction of such improvements. These plans shall be reviewed and approved by the County Public Works Department.

(b) The Operator shall provide a cash bond security, letter of credit, escrow deposit or other security acceptable to the County, in which case, the County shall install and

construct such road improvements.

(2) Roads and Traffic Standards

(a) Chains on heavy equipment shall not be permitted on paved County roads. All damage to County roads directly attributable to the installation, construction and operation of oil or gas facilities shall be promptly repaired at the Operator's expense.
(b) Heavy equipment shall not be used on roads with ruts measuring six (6) inches or more in depth.
(c) Speed limits shall be set at a level to prevent the creation of excessive dust and erosion.
(d) Location of signs and markers.
(i) The operator shall provide perimeter and other on-site and off-site signs and markers advising the public of the oil and gas Development activity and related hazards that may be present including, but not limited to, warning of truck traffic.
(ii) The operator shall submit a signage plan that shows the number, type, size and location of signs and markers.
(e) The amount of traffic generated by the proposed development shall not cause public roads to operate at a level less than what can be met by current capacity and structural conditions.
(f) In the event that traffic generated by the development increases the burden on or causes a deterioration of County roads, the Operator shall be required to pay a pro-rata share of the costs incurred to improve the County road. The pro-rata share shall be determined by the County's Public Works Director and the Operator.
(g) Trucks and all other vehicles shall not exceed the regulated weight limits as defined by the New Mexico Department of Transportation for each class and type of vehicle on any roadway, bridge, overpass or culvert.

(3) Timing of Transportation Activities

(a) Truck deliveries of equipment and materials associated with drilling and/or production, well servicing, site preparation, and other related work conducted on the oil or gas facility shall be limited to between the hours of 8:00 AM and 5:00 PM except in cases of fires, blowouts, explosions and any other emergency or where the delivery of equipment is necessary to mitigate the emergency.
(b) In coordination with County and/or municipal officials and the Pueblo and Tribal Leadership of any impacted tribes or pueblos, the Operator shall avoid truck traffic under the following conditions:
(i) During times of school bus transport of children to and from school locations.
(ii) During public events, festivals and feast days.

K. Well Sites and Facilities.

(1) The Oil or Gas Facility shall not be used for the storage of flowlines or other equipment or materials except during the drilling, operating, or servicing of Oil or Gas Wells. Where not already required by another permitting agency, the Operator may seek a written

exception/permission for staging of Flowlines or other equipment from the Director which shall be approved upon a demonstration of need, for a length of time to be determined by the Director and the Surface Property Owner. Where storage permitting is authorized by another permitting agency, a copy of the storage permit or authorization shall be submitted to the Director.

(2) Site dimensions for an Oil or Gas Facility or Facilities, shall be the size necessary to provide a safe work area and minimize surface disturbance.

(3) Following the Completion of an Oil or Gas Well, the pad shall be reduced to the minimal size required to operate the site, and the surrounding disturbed surface shall be reclaimed.

L. Gas Flaring and Venting.

Flaring and venting of gases from an approved Oil and Gas Facility shall be in accordance with 19.15.18.12 NMAC.

M. Water Protection.

The Operator shall take all measures necessary to avoid Degradation of surface water and ground water.

(1) Ground water monitoring requirements at the Well Site.

(a) Unless the Operator has received a waiver under Article VIII, Section P(1)(b), the Operator shall establish an onsite ground water monitoring system and conduct baseline testing in accordance with the approved Water Use and Protection Plan.

(b) If an Operator who has received a waiver as provided in Article VIII, Section P(1)(b), encounters a USDW during drilling operations the Operator shall immediately cease drilling operations and inform the Director by phone and by email. With the advice of the Consultant, the Operator shall install a monitoring well system before drilling or production operations continue.

(c) Prior to commencing construction of the Well Site, the Operator shall, with the advice of the Consultant, take water samples from the approved on-site ground water monitoring wells.

(d) The Operator shall also sample monitoring wells for baseline data before any hydraulic fracturing activity takes place. The analysis, not the sampling, of fracturing chemicals deemed proprietary may be delayed until after the Operator provides OCD with the list of substances actually used as required by NMAC 19.15.16.19 B and 19.15.16 C.

(e) The Operator shall report all baseline and ongoing sampling analysis results to the Director, the Consultant, OCD and NMED.

(f) In the event that ongoing, on-site, ground water monitoring samples at the well site indicate a potential violation of the New Mexico Water Quality Act the Operator shall have the test repeated. If the violation is confirmed by the laboratory, the Operator shall immediately take measures to reduce these contaminants to acceptable legal standards. The Operator shall immediately notify, in writing, private and public well owners within the Area of Review as well as Tribes and Pueblos whose land is within

the Area of Review, the Director, the Consultant, NMED and OCD, providing them with copies of the results of the tests and the measures taken to reduce contaminants to acceptable legal standards.

(2) Public and Private Wells Baseline Testing Requirements.

(a) Subject to surface owner permission and prior to the commencement of drilling, the Operator, at his expense, shall sample four (4) private wells and each public water well within one (1) mile of the Well Site for the baseline analytes and measurements agreed to as required under section O(3)(d) of the Water Use and Protection Plan. Subsequent sampling shall be done at Operators expense between 6-12 months and 60-72 months after completion.
(b) The Operator shall provide the baseline testing results to the sampled public and private water well owners, to the Director and the Consultant, to OCD and to NMED;
(c) If a private water well owner refuses to have the Operator test the well, the Operator shall make a good faith effort to ensure that a waiver form, developed by the Director, is signed. The form, requesting a signature, shall be sent to the well owner by registered mail, return receipt. Both the Director and the Operator shall maintain a copy of the signed waiver form and a list of those who have not signed the form.

(3) Surface Water Baseline Testing Requirements.

(a) Subject to owner permission and with the advice of the Consultant, the Operator shall sample Watercourses and lakes within the Area of Review prior to the commencement of drilling to establish baseline information.
(4) The Operator shall report all baseline and ongoing sampling analysis results to the Director, the Consultant, OCD and NMED.

(5) All sampling and testing required in this section must be conducted by an independent Consultant and analyzed in a NMED certified laboratory, both of which are to be approved by the Director with the advice of the Consultant. These services shall be paid for by the Operator.

(6) Spills and Leaks.

(a) The Operator shall install and maintain the spill and leak protection measures described in the Water Use and Protection Plan.
(b) The Operator shall perform regular inspections of the facility to detect leaks, spills or maintenance needs as described in the Water Use and Protection Plan.
(c) In the event of a detected spill or leak, the Operator shall comply with OCD protocols as required by 19.15.29 et seq. NMAC. In addition to the required notification of NMED and OCD, notify and inform the Director and the Consultant of the required remediation plan and the results.
(d) The Operator shall promptly notify Pueblo and Tribal Leadership, the Mayors of municipalities, as well as private land owners, within the Area of Review of any Major Release, as defined by OCD, and inform them of the measures that are being

taken to remedy the problem. Copies of these notices shall be filed with the Director, who shall maintain a record of each Operator's spill and leak history.

N. Air Quality Protection.

The oil and gas operations shall, to the maximum extent practicable, avoid causing a Significant Deterioration of air quality. In no event shall the oil and gas operations be operated in a manner that allows emissions from the operations to create a public nuisance, and specifically, venting or flaring operations shall not be carried out in a manner that is injurious to the health, safety or property of neighboring residents.

O. Emergency Response

(1) A list including quantities of chemicals, fluids, and other dangerous Hazardous Materials used in drilling, fracking, production and transportation, where they are stored, and any corresponding Material Safety Data Sheets, must be provided to the County Fire Chief before beginning operations. The list of fluids used in the fracturing of a well shall be provided in a sealed envelope which shall be securely stored but immediately accessible should an incident posing a threat to health, safety and the general welfare occur.

(2) If the Operator, or any of the Operator's contractors, store any chemicals and other Hazardous Materials used for Fracturing or other purposes at any location in the County, the following information shall be provided to the Fire Chief.

(a) The GPS coordinates of each location where the chemicals are stored;

(b) A complete list of all Hazardous Materials stored at each location in a sealed envelope, to be securely held by the Fire Chief but immediately accessible should an incident occur;

(c) The location of the nearest fire station or fire-fighting equipment; and.

(d) Assurances that any fire, flood or other incident at a storage site posing a threat to health, safety or the general welfare will be immediately reported to emergency services, and that Applicant or contractor will fully cooperate with emergency services efforts to contain the threat.

(3) The Emergency Response Plan, including the list of Hazardous Materials, shall be updated and resubmitted to the county on a semi-annual annual basis or within ten (10) business days if the conditions change such as change of ownership or Operator.

(4) The County must be immediately notified of any emergency contact information changes.

(5) The County shall be immediately notified of any emergency even those that may be handled on-site.

(6) If the County determines that emergencies are due to Operator negligence the County may request reimbursement for its share of the cost of those emergency services.

(7) Hydrogen Sulfide Contingency Plan.

(a) Applicant shall provide a copy of the Hydrogen Sulfide Contingency Plan submitted to OCD according to 19.15.9 NMSA to the Director.

(b) The Director shall send a copy of the Applicant's Hydrogen Sulfide Contingency Plan to the municipalities – incorporated and unincorporated Pueblo and Tribal Leadership within one mile of the Facility.

P. Cultural, Historical and Archeological Sites.

(1) All Cultural Properties as identified in the Cultural Properties Report must be protected. Prior to the commencement of oil and gas operations, there shall be written agreements between the Applicant and the NM Historic Preservation Division and between the Applicant and all Tribes and Pueblos that have identified potentially affected Cultural Properties. These agreements shall specify all measures to be taken to ensure the protection of identified Cultural Properties.
(2) In the event that a cultural, historical or archeological site, including unmarked burial grounds, is discovered or identified during any phase of the development and the production of oil and gas at the Facility, or during the repair of roads and the construction of new roads that are required for traveling to and from the site, the Operator shall comply with all applicable local, state and federal laws listed under Article I, Section E of this ordinance. These include: the American Indian Religious Freedom Act; the Archaeological Resources Protection Act; the NM Cultural Properties Protection Act; the National Environmental Policy Act; the National Historic Preservation Act; the National Scenic Byways Program; the Native American Graves Protection and Repatriation Act; the NM Prehistoric and Historic Sites Act; and the NM Scenic Byways Program.
(3) A violation under this section may be subject to the enforcement provisions of Article XVII in this ordinance.

Q. Abandonment, Plugging and Restoration.

(1) The Operator shall submit to the County copies of all OCD approved plugging and abandonment forms whether temporary or permanent.
(2) The Operator shall include a written certification that all Flowlines and gathering lines have been removed and a statement of the use to be made of the Facility following restoration, including a discussion of the utility and capacity of the reclaimed land to support the Surface Owner's preferred use and the consideration which has been given to making restoration operations consistent with surface owner plans, and the terrain in its natural state prior to drilling.
(3) Soils.
  (a) Soils having severe limitations, or which are shown as unsuitable for the intended purposes, shall not be used for those purposes unless the Operator has clearly demonstrated in the Terrain Management Plan how the soil limitations are to be overcome or mitigated.
  (b) All topsoil stripped from the surface and retained on or off the site shall be carefully stockpiled in a manner to prevent its erosion or loss, contamination by on-site operations, and in a state to facilitate its re-application to the disturbed areas during restoration.

(c) Any necessary grading or clearing should, to the extent possible, follow, preserve, match, or blend with the natural contours and vegetation of the land and should not increase the possibility for erosion.
(d) All changes made to the existing soil composition and arrangement shall be compatible with the soil stability and erodibility as demonstrated in the soil survey, if a soil survey was required in the application.
(e) The Operator shall take sufficient measures to prevent dust arising from any area where the surface is disturbed; however, oil and gas waste water shall not be used for dust suppression.

(4) Drainage and Erosion.
(a) Using appropriate grading and erosion control methods throughout all Oil and Gas operations, including any soil and terrain restoration, the maintenance and restoration of natural or well-controlled drainage flows shall be preserved.
(b) To the extent possible, the Operator shall preserve the natural drainage existing on the Facility prior to Development.
(c) Water that drains from the well site shall not contain pollutants or sedimentary materials at a greater concentration than would occur in the absence of the development.
(d) Drainage from the Facility shall not cause erosion outside of the Facility boundary to a greater degree than would occur without the presence of the Development.

(5) Vegetation.
(a) During development and operation, the Operator shall minimize damage to existing vegetation.
(b) There shall be no introduction of, or increase in the prevalence of, invasive or noxious plant species within the well site or associated areas also under restoration as a result of oil and gas Development.

(6) Restoration.
(a) The Operator shall begin interim and final restoration activities as soon as practical upon completion of each phase of development.
(b) The Operator shall reseed by drilling on the contour, or any other method approved by the Director.
(c) The Operator shall obtain vegetative cover that equals at a minimum 70% of the native perennial vegetative cover, which has not been impacted by overgrazing, fire, or some other damaging intrusion, and shall maintain that vegetative cover for at least two (2) successive seasons.
(d) The Operator shall remove from the areas under restoration all buildings, equipment, materials, Flowlines and gathering lines, and waste and debris related to the Oil and Gas activities.
(e) The Operator shall notify the County at least 10 days in advance of the date that final restoration activities are to begin and also notify the County when restoration activities have been completed.
(f) Revegetation shall be monitored semi-annually for three (3) years; planted vegetation or seedlings which are not established after two (2) years shall be replaced.

ARTICLE X. NOTIFICATION REQUIREMENTS FOR PERMITS, VARIANCES AND APPEALS.

A. The following provisions only apply to Exploratory Drilling Wells and Development Wells.
   (1) Notification of the time and place of any permit, variance or appeals public hearing for an Exploratory Drilling Well and a Development Well shall be displayed on the County website and published in a newspaper of general circulation in the County at least fifteen (15) days prior to the hearing. This notice shall appear in either the classified or legal advertisements section of the newspaper and at one other place in the newspaper calculated to give the general public the most effective notice and, when appropriate, shall be printed in both English and Spanish. In addition, the notice shall be posted on the proposed or existing Oil and Gas Facility entrance to the property on which the facility is or is proposed to be located and posted in at least four conspicuously publicly accessible places in the closest incorporated municipality located near the existing or proposed Oil and Gas Facility. To ensure reasonable notice to affected persons the Director may require additional postings.
   (2) The notice shall give the name of the Applicant, a description and location of the proposed development and the location and description of the proposed hearing.
   (3) Notice of the public hearing shall be mailed, at the expense of the Applicant, by certified mail, return receipt requested, to:
      (a) The applicant(s);
      (b) The owner(s), as shown by the records of the County Assessor, of the property on which the Facility is proposed to be located, if different from the applicant(s);
      (c) The owners, as shown by the records of the County Assessor, within a two (2) mile radius of the exterior boundary of the lot on which the proposed Oil and Gas Facility is or will be located, excluding public right-of-way. If any notice is returned undeliverable, the County shall attempt to discover the addressee's most recent address and shall remit the notice by certified mail, return receipt requested;
      (d) All Pueblo and Tribal Leadership located within the County shall be notified by the County of any request for any Oil and Gas Facility hearing as regulated by this ordinance;
      (e) All state and federal agencies responsible for state and federal lands and incorporated municipalities within five (5) miles of the proposed well site shall be notified by the County.
      (f) The County shall provide notice by email to any other person, municipality, agency or organizations that has previously filed a request with the Director to receive hearing notices for an Application for an Oil and Gas Exploratory Well Permit, for an Oil and Gas Development Permit, for variances or for appeals.
   (4) Posting of application materials and written comments
      (a) All completed application materials shall be posted on the County website ten (10) business days prior to the hearing.
      (b) The public shall be allowed to submit written comments up to seventy-two (72) hours prior to the hearing.
      (c) The public shall be notified to whom to submit written comments, the deadline for submission and the name, address, including email address, of the Director.

(d) All written comments shall be posted on the County website no later than seventy-two hours prior to the hearing.
(e) The Director shall address all significant issues raised in public comments and the ordinance approval criteria in determining whether to recommend to P and Z the granting or denial of the permit.

ARTICLE XI. PUBLIC HEARING. LOCATION.

A. The quasi-judicial hearing for and Exploratory Drilling Well Permit or an Oil and Gas Development Permit shall be held before the Planning and Zoning Commission.
B. The hearing shall be held at a location within reasonable proximity to the proposed or existing Oil or Gas Facility location as determined by the Director so affected property owners may attend the meeting within a reasonable distance from the proposed or existing Oil or Gas Facility.

ARTICLE XII. INSURANCE REQUIREMENTS.

In addition to the financial assurance required by the OCD and other laws, the Operator shall carry the insurance policy or policies required below provided by an insurance company or companies authorized to do business in New Mexico. In the event such insurance policy or policies are cancelled, the operator will take immediate corrective actions to reinstate the insurance policy or policies, and notify the County of said corrective action.

A. General Requirements.

(1) The County, its officials, employees, agents and officers shall be endorsed as an "additional insured" on the required policies.
(2) Certificates of insurance shall be delivered to the Sandoval County, Planning and Zoning Commission, 1500 Idalia Road, Building D, Bernalillo, NM 87004, evidencing all the required coverage, including endorsements, prior to the commencement of operations requiring notice.
(3) Each policy shall be endorsed to provide the County a minimum thirty-day notice of cancellation, non-renewal and/or material change in policy terms or coverage. A ten days' notice shall be acceptable in the event of non-payment of premium.

B. Standard Commercial General Liability Policy.

(1) This coverage must include premises, operations, blowout or explosion, products, completed operations, sudden and accidental pollution, blanket contractual liability, underground resources and equipment hazard damage, broad form property damage, fire, independent contractors' protective liability and personal injury.
(2) This coverage shall further provide a limit of liability of not less than Five Million Dollars ($5,000,000) per occurrence.
(3) The policy or policies shall provide that they may not be cancelled without written notice to the County of at least thirty (30) days prior to the effective date of such cancellation.

C. Pollution Insurance:

(1) Unless the policy or policies under B include environmental damages, the County shall require a pollution insurance policy or policies that provide standard pollution liability insurance with a coverage of not less than $ 15,000,000 per occurrence, issued by an insurance company authorized to do business in the State, and that names the applicant as insured and the County as additional insured.
(2) Such insurance policy shall be maintained in full force and effect from the date of approval of the Oil and Gas Development permit by the County Planning and Zoning Commission and continuing in force until the well is plugged and abandoned in accordance with the applicable state statutes, OCD regulations, and the Terrain Management Plan as approved by the County Engineer.
(3) A separate policy is not required if pollution coverage is included as part of the commercial general liability insurance policy required by this Section as long as the pollution coverage is not less than Fifteen Million Dollars (15,000,000).
(4) The insurance policy or policies shall provide that they may not be cancelled without written notice to the County at least thirty (30) days prior to the effective date of such cancellation.

D. The Applicant, if offering a plan of self-insurance, may provide a certificate of insurance as required by this Section issue pursuant to such plan provided that such plan has been approved by the New Mexico Division of Insurance and the County Manager.

ARTICLE XIII. NOTICE OF DECISIONS.

The County shall notify Applicants in writing of decisions regarding application for Oil and Gas Facilities by the Director and by Planning and Zoning Commission. The County shall also notify, in writing, all government agencies involved in the review process for Oil and Gas Facilities, and the Leadership of the Tribes and Pueblos who received notices of meetings for application review.

ARTICLE XIV. CHANGE OF OPERATOR.

A. If a permitted facility undergoes a change of Operator or a change of Operator name, the new Operator shall submit a copy of the applicable OCD permits within ten (10) business days of the permit being approved by OCD.
B. The new Operator shall provide updated emergency and other contact information within ten (10) days of the change.
C. The new Operator shall also present proof of adequate insurance as required in Article XII.
D. The new Operator must demonstrate that it is financially solvent, as required under Article VIII, Section J, and has no outstanding environmental violations, as required under Article VIII, Section I.
E. The new Operator must provide a statement signed by a corporate officer that the Operator will abide by all the terms of the permit that was granted to the prior Operator.
F. Once the information required under Sections A – E above has been provided and found complete by the Director, the county permit may be transferred to the new Operator.

ARTICLE XV. NONCONFORMITIES

The procedures for evaluation of a potential Non-Conforming Use are established in Section 18 (1), Nonconformities, Sandoval County Comprehensive Zoning Ordinance.

ARTICLE XVI. VARIANCES.

Application for variance of any of the standards associated with any permit contained within this Ordinance shall be submitted in accordance with the CZO No. 10-11-18.7A, Section 18.

No such variance shall be approved unless the Applicant and/or property owner demonstrates by clear and convincing evidence that, if granted, the variance will have no significant effect on the health, safety and welfare of the County, its residents and other service providers and is consistent with the intent and purpose of this Ordinance.

ARTICLE XVII. ENFORCEMENT

A permittee who fails to comply with the Oil and Gas Ordinance, the Sandoval County Comprehensive Zoning Ordinance or the terms or conditions of any permit issued pursuant to the Oil and Gas Ordinance, shall have committed a violation and shall be held responsible for the violation and be subject to administrative, civil or criminal penalties as well as other equitable and legal remedies.

A. Minor Violations.

(1) If any permittee violates any provision of this ordinance or any provision of any permit granted under this ordinance, and such violation does not directly cause material harm to the public health and safety of county residents, to the environment and to Cultural Properties, the Planning and Zoning Division Director shall issue a written citation to such person describing the violation and the corrective actions required giving the permittee no more than thirty (30) days to mitigate the violation.
(2) The citation shall conspicuously and in bold face type state: "If not paid, this fine shall constitute a lawful debt which will be collected pursuant to legal process and may be assessed as a lien upon the property upon which the violation exists. If the violation is remediated by the County or by a contractor hired by the County, the actual costs of remediation shall be added to the fine.
(3) The fine for violating Article XVII, Section A of this ordinance shall not exceed $300 or the maximum legally allowable, or imprisonment for ninety days, or both the fine and imprisonment. The fine shall be payable to the County. The fine may be waived at the sole discretion of the County if the alleged permittee commences and completes satisfactory actions to remediate the alleged violation within the time allotted to mitigate the violation.
(4) Each day that a violation exists shall constitute a separate violation of the Ordinance.
(5) Nothing in this section shall preclude the County from taking such other lawful action as is necessary to prevent or remedy any violation, such as seeking injunctive relief, abatement, suspension or revocation of a permit, or forfeiture of any financial assurance

deposited with the County to prevent or remedy a violation of this ordinance.

B. Major Violations.

When the Director, or the Director's authorized representative, determines that a violation of this ordinance or the terms and conditions of any permit issued under this ordinance, has resulted in, or is imminently likely to result in, a Major Release, or material harm to the public health and safety of county residents, to the environment or to Cultural Properties, the permittee shall be electronically or personally delivered a Cease and Desist Letter by the County, giving the permittee up to thirty (30) days, depending on the seriousness of the alleged violation, in which to correct the violation. Failure to correct the violation may result in the permittee receiving a summons for violating the Sandoval County Oil and Gas Ordinance and the provisions of the permit and having the permit suspended or revoked.

(1) The Director may suspend or revoke the permit after notice and an opportunity for a public hearing. In assessing whether to suspend or revoke the permit, the Division may consider the seriousness of the violation and any good-faith efforts to comply with the applicable requirements.
(2) The Director may suspend or revoke the permit when the permittee has received a Compliance Order from the New Mexico Oil Conservation Division or from the New Mexico Environment Department.
(3) Nothing in this section precludes the County from filing a criminal, civil and administrative action simultaneously to stop the permittee from harming the health, safety, environment and the Cultural Properties of the County.
(4) The violation citations under Article XVII, Sections A or B shall be issued to the permittee. When possible, the citation shall contain the address of the property on which the violation is alleged to exist, the legal description of the property or both. The citation shall be hand-delivered to the alleged permittee if possible, or may be mailed to the alleged permittee and posted upon the property. Any of the previously listed forms of notice shall constitute sufficient service of notice under the law.
(5) Any citation issued for violation of this Ordinance shall state the name of the alleged permittee, the date the citation was issued, the type of violation, and the section of this Ordinance under which the violation is issued. The citation shall, if possible, list the action necessary to cure the alleged violation.
(6) The Director shall maintain a record of minor and major violations committed by permittees, the dates the violations occurred, the type of violations, any mitigating circumstances, the dates when the violations were resolved and the corrective actions taken to resolve the violations.
(7) The Director is granted the authority to ensure that permitted Oil and Gas Facilities are in compliance with the oil and gas ordinance, including the permit conditions, and the CZO.

ARTICLE XVIII. INTERPRETATION.

In the event that this Ordinance and the CZO are in conflict, the more stringent provisions shall apply. Otherwise, this Ordinance and the CZO, where applicable, are to be enforced together.

ARTICLE XIX. ASSESSMENTS AND REPORTS.

A. Assessment of Oil and Gas Ordinance

(1) The Director shall conduct an ongoing assessment of the oil and gas ordinance to determine whether any procedural or operational improvements are needed and to assess any new changes in state or federal laws or regulations or relevant court decisions

(2) By March of 2021 the Director shall report to the Planning and Zoning Commission the experiences and challenges of the oil and gas ordinance and whether the Commission should consider any additions or modifications to discuss and recommend to the Board of County Commissioners.

ARTICLE XX. SEVERABILITY AND EFFECTIVE DATE.

A. If any provision of this ordinance shall be held invalid or non-enforceable by any court of competent jurisdiction for any reason, the remainder of this ordinance shall not be affected and shall be valid and enforceable to the fullest extent of the law.
B. As necessary to protect the public health and safety, this ordinance proposed for adoption shall take effect 30 days upon approval by the Sandoval County Board of County Commissioners.

Aquifer Water Protection & Oil and Gas Ordinance

Citizens Working Group (CWG) Ordinance Team

October 10, 2018

Submission for the Sandoval County New Mexico County Commission

LEGAL REVIEWS

Aquifer Water Protection & Oil and Gas Ordinance

Sandoval County New Mexico
Citizens Working Group (CWG) Ordinance Team

ORDINANCE LEGAL REVIEW

UNM School of Law Natural Resources and Environmental Law Clinic

July 16, 2018

LEGAL REVIEW SUBJECT

Questions Relating to Regulation of Oil and Gas in Sandoval County

- What is Sandoval's County Power to Ban or Burden Hydraulic Fracturing?
- Can Sandoval County ban injection wells?
- Are local governments required to comply with tribal water standards?
- Is the New Mexico Water Quality Control Commission compliant with federal water law?
- Does the State Engineer have sole authority over the appropriation and regulation of water rights?

ORDINANCE LEGAL REVIEW PURPOSE

To meet the ordinance legal solidity requirement, the Ordinance Team has signed an agreement with the University of New Mexico's Law Clinic and other attorneys to review our draft ordinance text and research selected critical legal questions.

MEMORANDUM

TO: Mary Feldblum
Sandoval County Citizens Working Group; Ordinance Team

FROM: Meaghan Baca, UNM NREL Clinic Student

DATE: July 16, 2018

RE: Questions Relating to Regulation of Oil and Gas in Sandoval County

The Sandoval Country Citizens Working Group ("CWG") has requested the University of New Mexico School of Law Natural Resources and Environmental Law clinic to research and provide an opinion on several legal issues relating to the regulation of oil and gas development in Sandoval County. This memorandum discusses the principles of home-rule, preemption, and four specific questions posed by the CWG.

Questions Presented and Brief Answers

1. What is Sandoval's County Power to Ban or Burden Hydraulic Fracturing?

   Sandoval County is not a home-rule county. As such, the County is a subdivision of New Mexico and may only promulgate regulations through a grant of positive police power from the State. New Mexico grants local governments broad power to provide laws that protect traditional local interests. The County must also avoid regulations that conflict with state law, for example by prohibiting activities that are implicitly encouraged through a state regulatory program. Accordingly, Sandoval County may enact ordinances pertaining to oil and gas industry as long as the regulations do not ban hydraulic fracturing and that the regulations relate to traditional local interests.

2. Can Sandoval County ban injection wells?

   No, Sandoval County may not ban injection wells. Sandoval County may regulate water used in injection, as long as the regulation is within the County's authority under state law, addresses a concern of local government, and does not eliminate an operator's ability to hydraulically fracture.

3. Are local governments required to comply with tribal water standards?

   Yes, Sandoval County should acknowledge Tribal water quality standards, and if there are established Tribal standards the local governments' actions not may adversely impact tribal water and lands located in Sandoval County.

4. Is the New Mexico Water Quality Control Commission compliant with federal water law?

Yes, the New Mexico Water Quality Control Commission adopted the federal standards set forth in the federal Safe Drinking Water Act and the Clean Water Act and must abide by federal laws.

5. Does the State Engineer have sole authority over the appropriation and regulation of water rights?

Yes, the New Mexico State Engineer has sole authority over the appropriation and regulation of water rights in Sandoval County.

I. Discussion

A. The Power of Sandoval County to Ban or Burden Hydraulic Fracturing

Before I address the four issues raised by the Working Group, as a general matter it is important to understand the role of the state government vis-à-vis the county governments, the power of local governments, and the doctrines of home-rule and state preemption. These principles are reviewed in this section to assist the Working Group in considering whether a county law may ban or burden fracking.

1. Home Rule: Power of Local Authority

Generally, New Mexico counties have the police power to establish land zones and districts when such zoning is used to promote the public's interest. *Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 10, 89 N.M. 503, 505. Public interest is defined as the safety, health, morals and general welfare of the county. *Id.* The basis underlying why a county chooses to zone must be determined upon its circumstances and locality. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926). Accordingly, it is a proper exercise of a county's police power to regulate land use in an effort to protect the community, *Id.* at 389-90, so long as there is a reasonable relation to the public's health, morals, safety and general welfare. *Id.* at 392. However, county powers must be consistent with state law. When there is an inconsistency between local and state law, the state law bars the local action under the doctrine of preemption.

Before I discuss preemption, let me review the concept of home-rule that recognizes local municipalities or counties possess authority to regulate in a wide variety of areas unless the state government has reserved the power to itself by legislation or in the state's constitution. In short, a "home rule" county or municipality generally has broader authority to pass local laws. Some home rule municipalities' ordinances have been upheld despite conflict with state law.

Local power always stems from the state. As such, local authority to self-govern is either granted broadly from the state to the local government through home rule, or granted narrowly and explicitly from the state through Dillon's Rule. Dillon's Rule requires that the state either expressly grants the local government power, the power is implied or necessarily implied, or the

powers are absolutely essential to the functioning of the local government. Dian Land, *Dillon's Rule...and the Birth of Home Rule*, Municipal Reporter, Dec. 1991. https://nmml.org/wp-content/uploads/Dillon%E2%80%99s-Rule-The-Birth-of-Home-Rule.pdf. See also, *City of Trenton v. State of New Jersey*, 262 U.S. 182, 18-88, 43 S. Ct. 534, 536, 67 L. Ed. 937 (1923). Sandoval County has not adopted home-rule status (and does not qualify for home rule status under the New Mexico Constitution), but New Mexico does grant broad authority to local governments to enact zoning ordinances that provide for the welfare of the county and its inhabitants. *Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1201 (10th Cir. 2002).

Article X, section 6 of the New Mexico Constitution provides the home-rule amendment which allows for municipal legislatures to adopt, repeal or amend home rule charters. N.M. Const. art. X, § 6; see also, *Einer v. Rivera*, 2015-NMCA-045, ¶ 6, 346 P.3d 1197, 1199. Essentially, article X, section 6 gives a municipality independent power to govern itself unless a state statute expressly limits a power. *Einer*, 2015-NMCA-045, ¶ 8. Conversely, a non-home-rule municipality is merely a subdivision of the state and only possesses powers that are positively granted to it by the state legislature. *Id.*

The New Mexico Constitution provides in order for a county to be designated as home-rule, it must conform to the two requirements in article 10, section 5 of the New Mexico Constitution pertaining to rural counties; see also *Einer*, 2015-NMCA-045, ¶ 7, or it must conform to two requirements in article X, section 10 of the New Mexico Constitution pertaining to urban counties. A rural county must be less than one hundred forty-four square miles in area, and have no less than ten thousand in population. N.M. Const. art. X, § 5. Whereas an urban county must be less than one thousand, five hundred square miles with a population no less than three hundred thousand. N.M. Const. art X, § 10. Sandoval County has a population of 142,507 and is 3,710.65 square miles.[1] This vastly exceeds the square mile maximum required by Article X. Sandoval County does not meet the standards mandated by the New Mexico Constitution that would qualify it adopt home-rule status. N.M. Const. art. X, § 5, 10; see also, NMSA, § 13-15-1. As such, it is not eligible to enjoy the same independent rule making power as a home-rule municipality.

As a non home-rule county, Sandoval County "possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers" *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 1976-NMSC-029, ¶6, 89 N.M. 313, 551 P.2d 1360. Even for non-home rule counties, however, New Mexico law grants significant legislative authority to county governments. The powers granted to counties include the power to enact zoning ordinances and those ordinances that are "necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants." *Rancho Lobo*, 303 F.3d, 1201.

Therefore, in the context of oil and gas development, Sandoval County's attempt to regulate fracking must be within the authority granted to local governments by the state. In addition, any ordinance must not be preempted by state oil and gas law, as analyzed below.

[1] https://www.census.gov/quickfacts/fact/table/sandovalcountynewmexico/SBO030212.

2. Preemption in New Mexico

Preemption may occur in three ways: express field preemption, implied field preemption or conflict preemption. *Rancho Lobo,* 303 F.3d, 1201. First, express field preemption occurs when the state explicitly declares they intend to regulate an entire field of law such that no other local government may promulgate laws regulating the same activity. *Id.* at 1201-03. Second, implied field preemption arises when the state clearly intended to preempt an entire field of law by asserting regulations that are so pervasive there is no additional room for local law to regulate the same activity. *Id.* at 1203. Last, conflict preemption may exist when a local law conflicts with state law objectives. *Id.* at 1205. This conflict arises when compliance with both state and local law is impossible or when the local law stands as an obstacle to accomplish the full purpose and aspiration of the state. *Id.*

As determined in a 2015 oil and gas fracking case, New Mexico state law does not expressly or impliedly preempt the entire oil and gas field. *Swepi, LP v. Mora Cty., N.M.*, 81 F. Supp. 3d 1075, 1193 (D.N.M. 2015). The lack of field preemption may allow room for concurrent regulation by a county and the state. *Id.* at 1196. However, a county cannot outright ban an activity that is highly regulated by the state and which the state impliedly encourages. *Id.* at 1199; see also, *Stennis v. City of Santa Fe*, 2008–NMSC–008, ¶ 22, 143 N.M. 320, 176 P.3d 309.

Swepi involved a challenge to Mora County's ordinance imposing hydraulic fracking prohibitions. *Id.* at 1087. The federal district court found that counties have concurrent authority to regulate some areas of oil and gas extraction because the Oil and Gas Act of New Mexico (NMSA 1978, § 70-1-1, (1953)) does not address "issues with which local governments are traditionally concerned," such as traffic, noise, nuisance from sound, dust, chemical run-off, or impact to neighboring properties related to oil-and-gas production. *Swepi*, 81 F. Supp. 3d, at 1196. Thus, New Mexico's state law does not preempt the entire oil and gas field. Instead, county governments may enact laws that protect the public's interests related to certain effects from oil and gas industry as long as those laws do not conflict with state law according to the doctrine of conflict preemption.

The New Mexico Oil and Gas Act asserts "authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil or gas operations in" New Mexico. NMSA 1978, § 70-2-6 (1953). See also, NMSA 1978, § 70-2-2 (1953). In *Swepi v. Mora*, the Federal District Court of New Mexico stated that the New Mexico Oil and Gas Act is "focused" to prevent waste, regulate drilling, and regulate the maintenance of wells. *Swepi*, 81 F. Supp. 3d, at 1196. *Swepi* also held that the law impliedly demonstrates the State's intent to encourage oil and gas extraction. *Id.* at 1199. The Oil and Gas Act contemplates the regulation of drilling in order to prevent waste. Said positively, the prevention of waste is the encouragement of conservation. As such, any county regulation that would extinguish an operator's ability to conserve oil and gas through drilling and wells would conflict with state law objective to prevent waste.

In *Swepi*, Mora County attempted to completely ban drilling, an activity impliedly encouraged by the state through regulation. Accordingly, the Court held that Mora County law

conflicted with state law not only because the County contradicted state law, by prohibiting an activity that State allows and encourages, but also because the County law undermined the State's objective to prevent waste by prohibiting a method of oil conservation, drilling.

In summary, the County may promulgate regulations that typically concern local governments in relation to the welfare of the County when such a concern is not addressed by the State and when those regulations do not conflict with state law objectives. The State's objective is to prevent waste of oil and gas through the regulation of drilling and wells. The Tenth Circuit held that when a state highly regulates an activity, that activity is encouraged. Therefore, because NM highly regulates drilling in order to prevent waste, NM impliedly encourages the conservation of oil and gas. Consider for example, OCD promulgates regulations regarding horizontal drilling. As such, horizontal drilling is an activity the State impliedly encourages in order to prevent oil and gas waste. Accordingly, a county could not ban horizontal drilling as that would conflict with state law which allows horizontal drilling and impliedly encourages through regulation. Furthermore, the prohibition of horizontal drilling could undermine the Oil and Gas Act's intention to prevent the waste of oil and gas.

However, there is no infringement of state authority where a local ordinance merely complements a state statute. *Rancho Lobo v. Devargas*, 303 F.3d, at 1201. A county could complement a statute regarding oil and gas operations by adding more stringent requirements to an activity associated with operations, so long as those requirements do not frustrate the state's objective. *New Mexicans for Free Enter. v. The City of Santa Fe*, 2006-NMCA-007, ¶ 43, 138 N.M. 785, 802. For example, in *Rancho Lobo v. Devargas*, the Tenth Circuit held that a county's ordinance that prohibited clear cutting did not conflict with state law because that statute did not grant a right to clear cut. *Rancho Lobo*, 303 F.3d, at 1205. As such, the county's more stringent regulation did not undermine any state law objective. Similarly, Sandoval County could impose more stringent regulations related to drilling as long as the County does not frustrate state law or state law objectives. See section B(1) for how Sandoval County may enact more stringent regulations.

In conclusion, Sandoval County is not a home-rule county. Therefore, it may only promulgate regulations through a positive grant of power by the Legislature. State law does grant even non-home rule counties broad authority to enact zoning ordinances and other ordinances that address health, safety, economic development, and other issues. Furthermore, the County's regulation must not conflict with state law and state law objectives as required by the preemption doctrine. In drafting an ordinance the Working Group should be mindful of the kinds of pollutants, procedures it seeks to regulate, and prohibitions it seeks to enact so that the provisions complement and do not conflict with state law. Otherwise such regulations would be preempted.

B. Sandoval County may not ban injection wells

Sandoval County may not prohibit injection wells. The EPA sets standards regarding the use of injection wells through the Underground Injection Control Program ("UIC"), a subsidiary program of the Safe Drinking Water Act ("SDWA"). 40 C.F.R. §§ 144.1, 146.4 (2010). In 1982, the EPA granted primacy to New Mexico to self-regulate and enforce the UIC. 48 Fed.

Reg. 31640 (July 11, 1983) (to be codified at 40 C.F.R. p. 145). As such, part of the New Mexico Oil Conservation Division's ("OCD") federally mandated authority is to implement the minimum UIC standards prescribed by the EPA, *Id.*, 40 C.F.R. 144.4, 146.6 (2010).When an activity is regulated by the state, that activity is impliedly encouraged. *Swepi v. Mora*, at 1199. As such, local government may not enact a law that conflicts with the interest of the state. *Rancho Lobo v. Devargas*, at 1205.

The OCD promulgates many regulations regarding injection wells. NM Admin Code 19.5. Accordingly, it is the intent of the State to allow operators to utilize injection wells in the oil and gas extraction processes. However, as discussed in Section A, a field is not preempted if: (1) state law does not explicitly state or clearly intend that the local ordinance is preempted, *Rancho Lobo*, at 1201-03; and (2) state law does not address the kinds of issues which typically concern local governments. *Swepi*, at 1195. Importantly, when a county promulgates regulations where there is room for concurrent regulation, those regulations must not conflict with state law. *Id.*, at 1198. The test is whether the ordinance prohibits an act the general law permits or vice versa. *Id.* However, an ordinance may require more stringent regulations if those regulations do not undermine the state's interest. *Rancho Lobo*, at 1205. Most New Mexico courts have upheld ordinances that were merely more restrictive than state law. *Swepi*, at 1199.

Similar to Rio Arriba County in *Rancho Lobo*, Sandoval County may promulgate more stringent regulations regarding oil and gas if: (1) the field is not entirely preempted by state law; (2) the ordinance does not conflict with state law; and (3) if the ordinance regulates an activity that is likely to have an impact to the health, safety and welfare of the County.

Sandoval County may not prohibit injection wells because this prohibition would frustrate OCD's purpose and authority to protect groundwater under the Safe Drinking Water Act ("SDWA") in relation to underground injection wells. 40 C.F.R. 144.1 (2010). Furthermore, if injection wells are necessary to drill, prohibiting injection wells would also conflict with the State law's implied intent to allow use of injection wells in the furtherance of the conservation of oil and gas. Nonetheless, the County may promulgate more stringent regulations on injection wells, as long as they are not antagonistic to state law. For example, N.M. Admin. Code 19.15.16.10(B) provides, "the operator shall use sufficient (emphasis added) cement on surface casing to fill the annular space behind the casing to the top of the hole, provided that authorized division field personnel may allow exceptions (emphasis added) to this requirement when known conditions in a given area render compliance impracticable." Sandoval County may supplement this law by providing, "the operator shall use (insert specific type of cement that is "sufficient") on surface casing to fill the annular space behind the casing to the top of the hole, unless an authorized OCD field personnel has allowed an exception to the operator." This county regulation would not conflict with state law because it merely requires a more stringent regulation without preventing an operator from actually constructing an injection well and extracting oil and gas.

(1) Sandoval County may regulate the type of water used in injection wells

Sandoval County may regulate the types of fluids authorized to be used in Class II injection as long as that regulation would not deny on an operator's ability to frack. *Swepi* determined that the Oil and Gas Act of New Mexico does not preempt the entire oil and gas field, but the State does have authority to enact and enforce laws which prevent the "waste" of oil and gas. *Swepi*, at 1196. Because state law regulates some aspects of oil and gas, conflict preemption should be examined regarding the fluid regulation of injection wells. Injection wells are an integral process to hydraulic fracturing. Environmental Protection Agency, Class II Oil and Gas Injection Wells (2017), https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells. Typically, a water-chemical solution is injected into a shale formation which triggers the process in which an operator may remove oil from the shale formation. *Id.* OCD does not address what types of water must or may be used in the injection process. NM Admin. Code 19.15.16. The Court in *Swepi* held that OCD's scope of authority focuses primarily on the prevention of "waste" and the drilling and maintenance of oil-and-gas wells. *Id.* Accordingly, OCD's intent in regulating injection wells is to prevent contamination of underground water during oil production processes, not the type of fluid to be used in injection. Notably, in *Rancho Lobo*, the Court of Appeals for the Tenth Circuit held that a local law may not conflict with state law objectives. *Rancho Lobo*, at 1205. Because successful hydraulic fracturing requires a special water solution, any local law that would likely prevent an operator's ability to drill for oil by mandating a type of solution would most likley be preempted due to conflict with state law objectives. However, as long as the operator's ability to frack is not exterminated, the County should be able to require specific types of water be used in injection, such as recycled water.

For example, Santa Fe County requires that only "fresh" water be used in injection. Santa Fe, NM, Oil and Gas Ordinance § 11.24.4 (2008). San Miguel County requires that only groundwater or recycled water be used as part of the fracturing process. San Miguel, NM., Oil and Gas Ordinance § 12.7 (2014). Accordingly, Sandoval County may seek to prescribe what type of water may be used in Class II injection wells as long as the ordinance does not prevent an operator's capacity to hydraulically fracture. [2] Sandoval County could also consider requiring operators to disclose types of chemicals used in fracking processes.[3]

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[2] Example of ordinance that does not conflict with state law: Boulder County, Colorado requires an operator to disclose, during the permitting process, all instances over the last ten years when an operator has been cited for violation of federal, state, or county oil and gas laws. Boulder County Land Use Code, Art. 12 § 400 (B)(4)(a). Colorado State law does not require this disclosure. Therefore, Boulder is able to request such information without conflicting with any state law objectives.

Another example of a non-conflicting regulation is the Santa Fe County oil and gas ordinance which requires an environmental impact report ("EIR") that assesses possible negative impacts to land surrounding oil well development. Santa Fe County Oil and Gas Ordinance 9.6.1.7.2.

[3] Sandoval County could consider requiring operators to disclose the types of chemicals used in fracking processes. As required by New Mexico state law, operators must submit to OCD "total volume of fluid; trade name, supplier, purpose, and CAS numbers of ingredients in fluid; maximum concentrations of ingredients in additives and fluid (% by mass). However, no

C. Sandoval County should acknowledge and abide by Tribal water quality standards[4]

The Sandoval County oil and gas ordinance should recognize that certain tribes in and around Sandoval County may have more stringent water quality standards, and that it is necessary for Sandoval County to not violate these sovereign water standards.

Certain tribes are granted authority by the federal government to enact their own water standards, similar to the same authority granted to states. This is referred to as "treatment as a state" (TAS) status. The Clean Water Act authorizes the EPA to require entities that discharge upstream from TAS-approved tribes to comply with tribal water standards. The CWA is enforced through the issuance of permits through the National Pollutant Discharge Elimination System (NPDES). These permits obligate specific reporting requirements and monitoring of discharged pollutants from a point source on a case-by-case basis. A point source may be a direct or indirect source of contamination into a navigable surface water of the United States. Any unaccounted for pollutant discharged from a point source to a US surface water is subject to violations of the CWA. Two recent circuit decisions have held that discharges into groundwater that then contaminate navigable surface water are also subject to regulation under the CWA. Therefore, a violation of the CWA is possible if a tribal surface water is found to be contaminated by groundwater that is traceable to a discernable point source, such as an injection well. Additionally, certain tribes in New Mexico define surface water to include groundwater. As such, it is possible that contamination of tribal groundwater (not just surface water) would violate the Clean Water Act

"In 1987, Congress amended the Clean Water Act to authorize the [omitted] EPA to treat Indian tribes as states under certain circumstances for purposes of the Clean Water Act." *City of Albuquerque v. Browner*, 97 F.3d 415, 419 (10th Cir. 1996). In upholding the Pueblo of Isleta's ability to enact water quality standards that are stricter than the standards of its surrounding state

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more disclosure must be made than would be included on a Material Safety Data Sheet under 29 C.F.R. § 1910.1200(i)(I). Brandon J. Murrill & Adam Vann, *Hydraulic Fracturing: Chemical Disclosure Requirements*, Congressional Research Service Report, Appendix B, June 19, 2012. Although the County may require disclosure fracking chemicals, it may not require the disclosure of trade secrets or confidential business information. *Id.*

Sandoval County should be mindful that any regulation attempting to regulate water used in injection should justify the regulation according to issues with which local governments have positive police power to regulate such as: economic development and local employment, water quality and availability, soil protection, archeological, historic and cultural resources, abatement of noise, dust, smoke and traffic, hours of operation, compatibility with adjacent land uses, cumulative effect when combined with existing harvests." *Rancho Lobo*, at 1205.

[4] Under certain circumstances, the Tribal Authority Rule authorizes Tribes to self-promulgate air quality standards under the Clean Air Act just as a state would. 63 Fed. Reg. 29, 7254 (Feb. 12, 1998) (codified at 42 U.S.C. §7601 (d)). Similar to compliance with Tribal CWA standards, the County should recognize these tribal air standards and strive to not violate such standards. Currently, there are no tribes in New Mexico authorized under the CAA; however, that does not mean New Mexico tribes will not be authorized under the CAA in the future. https://www.epa.gov/caa-permitting/tribal-nsr-implementation-epas-south-central-region

government, the court in *Browner* also affirmed the tribe's ability to designate unique tribal water uses upon which those water quality standards are based, for example, unique cultural water uses. The City of Albuquerque, upstream of the Pueblo, was required by the EPA to comply with the Pueblo's more stringent standards for the section of the Rio Grande that runs through the Pueblo.[5]

Tribes can be treated as states for most purposes and programs of the Clean Water Act. 33 U.S.C. § 1377. In addition to tribes establishing their own water quality standards, tribes may administer the National Pollutant Discharge Elimination System permit program, granting or denying certification for federally permitted activities that may result in discharges of pollutants into the surface waters, and developing management programs for nonpoint source pollution. States may also administer such programs.

The Clean Water Act establishes two primary permit programs. One is the NPDES (National Pollutant Discharge Elimination System) program under which a permit must be obtained before any "point source" may discharge pollutants into navigable waters. A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Rapanos v. United* States, 547 U.S. 715, 753, 126 S. Ct. 2208, 2233, 165 L. Ed. 2d 159 (2006). The second program is the permit program for the discharge into navigable waters of dredged or fill material, known as the § 404 permit program after the section of the statute that created it. The EPA, NM and certain tribes all have effluent standards that must be met. 33 U.S.C. § 1311; N.M. Admin. Code § 20.6.2.2101; Pueblo of Sandia Water Code §§ B(6-7), H; Pueblo of Santa Ana Water Code §§ B(6-7), H. Violations of these effluent standards are measured by direct or indirect discharge of pollutants into navigable surface waters of the United States. 33 U.S.C. §§ 1311, 1319.

The EPA and a growing number of federal courts are confronting the issue of whether and when discharges to groundwater are regulated under the Clean Water Act, 33 U.S.C. §§ 1251 – 1388. Specifically, EPA on February 20, 2018, requested comments on whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow may be subject to regulation under the CWA. See 83 Fed. Reg. 7126 (Feb. 20, 2018). This is a new approach by the EPA because generally the EPA has taken a case-by-case approach to determining whether such discharges are subject to the CWA. In determining whether a direct hydrologic connection exists, EPA has typically taken a fact-specific approach that considers "the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source" in addition to factors such as "geology, flow, and slope." 83 Fed. Reg. at 7128. The comment period ended on May 21, and EPA received 58, 336 responses with industry groups calling for EPA to decline or limit CWA permitting relating to groundwater, and environmental and citizen groups requesting EPA preserve or expand its permitting regime.

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[5] A significant number of tribes now have EPA-approved water quality standards. See http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes.cfm.

The backdrop for EPA seeking comments includes a number of recent federal court decision regarding regulation of discharges to groundwater under the CWA. The U.S. Court of Appeals for the Ninth Circuit recently held that a point source discharge to groundwater of more than a de minimis amount of pollutants is subject to the CWA's NPDES program if the discharge is "fairly traceable from the point source . . . such that the discharge is the functional equivalent of a discharge into the navigable water." *Hawai'I Wildlife Fund v. Cnty of Maui,* 886 F.3d 737, 749 (9th Cir. 2018). *Hawai'i Wildlife Fund* involved a challenge by environmental groups to the County of Maui's wastewater disposal practices. The County disposed 3 to 5 million gallons of treated sewage every day by injecting it into one of four wells at their wastewater reclamation facility. The parties did not dispute that some of the wastewater travelled through groundwater and reached the Pacific Ocean via submarine springs; the issue was whether such activities required an NPDES permit under the CWA.

On April 12, 2018, the U.S. Court of Appeals for the Fourth Circuit similarly found that discharges to groundwater can be regulated under some circumstances. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.,* 887 F.3d 637 (4thth Cir. 2018). In that case, an underground pipeline broke and spilled petroleum products into nearby soil and groundwater. *Id.* at 643. The pollutants then traveled several hundred feet through the groundwater into two nearby creeks (which constitute "navigable waters" that are regulated under the CWA). *Id.* The court first considered whether the CWA requires that pollutants discharge "directly" from a point source to protected waters. The court determined it does not, relying in part on language from Justice Scalia's plurality opinion in *Rapanos v. United States*: "[t]he [CWA] does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. 715, 743 (1987) (emphasis in original).

Having determined that no direct connection between a point source and navigable waters was required for liability to attach under the CWA, the court turned to the question of causation: What standard should courts apply to determine whether groundwater has provided a sufficient connection between a point source and navigable waters?

Here, the Fourth Circuit again considered the result in *Hawai'i Wildlife Fund*, but this time reached a slightly different conclusion. In *Hawai'i Wildlife Fund*, the Ninth Circuit determined that an indirect discharge must be "fairly traceable" from a point source to protected waters. There, the court considered that standard satisfied where a tracer dye study confirmed that wastewater effluence from disposal wells reached the Pacific Ocean.

The Fourth Circuit instead turned to a term of art favored by the Environmental Protection Agency (EPA): "direct hydrological connection." The court held that the "complex and highly technical nature" of CWA enforcement means that the EPA's interpretation of its statutory authority "warrants respectful consideration" under *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Citing federal guidelines and standards in which the EPA has asserted that CWA liability exists where a party discharges "from a point source via ground water that has a direct hydrologic connection to surface water," the court determined "direct hydrological connection" to be the appropriate standard. *Upstate Forever*, at *22–23.

The court further explained that assessing whether such a connection exists is a factual inquiry, where "time and distance," and "geology, flow, and slope" are all relevant. *Id.* Turning to whether plaintiffs had sufficiently alleged such a connection, the court held that they did: "plaintiffs have alleged that pollutants are seeping into navigable waters . . . about 1000 feet or less from the pipeline." *Id.* Describing 1000 feet as an "extremely short distance," the court held the pleadings sufficient under the newly adopted standard.

It is important to note that both the *Hawai'i Wildlife Fund* and *Upstate Forever* cases involved citizen suits, rather than enforcement actions initiated by the EPA itself. These cases, therefore, establish grounds for citizen organizations to pursue CWA groundwater-discharge claims in cases where EPA declines to do so.[6]

Together, *Hawai'i Wildlife Fund* and *Upstate Forever* suggest a significant expansion of CWA liability and potential permitting requirements for the regulated community. These authorities mean that industry and individuals need to carefully consider discharges to land or groundwater that could potentially reach navigable waters and evaluate whether CWA permitting is required, in addition to other potentially applicable federal, tribal and state permits. Moreover, as cautioned by *Upstate Forever*, where accidental spills and leaks are concerned, companies and environmental managers will need to consider ongoing migration of contaminants through groundwater well after the cause of discharges may have been resolved.

In New Mexico, ground water is defined as "interstitial water which occurs in saturated earth material and which is capable of entering a well in sufficient amounts to be utilized as a water supply." NM Admin. Code 20.6.2 (z). No New Mexico federal district court or Court of Appeals for the Tenth Circuit have considered whether a point source discharged to groundwater can be regulated under the CWA. This means that even if contaminated groundwater flowed into a surface water which subsequently flowed and polluted a designated Pueblo surface water, a court must first consider whether contamination of groundwater that then conveys to navigable waters is regulated under the CWA. If a court finds that groundwater can be regulated under the CWA, it must then determine if there is a "fairly traceable" point source from the contamination to the surface waters as determined by the Ninth Circuit or a "direct hydrological connection" as found by the Fourth Circuit.

Some Pueblos specifically define surface water to include groundwater. This inclusion of groundwater into the surface water definition might allow for tribal groundwater to be protected under the CWA. For example, the Pueblo of Sandia encompasses wetlands into its definition of surface waters, Pueblo of Sandia Water Code, § P, as does the Pueblo of Isleta. Pueblo of Isleta Water Code § VII. The Pueblo of Santa Ana expressly states that groundwater and storm water are considered surface waters on Pueblo lands. Santa Ana Pueblo Water Code § 65.1. Whereas,

[6] These recent decisions in the Fourth and Ninth Circuits create a potential circuit split regarding the status of groundwater under the CWA. See *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (groundwater is not regulated under the CWA even when it is "hydrologically connected with surface waters"); *Rice v. Harken Expl. Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (discharges onto land, with seepage into groundwater, that have only an indirect connection with a navigable water are not regulated under the CWA).

the Pueblo of Taos explicitly states implementation of the CWA on the Pueblo applies to "pueblo water" which encompasses groundwater. Pueblo of Taos Water Code § B(h). These codes are approved and supported by the EPA through the CWA. 33 USC 26, §1377. As such, neighboring governments of the Pueblos should be cognizant that any human or industrial activity that would pollute pueblo waters or lands would be subject to violations under the CWA. 33 USC 26, §1377. Because certain tribes legally recognize that groundwater and surface water are interconnected, a court may find that the violation of tribal groundwater is in fact a violation under the Clean Water Act.

In summary, pursuant to the Clean Water Act, Sandoval County has a duty to observe and respect tribal surface waters according to a tribe's sovereign authority to regulate their own water standards. Some Tribal water codes identify surface water and groundwater to have an indistinguishable connection, and recently, two circuits have recognized that contamination of groundwater that conveys to navigable waters can be regulated under the Clean Water Act. As such, the Clean Water Act may apply to discharges to groundwater in some circumstances, although this is still legally uncertain. New Mexico and the Tenth Circuit have yet to consider the connection of surface and groundwater. However, in light of other recent circuit decisions and new tribal water codes, an operator could be held liable under the Clean Water Act for violation of tribal water standards if contamination to surface or groundwater were to occur. It does not seem that the County has a duty to enact a law that would mitigate tribal water contamination from a point source belonging to a private entity. However, citizens or tribes could bring suit against the EPA or state for failure to require injection wells to be permitted under the NPDES. Furthermore, if an NPDES permit was issued, a tribe may protest this permit under Section 401(a)(2) of the Clean Water Act. Nonetheless, the County should recognize that tribes have certain water quality standards which should be acknowledged and considered when approving oil and gas permits.

D. The New Mexico Water Quality Control Commission is in compliance with federal water law

The New Mexico Water Quality Control Commission ("WQCC") is responsible for complying with federal water laws. The WQCC is the New Mexico regulatory agency that enforces water standards in New Mexico through the federal Safe Water Drinking Act, 42 U.S.C. § 300f (1974), and several New Mexico statutes. NMSA 1978, § 74-1-12 (1999); NMSA 1978, § 74-6-3(E) (1999); NMSA 1978, § 74-1 (1999); NMSA, 1978, § 3-29-21 (2006), NMSA 1978, § 20-7-4 (1987), Drinking Water State Revolving Loan Fund Act. Pursuant to NMSA 1978 §§ 74-1-12 and 74-1-6(E) (1999), New Mexico adopted the same water standards set forth by the United States Environmental Protection Agency ("EPA") in the Safe Drinking Water Act. Additionally, New Mexico must adhere to federal standards even if those standards are not explicitly adopted into state law. For example, New Mexico is still subject to the federal Clean Water Act implemented by the EPA even though New Mexico has not chosen to administer the NPDES program like other states have.

E. The State Engineer has sole authority over the appropriation and regulation of water rights

The State Engineer has sole authority over the appropriation and regulation of water rights. As such, Sandoval County may not require or impose any regulations regarding the apportionment of water within the County.

The New Mexico State Engineer has authority to appropriate and regulate all waters of the State. NMSA 1978, §§ 72-1-1 (1982), 72-2-1 (1982), 72-5-1 through 37(1982), 72-12-1 through 28 (1982). Waters of the states encompasses "all natural water flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the State of New Mexico" NMSA 1978, § 72-1-1 (1982). The State Engineer may authorize water masters within water districts to appropriate and regulate waters within a district. NMSA 1978 § 72-3-2. The "sole means for acquiring a water right is to 'make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by'" the state engineer. NMSA 1978, § 72-5-1 (1982). See also, *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 24, 147 N.M. 523, 532, 226 P.3d 622, 631. Accordingly, the appropriation of waters is in the sole discretion of the State Engineer's Office. As such, Sandoval County may not restrict or appropriate water rights within the County.

Conclusion

Sandoval County is not a home-rule municipality. Therefore, any regulation promulgated by the County must stem from a positive grant of authority from the State and the regulation must also not be preempted.

The County may not ban injection wells because it is likely that the prohibition of injection wells would deny operators the ability to conserve oil and gas. A prohibition of this nature would undermine the state's interest and directly conflict with state law, which is not acceptable under the doctrine of preemption. Accordingly, banning injection wells in Sandoval County is not recommended. However, Sandoval County may be able to regulate what type of water is used in injection wells, as long as an operator's ability to conserve oil is not impeded by the County's regulations. The Oil Conservation Division does not address the types of water that must be used in the injection process. As such, there may be room for concurrent regulation of injection from the County. Santa Fe County and San Miguel County have already taken advantage of this room for concurrent regulation and require that only "fresh" water, groundwater or recycled water to be used in injection processes.

Furthermore, Sandoval County should recognize that tribes in and around Sandoval County are granted authority to enact water quality standards more stringent than the State under the Clean Water Act. Although the Clean Water Act typically applies to surface waters, certain tribes incorporate groundwater into their surface water definition and two Circuit courts of appeals have recognized the connection of ground and surface water in the hydrological cycle. Although this area of law is still developing, any contamination of groundwater or surface water that infiltrates tribal lands may be subject to federal violation of the Clean Water Act. As such,

the Sandoval County's oil and gas ordinance should be judicious in protecting sovereign tribal water standards from oil and gas industry.

The Water Quality Control Commission regulates water quality standards throughout the state of New Mexico. The Commission has adopted the federal Safe Drinking Water Act and must comply with the federal Clean Water Act. As such, the Commission is compliant with federal water quality standards.

Lastly, the State Engineer has sole authority to appropriate and regulate all waters of the State. As such, when the State Engineer has adjudicated water rights to an operator, the County may not encroach on the delegated authority of the State Engineer by attempting to also regulate those same water rights.

Aquifer Water Protection & Oil and Gas Ordinance

Sandoval County New Mexico
Citizens Working Group (CWG) Ordinance Team

ORDINANCE LEGAL REVIEW

UNM School of Law Natural Resources and Environmental Law Clinic

July 27, 2018

LEGAL REVIEW SUBJECT

Questions Relating to the Zoning and Administrative Process of
Oil and Gas Permitting in Sandoval County

- Whether a county may zone its land according to the geology of the region? If so, may it ban horizontal hydraulic fracking in one or more zones based on geology?

- Whether limiting notice and hearing requirements in District A compared to Districts B and C violates procedural due process or equal protection under XVI Amendment of the U. S. Constitution or under Art. 2, Section 18 of the New Mexico Constitution?

ORDINANCE LEGAL REVIEW PURPOSE

To meet the ordinance legal solidity requirement, the Ordinance Team has signed an agreement with the University of New Mexico's Law Clinic and other attorneys to review our draft ordinance text and research selected critical legal questions.

UNM SCHOOL of LAW
CLINICAL LAW PROGRAMS

MEMORANDUM

TO: **Mary Feldblum**
Sandoval County Citizens Working Group; Ordinance Team

FROM: **Meaghan Baca**

DATE: **July 27, 2018**

RE: **Questions Relating to the Zoning and Administrative Process of Oil and Gas Permitting in Sandoval County**

The Sandoval Citizens Working Group ("CWG") has requested the University of New Mexico School of Law Natural Resources and Environmental Law clinic to research and provide an opinion on two legal issues relating to the zoning and administrative process in Sandoval County. This memorandum discusses the principles of a county's power to zone land, procedural due process, and equal protection.

Questions Presented

1. Whether a county may zone its land according to the geology of the region? If so, may it ban horizontal hydraulic fracturing in one or more zones based on geology?

2. Whether limiting notice and hearing requirements in District A compared to Districts B and C violates procedural due process or equal protection under the XVI Amendment of the U.S. Constitution or under Art. 2, Section 18 of the New Mexico Constitution?

Brief Answers

1. Yes, a county may zone its land according the geology of the region. It is likely a court would overrule a ban on horizontal hydraulic fracturing in one zone if it eliminated an operator's ability to mine oil and gas.

2. By limiting the notice and hearing requirements in District A compared to Districts B and C, it is likely the Adang Ordinance violates procedural due process of limited individuals, but unlikely to violate equal protection pursuant to Article 2, Section 18 of the New Mexico Constitution and the XVI Amendment of the United States Constitution.

Statement of Facts

The proposed Adang Ordinance ("AO") divides Sandoval County into three distinct districts based largely on geological features: Districts A, B, and C. District A is comprised of the San Juan Basin. The San Juan Basin is a "structurally simple" depression that is not heavily faulted. AO, VI.A.(1). This particular basin contains oil and gas reserves that have been developed over the last century. *Id.* at VI.A.(2). Despite some surface spills and casing leaks

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arising from conventional drilling, the San Juan Basin has not experienced any known drinking water contamination from unconventional drilling (i.e., hydraulic fracturing). *Id.* at VI.A.(3).

District B is a "transition zone" between the San Juan Basin and the Middle Rio Grande Basin (MRGB), part of the Colorado Plateau (District B includes part of the San Juan Basin). *Id* at VII.A. District B is a geologically complex and ecologically fragile area that also includes all or part of 12 Native American Tribal Reservations. *Id.* It has no history of oil and gas production. *Id.*

District C is located in the MGRB, and is highly faulted, fractured, and fissured and is an area with active tectonic movement. *Id.* at VIII.A.(5). District C contains 90% of Sandoval County's population. *Id.* at VIII.A.(1). It is currently nonproductive of oil and gas, and largely unexplored. *Id.* at VIII.A.(8).

District A is also distinct from Districts B and C pursuant to the permitting requirements for operators and the notice and hearing processes afforded to the public when oil and gas zoning applications are under review. The AO provides that District A zoning permits shall be reviewed by the Director of Planning and Zoning to determine sufficiency of an operator's compliance with the Sandoval County Oil and Gas Ordinance. *Id.* at (G)(1). Once the Director determines the application is complete, public notice of the application will be published in a local newspaper of general circulation. *Id.*, at (H). Interested parties are given sixty days to review the application and provide comments regarding the application to the Director. *Id.* The Director may take these comments into consideration when determining whether to approve the application. *Id.*

In District B, applications will be submitted to the Director to determine compliance and needs of possible affected parties (surface property owner and pueblo entities). The Director will review the application and submit a written report with a recommendation to deny or grant a conditional use permit to the Sandoval County Planning and Zoning Commission. The Commission will then review the application for compliance with the Sandoval County Comprehensive Zoning Ordinance. The Commission is required to consider an oil well's potential impact on fresh water aquifers, surface property owners, adjacent landowners, sensitive habitats and resources, and Native American entities and cultural sites. *Id.* at (H)(4)(a)-(e). Furthermore, District B requires that there be a public hearing and actual notice to landowners within two miles of an application site and all Native American pueblo agencies within three miles of an application site. *Id.* at Art. VII (I), XI (1)(c), (2).

In contrast with District A, the process for a permit application in District B provides actual notice instead of constructive notice to nearby landowners and pueblos, and a hearing in front of the Planning and Zoning Commission in addition to a written comment period. Further, the Commission is directed to specifically consider factors such as potential impact on water quality, affected property owners, and Pueblos in District B when deciding whether to grant a permit, whereas the Director of Planning and Zoning is not explicitly required to take these factors into account in District A.

The AO prohibits hydraulic fracturing in District C. The AO provides that conventional drilling may be granted a permit under the same notice and public hearing process as provided for in District B. *Id.* at Art. VIII (E).

Discussion

1. **A County may zone its land according to the geology of the region as long as the zoning has a substantial relation to the public health, safety, morals, or general welfare.**

A county is a subdivision of the state and may only exercise powers directly granted to it by the Legislature. *Vill. of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365, 388. Pursuant to NMSA 1978, section 3-21-1(B)(1) (2007), a county has the authority to divide territory within its jurisdiction into districts for zoning as necessary to carry out for the purposes of promoting health, safety and welfare of the county. This districting method by a governmental body is known as zoning. *Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 10. When zoning is based on protecting the public interest, courts have upheld the idea that this is a legitimate exercise of police power. *Id. See also, City of Santa Fe v. Gamble-Skgomo, Inc.*, 73 N.M. 410, 17 (1964). Courts have also specifically upheld the use of districting under municipal or county zoning ordinance. *See City of Santa Fe v. Gamble-Skgomo*, ¶ 10. The validity of a regulatory zoning ordinance must be examined according to the connection and circumstances of locality compared to the districting. *Vill., of Euclid*, 272 U.S. at 387-88. The segregation of industries to a particular district, when exercised reasonably, may bear a rational relation to the general welfare of the community. *Euclid*, at 392.

The United States Supreme Court held that it is a proper exercise of police power, and not a violation of Constitutional substantive due process protections, for a locality to enact regulatory ordinances that district the locality when in furtherance of protecting the health, safety, and general welfare of the people. *Id.* at 395. In the seminal case, *Village of Euclid*, the petitioner asserted that a city ordinance dividing the city into several districts to regulate building construction violated Constitutional property rights under the guise of police power. *Id.* at 386. The ordinance relegated industrial establishments to areas of the village separated from residential sections in order to stem industrial activity from injuring the residential public. *Id.* at 389-90. Upon this premise, the Court held that there is a rational relationship between the zoning of the city and protection of the general welfare. *Id.* at 390, 397. The Court also affirmed that a zoning regulation may only be declared unconstitutional if provisions are clearly arbitrary and unreasonable, and have no substantial relation to the public, health, safety, and morals. *Id.* at 396. Furthermore, the Court found that conclusions of supportive commissions and reports were evidence that the standard for being arbitrary had not been met. *Id.* 394-95.

In this case, Districts A, B and C are zoned according to the geology of the county based on science proffered by New Mexico Tech. The AO asserts that District A is a safer location to horizontally hydraulically fracture because the geologic strata is uniform, opposed to the strata in Districts B and C which is geologically complex or even highly faulted and tectonically active. The AO further claims that groundwater in Districts B and C is at a much higher risk of contamination due the faulted strata in the area compared to District A. According to the

findings in the AO, preventing contamination to groundwater is a public interest the County wants to protect for the general welfare of the community.

Similar to the city in *Village of Euclid*, the AO attempts to zone Sandoval County into districts which would limit oil and gas activity according to specific district provisions. The districting of the County is premised upon the potential impact oil and gas activity can have on groundwater. The AO asserts groundwater is a public interest that it intends to protect. This is similar to the intended protection of residential areas from industrial activity in *Village of Euclid.* In both cases, the local government attempts to safeguard the general welfare by zoning their jurisdiction in such a way that the activity is not prohibited outright in the jurisdiction but rather allowed only in some areas in order to divert negative impacts away from the public. Moreover, in this case, the AO bases its districting upon a detailed and comprehensive report regarding Sandoval County's groundwater and potential impacts of hydraulic fracturing. According to *Euclid*, the consideration and application of investigatory reports to a zoning plan provides evidence of reasoned decision making and limits the possibility of a court considering such a zoning plan as clearly arbitrary and unreasonable. Considering that the ordinance would zone the County on the basis of a comprehensive geologic report, in order to protect the public's general welfare from groundwater contamination, it is likely that a court will uphold the zoning of Districts A, B, and C against challenges that the use of districts based on geology for zoning exceeds the County's authority as granted by the state or violates substantive due process under the Fourteenth Amendment of the U.S. Constitution or Article 2, Section 18 of the New Mexico Constitution.

1.a. May a County Zoning Ordinance Ban Horizontal Hydraulic Fracturing in One or More Districts based on Geology.

As analyzed in the separate Water Memo, state law allows concurrent regulation in oil and gas activity. *Swepi, LP v. Mora Cty., N.M.*, 81 F. Supp. 3d 1075, 1193 (D.N.M. 2015). Counties have authority to promulgate laws that protect the health, safety and welfare of the public. *Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 10, 89 N.M. 503, 505. These local laws must not conflict with state law. *Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1205 (10th Cir. 2002). A conflict between local government and state may arise if the local law frustrates the purpose of the state law. *New Mexicans for Free Enter. v. The City of Santa Fe,* 2006-NMCA-007, ¶ 43, 138 N.M. 785, 802. The issue in this matter is whether the prohibition of horizontal drilling only in District C would frustrate the State's objective to conserve oil and gas.

There is no exact case law that answers this issue; however, in *Swepi v. Mora*, the court reasoned that the New Mexico Oil and Gas Act asserts "authority over all matters relating to the conservation of oil and a gas and the prevention of waste of potash as a result from oil and gas operation in" New Mexico, but the field of oil and gas is not preempted. *Swepi, LP v. Mora Cty., N.M.,* 81 F. Supp. at 1193. As such, there is room for concurrent—but not conflicting—regulation from local governments. A regulation that would eliminate an operator's ability to conserve oil would conflict with state law objective to prevent oil waste. The prohibition of horizontal drilling in a single district could eliminate an operator's ability to frack. Not all oil reserves are may be taken advantage of without unconventional drilling techniques. If an operator could only produce oil by horizontal drilling but a local ordinance prohibited such a

technique, it is likely an operator will claim the local law is preempted by state law because it frustrates the purpose of the Act, to conserve oil.[1]

In defense to such a challenge, the county could argue that the County is not banning all hydraulic fracturing, it is only banning hydraulic fracturing in the areas where it has a rational basis to believe there is greatest risk to groundwater, erosion of property values, and other traditionally local concerns. Such an argument could fail, however, because even a ban in one area of the county could be seen as conflicting with state law that would otherwise allow such drilling activities in that part of the state.

Under *Swepi*'s reasoning, there is room for concurrent regulation of oil and gas activity, as long as the State's intent to prevent the waste of oil is maintained. The complete prohibition of horizontal fracking in District C, however, is at risk of being found by the courts to conflict with state law and therefore to be preempted.

2. By limiting the notice and hearing requirements in District A compared to Districts B and C, it is likely the Adang Ordinance violates procedural due process for limited individuals, but not equal protection pursuant to article 2, section 18 of the New Mexico Constitution and the Fourteenth Amendment of the United States Constitution.

Article 2, section 18 of the New Mexico Constitution prescribes that "no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." The U.S. Constitution proves similar protection to New Mexico residents under the Fourteenth Amendment.[2] Counties have wide discretion to promulgate regulations over county lands as discussed in Part 1 of this memo and Part 2 of the "Water Memo." Despite this wide discretion, county law must comply with state and federal constitutions. Parts 2(A) and (B) will discuss whether the Adang Ordinance could be successfully challenged as violating procedural due process[3] and equal protection provisions of the federal and state constitutions.

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[1] A local regulatory law that eliminates an operator's entire ability to extract oil it might also be a regulatory taking under the Fifth Amendment of the United State Constitution.

[2] The New Mexico Supreme Court has recognized that New Mexico's equal protection clause affords rights and protections independent of the federal constitution. *Breen v. Carlsbad Municipal Schools*, 14. However, New Mexico courts use federal interpretation of the Equal Protection Clause as guidance. Id. (See also, *Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 50, 306 P.3d 457, 469, asserting NM Const. art 2, § 18 and US Const. XVI due processes are similar.

[3] Substantive due process protects policy enactments that exceed the limits of governmental authority: courts may find that a majority's enactment is not law and cannot be enforced as such, regardless of whether the processes of enactment and enforcement were actually fair. As discussed in Part 1 of this memo, Sandoval County has the authority to promulgate different regulations pertaining to the same act between districts. As such, substantive due process of this ordinance is not in dispute. Lawrence Gene Sager, *Fair Measure:*

Procedural due process affords interested parties the right to adequate notice and a fair hearing when subject to a deprivation of a property interest. *Mullane v. Cen. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). In order to bring a procedural due process claim, the plaintiff must first be deprived of a legitimate property interest through a government action. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence, Kan.*, 715 F. Supp. 1000, 1115 (D. Kan. 1989), aff'd, 927 F.2d 1111 (10th Cir. 1991). In this case, it is possible that the grant of a well permit in District A, under the Adang Ordinance (AO), would be viewed as a governmental action that deprives adjacent property owners or other residents of a legitimate property interest. If the permitting process actually deprived a legitimate property interest, actual notice should be afforded to interested and identifiable parties because adjudicatory processes typically only affect a limited number of people. *Uhden v. New Mexico Oil Conservation Comm'n*, 1991-NMSC-006, ¶ 12, 112 N.M. 528. Furthermore, opportunity for a hearing to defend against the deprivation of property should be afforded to affected individuals. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The Equal Protection Clause protects against government actions that treat similarly situated people differently. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 290 (1978). Typically, intentionally discriminatory treatment of a suspect class such as race, religion, or national origin will be held unlawful under a court's strict scrutiny review. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). However, when a non-suspect class faces discriminatory treatment, under rational basis review, courts will uphold the law so long as it serves a legitimate government interest. *ACLU of NM v. City of Albuquerque*, 2006-NMSC-089, ¶ 19, 144 NM 471. In this case, the AO does not appear to intentionally discriminate against a suspect class. As such, an alleged violation of equal protection would only be subject to rational basis review. *ACLU of NM v. City of Albuquerque*, 2006-NMSC-089, ¶ 19. Under rational basis review, it is likely that the AO is reasonably related to and furthers the objective of protecting groundwater from contamination based on different geological factors. Accordingly, a court is likely to find that the Equal Protection Clause under the New Mexico and United States Constitution has not been violated.

Below, Parts A and B discuss the two issues raised by the Sandoval County Citizens Working Group, Ordinance Team regarding procedural due process and equal protection of Distirct A in relation to the Adang Ordinance.

A. Does the AO violate procedural due process by only requiring constructive notice and a public comment period to District A during permitting of a hydraulic fracking well?

It is possible the AO violates procedural due process. While grants of a drilling permit under the AO ordinance would not implicate any property interest broadly held by all District A residents, some property owners near the drilling operation may be able to allege deprivation of a legitimate property interest. For those individuals, actual notice may be required because the

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The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1228-29 (1978).

approval of oil and gas drilling permits may only affect the property interests of a limited number of readily identifiable individuals. Whether or not a hearing is required for individuals alleging a deprivation of a legitimate property interest will likely depend on the nature of the allegation. If the property deprivation is substantial, it is likely a court would find that a hearing was required.

Procedural due process ensures that prior to a government deprivation of life, liberty or property, a person receive reasonable notice and is afforded the opportunity of a fair hearing. *Mullane*, 399 U.S., at 313. To allege a procedural due process violation, a challenger must first identify a property interest that they are entitled to under state law or other rules sufficient to warrant due process protections. Jacobs, 715 F. Supp., 1116 (D. Kan. 1989). An abstract need or desire for an interest is insufficient. *Curtis Ambulance of Florida, Inc. v. Board of County Com'rs of Shawnee County, Kan.* 811 F.2d 1371 (10th Cir. 1387). Typical claims of entitlement to a legitimate property interest are based on statutory or contractual provisions. *Id.*

Once a property interest is established, what is adequate notice is determined according to whether the local government's action was adjudicatory or administrative. *Rayellen Res., Inc. v. New Mexico Cultural Properties Review Comm.*, 2014-NMSC-006, ¶ 27, 319 P.3d 639. An adjudicatory action is when the government rules on an individual's right, which may affect a limited group of people within a limited area. *Rayellen*, 2014-NMSC-006, ¶ 25. In contrast, an administrative action is regulatory and will most likely affect the general land use and general population. *Rayellen*, ¶ 27. Accordingly, actual notice (notice by mail) is reasonable and appropriate for adjudicative actions since affected people are easily identifiable, and constructive notice (notice by publication) is reasonable and appropriate for administrative actions since affected people may be vast and hard to identify. *Id.* When determining whether a hearing is appropriate in procedural due process, three factors must be contemplated: (1) the private interest that will be affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the value of additional safeguards; and (3) the governmental interest in imposing burdens on the procedure at issue. *Mills v. New Mexico State Bd. of Psychologist Examiners*, 1997-NMSC-028, ¶ 5, 123 N.M. 421. The necessity of a hearing is determined on a case-by-case basis. *Id.*

i. Some individuals in District A may be able to claim that a legitimate property interest is being deprived when a specific drilling permit is granted

The threshold question with regards to whether the procedure made available to non-permittee residents in District A under the Adang Ordinance is sufficient under Constitutional due process protections is whether those residents of District A have a legitimate property interest that is being deprived by the County's permitting process. For example, adjacent landowners might argue that the County's grant of a drilling permit lowers their property value, interferes with their quite enjoyment of their property, or increases risk of contamination to their groundwater.

In *Uhden v. New Mexico*, an individual petitioner brought a procedural due process claim against the New Mexico Oil Conservation Division for lack of actual notice and hearing prior to the Commission approving an application to widen well spacing, which subsequently reduced the petitioner's royalties from the well. *Uhden*, 1991-NMSC-089, ¶ 2. The Court established that

the petitioner had a clear property interest in her oil and gas lease, as it was a state contractual property right. *Uhden*, ¶ 8.

Petitioners in *Rayellen v. New Mexico Cultural Properties* were private land owners who alleged due process was violated when the New Mexico Cultural Properties listed Mount Taylor as cultural property on the state historic register, depriving them the ability to develop their surface and mineral rights, without providing actual notice to all affected property owners. *Rayellen*, ¶¶ 8, 9. Although the Court did not address the issue directly, the Court's decision implicitly affirmed that the loss of surface and mineral rights because of the cultural listing was a legitimate property interest sufficient to bring a procedural due process claim. *Rayellen*, ¶¶ 14, 17.

In *Jacobs*, a limited group of land developers attempted to rezone their residential property to commercial use so as to build a shopping mall. *Jacobs*, 715 F. Supp., 1114. After several denials of rezoning from the city commission, petitioners claimed, among other things, a violation of procedural due process for lack of an impartial hearing. *Jacobs*, 1114-15. The court articulated that the petitioners must first establish a legitimate property right to bring a due process claim. *Jacobs*, at 1115. The appellants claimed that state law gave them a legitimate expectation of rezoning. *Id.* at 1117. The court held, however, that in order to establish a legitimate expectation sufficient for a due process challenge, there needed to be a set of rules provided by state law or by the commission that gave rise to an expectation of rezoning if the criteria were met. *Id.* at 1116. In the absence of such rules, the discretion given to the zoning commission to deny rezoning did not give rise to legitimate property interest for the purposes of a due process challenge. *Id.*

Non-permittee residents in District A likely do not have a broadly-held property interest recognized by state law or county law that should be afforded procedural due process protections during the adjudication of an oil and gas drilling permit. For example, a District A resident could try to bring a due process claim alleging that the approval of a drilling permit has deprived him of a property interest in uncontaminated groundwater. As in *Jacobs*, a court would be unlikely to find that granting the permit would constitute the deprivation of a legitimate property interest. Even if state law or the County ordinance were found to create a legitimate expectation of uncontaminated groundwater, the County approval of a drilling permit does not deprive residents of uncontaminated groundwater. At worst, it potentially increases the risk of contamination. It is unlikely that Courts would find that the County ordinance or other law establishes a legitimate expectation that residents have a property right to prevent activities that could increase risk of contamination to their groundwater. Consistent with the court's reasoning in *Jacobs*, this might be different if the Adang Ordinance established conditions that would require denial of a permit in District A if a risk of contamination was found, giving rise to the legitimate expectation that no permits be granted if they increased the risk to groundwater. Under the language of the ordinance, however, there are no such specific criteria limiting permitting discretion in this way.

There may be instances, however, where a specific property owner in District A can allege that granting a specific permit would lead to a deprivation of a legitimate property interest, more closely resembling the facts in *Uhden*. For example, a neighboring property owner may be able to allege that the grant of a drilling permit will result in the diminishment of her property

value, or deprive her of quiet enjoyment of her property (if drilling activities were to bring noise or pollution into her property). If an individual in District A has a definite or actual property right, such as surface rights, to a parcel of land that will be affected by a well permit, then that specific individual would be entitled to procedural due process prior to the granting of the permit.

In sum, most residents in District A probably do not have a property interest that would trigger a procedural due process protection during the granting of a county drilling permit. Nonetheless, in specific permitting decisions, some private landowners may be able to claim that the grant of a permit deprives them of a legitimate property interest and therefore bring a valid procedural due process challenge.

ii. District A individuals with legitimate property rights are not afforded adequate notice.

If a court determines that a plaintiff has a legitimate property interest which may be protected by procedural due process, the court must then determine what would be adequate notice and hearing to affected parties. The notice required should be "appropriate to the nature of the case." *Mullane*, 339 U.S. at 313. The test applied by the court is whether notice is "reasonably calculated under the circumstances to inform interested parties of its action in order to afford them the opportunity to be heard." *Rayellen*, 2014-NMSC-006, ¶ 20. In general, actual notice is required for adjudicatory processes that directly impact a relatively few individuals, whereas constructive notice is sufficient for administrative processes that impact the general public.

In *Uhden*, actual notice to the property owner was required because the commission's action was based on the adjudication of an individual property right and because the property owner was easily identifiable. *Uhden*, ¶ 13.

In *Rayellen*, the Court found that "because no individual property rights were being adjudicated by [omitted] the listing, personal notice was not required" and constructive notice was sufficient. *Rayellen*, ¶ 27. Defendant's notice of the cultural listing was adequate because the commission made reasonable efforts to provide individual and constructive notice to adversely affected property owners, of which there were hundreds. *Rayellen*, ¶¶ 27, 28. Actual notice to every effected person would have been too burdensome on the commission, and therefore, unreasonable to require. *Id.* at 27.

The granting of a drilling permit under the proposed ordinance would be an adjudicatory action as in *Uhden* because the people most likely to have legitimate affected property interests would be a small and identifiable number. For example, the surface property owner and adjacent property owner. As in *Uhden,* actual notice would likely be required.

The proposed AO does not currently require that actual notice be provided to any individuals in District A. The AO articulates that notice of permit applications will be provided through publication in a local newspaper and on the Sandoval County Commission website.

Unlike the administrative process occurring in *Rayallen*, the AO prescribes notice regarding an adjudicative action. The *Rayallen* court held constructive notice is reasonable and appropriate when administrative action affects a general population that is not easily discernable. However, in this case, permit approvals are an adjudicative action that will likely not affect a general population. Instead, permit adjudication will affect limited and identifiable individuals, such as adjacent property owners or surface right owners. Because such individuals may in some circumstances have viable claims that they are being deprived of legitimate property interests, these individuals should be afforded actual notice.

iii. **Individuals of District A may be entitled to a hearing.**

The United States Supreme Court has consistently held that "some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. at 333. "Procedural due process requirements are not static, and the extent of a hearing is determined on a case-by-case basis." *Mills v. New Mexico State Bd. of Psychologist Examiners*, 1997-NMSC-028, ¶ 19. A hearing does not necessarily need to provide all, or even most, protections afforded by trial. *Camuglia v. The City of Albuquerque*, 448 F.3d 1214, 1220 (10th Cir. 2006). Whether an administrative procedure is constitutionally adequate requires an analysis of the governmental and private interests that are affected. *Eldridge,* at 334. Within this test there are three factors to consider: (1) the private interest that will be affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the value of additional safeguards; and (3) the governmental interest in imposing the burdens of the procedure at issue. *Mills*, 1997-NMSC-028, ¶ 19.

In *Mills*, the petitioner appealed the New Mexico Board of Psychology's reinstatement procedure, which required the petitioner to take an oral examination in order to reinstate her psychology license. *Mills*, 1997-NMSC-028, ¶¶ 4-7. The Board informed the petitioner the exam was to assure that she was in good mental health to practice. *Id.* ¶ 4. In response, the petitioner submitted affidavits from her doctors and colleagues to attest to her mental health standing. *Id.* However, the Board continued to insist on an oral examination and refused to grant the petitioner a hearing to address the issue. *Id.* The New Mexico Court of Appeals held that procedural due process was violated when the Board denied petitioner a hearing. *Id.* ¶ 20. It reasoned that the petitioner was at risk of losing a significant property interest (her profession) over an oral exam, and that a hearing could diminish this risk. *Id.* Furthermore, a delay from a hearing would not impose any suffering to the public or the Board. *Id.*

In this case, the AO does not afford a hearing to any interested parties in the process of well permit approval in District A. It only affords a written comment period. In *Mills*, the petitioner was allowed to submit affidavits of good health yet was denied the opportunity to defend her property interest when the Board denied her request for a hearing. Similarly, affected parties in District A have an opportunity to submit comments to the Director, but they do not have the opportunity to be heard and to defend against deprivation of property due to adjudicative action by the County. The County might choose not to provide a hearing for District A in order to maintain an efficient permitting process for operators.

The likelihood that a court would find that a hearing is required depend in part on what deprivation of property is asserted and what value a hearing would provide in safeguarding against an erroneous deprivation. It is possible that a court would find that the County's interest in an efficient process does not outweigh an individual's fundamental right to protect deprivation of property. As such, the AO may be at risk of due process challenges if it denies a hearing to individuals with legitimate property interests at risk of deprivation.

In sum, in order to bring a procedural due process challenge individuals must allege deprivation of a legitimate property interest. While grants of a drilling permit under the AO ordinance would not implicate any property interest broadly held by all District A residents, some property owners near the drilling operation may be able to allege deprivation of a legitimate property interest. For those individuals, actual notice may be required because the approval of oil and gas drilling permits may only affect the property interests of a limited number of readily identifiable individuals. Finally, whether or not a hearing is required for individuals alleging a deprivation of a legitimate property interest will likely depend on the nature of the allegation. If the property deprivation is substantial, it is likely a court would find that a hearing was required.

B. Does the AO violate equal protection by prescribing different due process procedure and permitting processes between districts?

It is unlikely the AO violates equal protection. Equal protection "focuses on the validity of legislation as it equally burdens all persons in the exercise of a specific right." *ACLU of NM v. City of Albuquerque*, 2006-NMSC-089, ¶ 17. When an ordinance is challenged on equal protection grounds, one of three levels of review is applied based on the status of the group affected. *ACLU*, ¶ 19. "Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty—such as first amendment rights, freedom of association, voting, interstate travel, privacy, and fairness in the deprivation of life, liberty or property—which the Constitution explicitly or implicitly guarantees." *Marrujo v. New Mexico State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 10, 118 N.M. 753, 757, 887 P.2d 747, 751. "Strict scrutiny also applies under an equal protection analysis if the statute focuses upon inherently suspect classifications such as race, national origin, religion, or status as a resident alien." *Marrujo*, 1994-NMSC-116, ¶ 10. Under strict scrutiny, "the burden is placed upon the state to show that restriction of the delineation of suspect class supports a compelling state interest, and that the legislation accomplishes its purposes by the least restrictive means." *Id.* Intermediate scrutiny will apply for a quasi-suspect class such as gender. *ACLU*, ¶ 19. However, such a class is not at issue in this case. When a fundamental right or suspect class is not alleging discrimination, rational basis review will be applied. *Id.* An ordinance analyzed under rational basis review need only demonstrate that there is a reasonable relationship between the enacted law and a legitimate government purpose. *Marrujo*, ¶ 12. Furthermore, the burden is upon the opponent to the legislation to prove that the law is arbitrary and unreasonable. *Id.*

The AO may have potential to be challenged under an Equal Protection Clause claim because District A has higher proportioned amount of Native American and Hispanic/Latino populations per capita compared to Districts B and C. The effect of the AO's zoning may create a disparate impact negatively affecting minority racial groups in District A, a suspect class for equal

protection purposes. Suspect classes are entitled to strict scrutiny review by the court. This review will determine if the law intended to discriminate against the suspect class, and if so, the Equal Protection Clause is violated. If a court were to find that discrimination against a suspect class in District A was not intended, then rational basis review would be applied to AO. Under rational basis, the court would determine if the law fulfills a legitimate government interest. If so, the law will be upheld. As such, the two issues in this matter are whether the AO intended to discriminate against a suspect class, and if not, under rational basis review, despite non-suspect class discrimination, does the AO further a legitimate government interest.

i. Does the Adang Ordinance intend to discriminate against a suspect class?

In *Village of Arlington Heights*, the court determined that petitioner's evidence failed to demonstrate race discrimination pertaining to a city's denial to rezone property that would be used to construct a low-income apartment complex. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977). In *Arlington*, the petitioner requested a rezoning from a single-family home to a multi-family home in order to construct a low income housing apartment complex. *Arlington Heights*, at 557. The city commission denied the petitioner's request to rezone on the grounds that the city intended the area to stay zoned for single-family homes. *Id.* at 258-59. Petitioner alleged that the denial to rezone was based on discrimination because the denial to rezone disproportionately affected African-Americans. *Id.* at 552. However, the Supreme Court reasoned that "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 266. Disparate impact may be a starting point to evidence legislative discrimination, but impact alone is not determinative. *Id.* A commission's departure from normal procedure and the commission's administrative history may offer guidance as to the intent of the commission. *Id.* at 267-68. The Court found that the city was undeniably committed to single-family homes as its dominant residential land use, *Id.* at 269, which was reflected in the commission's official minutes. *Id.* at 270. As such, the Court held that the commission's decision was not based on race but instead based on historical zoning procedures. *Id.* Accordingly, the petitioner failed to establish the requisite intent to discriminate despite a disparate impact on African-Americans. *Id.*

In this case, the Adang Ordinance may disproportionally impact minority groups by creating a more liberal drilling permitting process for District A in comparison to Districts B and C. However, if a disparate impact were alleged, it is unlikely that the court would find evidence of intentional discrimination based on race that would give rise to a strict scrutiny analysis. In *Arlington*, the court found the city lacked the requisite discriminatory intent in its denial to rezone for low-income apartment complex, despite disproportionally affecting African-Americans. As such, the zoning decision did not violate equal protection. Similarly, the AO findings section indicates that the county's process may be more lax in District A because of the uniform strata formations in the area provide for a safer environment to frack. As such, even if there was a disparate impact to a suspect class, a court would likely hold that the AO lacks the legislative intent to discriminate to give rise to an equal protection claim.

ii. Under rational basis review, does the AO violate the Equal Protection Clause?

In *ACLU of New Mexico v. City of Albuquerque*, the petitioners asserted that equal protection was violated when the City of Albuquerque passed a sexual predator ordinance requiring sex offenders to register with the Albuquerque Police Department. *ACLU*, ¶ 22. The court determined sexual offenders are not part of a suspect class; as such it was appropriate to review the matter under a rational basis standard. Under rational basis, the opponent of the legislation must demonstrate the law is arbitrary and unreasonable. *Marrujo*, ¶ 12. This ordinance required different reporting provisions contingent upon whether the offender was a resident or non-resident of the State. *ACLU*, ¶ 28. The Court found that the ordinance violated equal protection because it did not require state resident sex offenders to register with APD, but required out of state sex offenders to register. *Id.* ¶ 29. This demarcation treated similarly situated people differently and did not further the objective of the city ordinance to register sex offenders. *Id.* ¶ 28. Accordingly, the court found an equal protection violation.

In *Jacobs*, the Court found that a city ordinance treated two similarly situated developers differently, but equal protection was not violated because the city had a legitimate purpose for the distinction between developers. *Jacobs*, 715 F. Supp., 1118-19 (D. Kan. 1989). The trial court reasoned that the developers in question were dissimilar because each sought rezoning approval in different locations. *Jacobs*, at 1118. The Court of Appeals disagreed, determining that a difference solely based on location did not mean that the developers were differently situated. *Jacobs*, at 1119. However, under rational basis review, the city's interest of retaining vitality of the downtown area by limiting commercial retail development outside the downtown area was a legitimate interest that was reasonably adjudicated through the denial to rezone a developer's property. *Id.*

Similar to opponents of the city ordinance in *ACLU* or the zoning decision in *Jacobs*, an opponent of the AO would need to demonstrate that requiring different notice and hearing requirements or permit application procedure between districts is arbitrary and unreasonable. There only needs to be a reasonable relationship between legislation and the government's objective for a court to uphold the legislation. The AO identifies that the distinction between districts is necessary because District A groundwater is safe from contamination related to hydraulic fracking. Therefore, providing actual notice and public hearing for every permit is unnecessary. Whereas District B and C fracking activity poses a high threat of groundwater contamination. As such, a more stringent notice and hearing process is reasonable. Because the ordinance's objective focuses on groundwater protection and provides scientific support for the permitting distinction, it is likely a court will not find that a different notice and hearing requirement between districts is arbitrary and unreasonable.

However, a violation of equal protection might be raised because the AO findings articulate that fracking in the San Juan Basin is safe. It appears that District B—the transition zone—may also include some of the San Juan Basin, yet District B has more stringent requirements for notice and hearing and District A has less stringent permitting application requirements. In *ACLU*, the petitioners claimed the Equal Protection Clause was violated when a city ordinance prescribed divergent treatment of similarly situated sex offenders. Similar to the city ordinance

in *ACLU*, the AO notice and hearing requirements and permitting processes in the San Juan Area across districts might be arbitrary and unreasonable since different laws apply to similarly situated permit applicants in the San Juan Basin. Accordingly, an individual, whether a citizen or operator in the San Juan Basin, may raise a violation of equal protection. However, under rational basis review, the high burden to prove the ordinance is arbitrary because it does not further a governmental interest remains. It is likely that a court will find the protection of ground water is a legitimate government interest that is reasonably legislated through the AO.

In summary, the AO most likely will not be found to meet the requirement of intentional discrimination against a suspect class, and would therefore not be reviewed under strict scrutiny. As such, an equal protection challenge would be analyzed under rational basis review. Under rational basis review, a court will uphold legislation as long as it is rationally and reasonably related to a governmental objective. The AO's objective is to protect ground water contamination related to fracking by requiring more stringent permitting applications and more varying notice and hearing requirements across districts. Thus, under a rational basis review, a court might find merit in an equal protection challenge pertaining to the demarcation of similarly situated people within the San Juan Basin between districts. However, the review would hinge on whether the distinction in procedure furthers a legitimate government objective, and it is likely a court would find that the protection of groundwater is reasonably legislated through the AO. Accordingly, an equal protection violation would be denied.

Thank you for allowing the University of New Mexico School of Law, Natural Resource and Environmental Law Clinic to represent the Sandoval Citizens Working Group, Ordinance Team.

Sincerely,

Meaghan Baca
NREL Clinical Law Student

Prof. Gabe Pacyniak
NREL Supervising Attorney

Aquifer Water Protection & Oil and Gas Ordinance

Citizens Working Group (CWG) Ordinance Team

LEGAL CASE

SWEPI, LP v. Mora County et al.
Case No. 1:14-cv-00035-JB-SCY
Filed Jan. 19, 2015

Federal District Court Judge James O. Browning

This is an attachment to the CWG Ordinance Team's ordinance that was submitted to the Sandoval County New Mexico Planning & Zoning Commission

Oil and Gas Development State Preemption statements are highlighted

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SWEPI, LP, a Delaware
Limited Partnership,

Plaintiff,

vs. No. CIV 14-0035 JB/SCY

MORA COUNTY, NEW MEXICO;
MORA COUNTY BOARD OF COUNTY
COMMISSIONERS; PAULA A. GARCIA,
Mora County Commissioner; JOHN P. OLIVAS,
Mora County Commissioner; and ALFONSO J.
GRIEGO, Mora County Commissioner,

Defendants,

and

LA MERCED DE SANTA GETRUDIS DE LO
DE MORA, a Land Grant; and JACOBO E.
PACHECO, an Individual,

Defendant-Intervenors.

MEMORANDUM OPINION AND ORDER

B STATE LAW PREEMPTS THE ORDINANCE.

New Mexico state law impliedly preempts the Ordinance, because it conflicts with state law. State law may either expressly or impliedly preempt a county ordinance. See San Pedro Mining Corp. v. Bd. of Cnty. Comm'rs, 1996-NMCA-002, ¶ 9, 909 P.2d 754, 758. To expressly preempt local laws, the State "legislature must clearly state its intention to do so." Rancho Lobo, LTD v. Devargas, 303 F.3d at 1201. There are two doctrines under which state law may impliedly preempt a local law: (i) field preemption; and (ii) conflict preemption. See San Pedro Mining Corp. v. Bd. of Cnty. Comm'rs, 1996-NMCA-002, ¶ 11. Field preemption occurs when "it is evident from the language of the New Mexico law at issue that the legislature 'clearly intended to preempt a governmental area.'" Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204 (quoting Casuse v. City of Gallup, 1987-NMSC-112, ¶ 6, 746 P.2d 1103, 1105). Conflict preemption examines "whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits." Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205 (citing Inc. Cnty. of Los Alamos v. Montoya, 1989-NMCA-004, ¶ 16 ("Rather, the tests are whether the stricter requirements of the ordinance conflict with state law, and whether the ordinance permits an act the general law prohibits, or prohibits an act the general law permits.")). Merely requiring

[39]While the Court is willing to issue a permanent injunction, enjoining the Defendants from enforcing the Ordinance on state lands, because the Court will invalidate the Ordinance, in its entirety, such an injunction would be moot.

greater restrictions than state law, however, does not necessarily make the ordinance invalid. See Inc. Cnty. of Los Alamos v. Montoya, 1989-NMCA-004, ¶ 16. SWEPI, LP argues that state law impliedly preempts the Ordinance through either field or conflict preemption. State law does not entirely preempt the oil-and-gas field. The Ordinance conflicts, however, with state law and is, thus, invalid because of conflict preemption.

1. New Mexico State Law Does Not Impliedly Preempt the Entire Oil-And-Gas Field.

New Mexico state law does not impliedly preempt the entire oil-and-gas field. SWEPI, LP directs the Court to a 1986 New Mexico Attorney General advisory letter in which the Attorney General opined that the entire field of oil-and-gas regulation was occupied by the State -- i.e. the State of New Mexico impliedly preempted the entire oil-and-gas field. See Motion at 20 (citing N.M. Att'y Gen. Op. 86-2, 1986 WL 220334). However, "Attorney General opinions and advisory letters do not have the force of law." United States v. Reese, 2014-NMSC-013, ¶ 36, 326 P.3d 454, 462. Moreover, the advisory letter is almost thirty years old, and there has been intervening case law that indicates that field preemption does not apply.[40]

In the advisory letter, the Attorney General's Office, through Assistant Attorney General Barbara G. Stephenson, considered whether the County of Santa Fe could regulate oil-and-gas operations. See N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *1. Ms. Stephenson opined that

[40]Several additional concerns caution against relying on the advisory letter. First, the letter appears to be an informal "advisory letter" rather than a formal Attorney General Opinion. During his time in office, New Mexico Attorney General, Paul Bardacke, the Attorney General in 1986, issued very few formal Attorney General Opinions. See Hal Stratton & Paul Farley, Office of the Attorney General State of New Mexico: History, Powers & Responsibilities 1846-1990 119 (1990)(showing that, in 1986, less than five Official Attorney General Opinions were issued while over seventy-five were issued in 1987, after Mr. Bardacke left office). Second, and related to the first, Mr. Bardacke did not sign the 1986 advisory letter. See N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *1. Assistant Attorney General Barbara G. Stephenson signed it. See N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *3. The lack of the New Mexico Attorney General's signature on the letter cautions against giving too much weight to the letter.

it could not regulate oil-and-gas operations, because the county regulations conflicted with Oil Conservation Division regulations, and because "the county is preempted from adopting zoning regulations relating to oil and gas production." N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *1. Specifically, Ms. Stephenson opined that "[t]he legislature has vested" the regulation of oil-and-gas production with the Oil Conservation Division "with the intention that the state agency occupy the entire field of regulation." N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *1. Ms. Stephenson noted that the county has only those powers that the Legislature provides, and that the county's zoning authority is subject to statutory or constitutional limitations. See N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *2. Ms. Stephenson opined that one such limitation comes from Section 70-2-36 of the New Mexico Statutes Annotated. See N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *2.

> A. The [Oil Conservation Division] shall have, and is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil and gas operations in this state. It shall have jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil and gas operations.

N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *2 (quoting N.M. Stat. Ann. § 70-2-36)(emphasis in N.M. Att'y Gen. Op. 86-2 but not in source). Based on this statute, Ms. Stephenson concluded that the Oil Conservation Division, "therefore, occupies the entire area of oil and gas regulation and a county cannot, by ordinance, attempt to regulate this area." N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *2. The Attorney General discussed cases from Washington, Missouri, and Alaska in which the courts found that the state law preempted the areas of prison construction, location of intercity electric transmission lines, subdivisions, and mobile home construction standards. See N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *2 (citing Snohomish Cnty. v.

State of Washington, 648 P.2d 430 (Wash. 1982)(en banc)(prison location); Union Elec. Co. v. City of Crestwood, 562 S.W.2d 344 (Mo. 1978)(en banc)(location of intercity electric transmission lines); Kenai Peninsula Borough v. Kenai Peninsula Bd. of Realtors, Inc., 652 P.2d 471 (Alaska 1982)(subdivisions); Snohomish Cnty. v. Thompson, 577 P.2d 627 (Wash. Ct. App. 1978)). Additionally, Ms. Stephenson opined that the county ordinance was further invalid, because it "applies requirements to oil and gas production beyond those imposed by OCD and thus prohibits, that which OCD permits." N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *3. Finally, Ms. Stephenson concluded that "[c]oncurrent jurisdiction does not appear possible." N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *3.

Since the Attorney General's Office issued the advisory letter, New Mexico courts and the Tenth Circuit have reined in New Mexico's field-preemption doctrine. In San Pedro Mining Corp. v. Board of County Commissioners, the Court of Appeals of New Mexico considered whether the New Mexico Mining Act, N.M. Stat. Ann. §§ 69-36-1 through 69-36-20, preempts a county's ability to regulate mining activity within its jurisdiction. See 1996-NMCA-002, ¶ 4. The Court of Appeals of New Mexico first concluded that the Mining Act does not expressly preempt local mining ordinances. See 1996-NMCA-002, ¶ 10. Concerning implied field preemption, the Court of Appeals of New Mexico noted that the Mining Act's, and subsequent regulations', primary focus is on "the minimization of damage to the land being mined." 1996-NMCA-002, ¶ 12. The Court of Appeals of New Mexico noted, however, that

> neither the Act nor the regulations contain any mention of development issues with which local governments are traditionally concerned, such as traffic congestion, increased noise, possible nuisance created by blasting or fugitive dust, compatibility of mining use with the use made of surrounding land, appropriate distribution of land use and development, and the effect of the mining activity on surrounding property values.

1996-NMCA-002, ¶ 12. The Court of Appeals of New Mexico concluded that, "[t]herefore, there is room for concurrent jurisdiction and regulation, with the County's ordinance regulating aspects of the mining activity that concern off-site safety, compatibility with surrounding property uses, and other matters left unaddressed by the Act and regulations." 1996-NMCA-002, ¶ 12. Because there was room for concurrent regulation between a county and the Mining Act, the Court of Appeals of New Mexico held that the Mining Act and subsequent regulations do not completely preempt the mining field. See 1996-NMCA-002, ¶ 14. The Court of Appeals of New Mexico noted that portions of Santa Fe County's ordinance may conflict with the Mining Act, and thus be preempted under conflict preemption, but, because the plaintiff argued only that the ordinance, as a whole, was preempted, the court did not consider which individual provisions might be preempted through conflict preemption. See 1996-NMCA-002, ¶ 13.

In Rancho Lobo, LTD v. Devargas, the Tenth Circuit considered whether the New Mexico Forest Conservation Act, N.M. Stat. Ann. §§ 68-2-1 through 68-2-34, preempted a New Mexico county's "Timber Harvest Ordinance." See 303 F.3d at 1197. The Tenth Circuit, in an opinion that the Honorable Mary B. Briscoe, United States Circuit Judge for the Tenth Circuit, authored, and Judges Ebel and McKay joined, held that the Conservation Act did not preempt the ordinance. See 303 F.3d at 1207. The Tenth Circuit noted that there was some support for the argument that the Conservation Act impliedly preempted the entire field; specifically, the Conservation Act created the Forestry Division and granted it with sweeping powers to make rules and regulations concerning timber harvests, and the Forestry Division's regulations were comprehensive. See 303 F.3d at 1204. The Tenth Circuit concluded, however, that the Conservation Act was "very similar" to the Mining Act in San Pedro Mining Corp. v. Board of County Commissioners. 303 F.3d at 1204. Both acts, it noted, "did not really address the kinds of development issues 'with

which local governments are traditionally concerned.'" 303 F.3d at 1204 (quoting San Pedro Mining Corp. v. Bd. of Cnty. Comm'rs, 1996-NMCA-002, ¶ 12). Specifically, the Tenth Circuit stated that the "Conservation Act's primary focus is the minimization of damage to the permitted land," while

> the main focus of the Timber Harvest Ordinance is on local issues, such as the amelioration of damage to the surrounding property as the result of timber harvesting, including issues such as the effect of the timber harvest on economic development and local employment, water quality and availability, soil protection, archeological, historic and cultural resources, abatement of noise, dust, smoke and traffic, hours of operation, compatibility with adjacent land uses, cumulative effect when combined with existing harvests.

Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204-05. The Tenth Circuit concluded that, because the Conservation Act "left room for concurrent jurisdiction over local forestry issues," the Conservation Act does not impliedly preempt "the entire field of regulation relating to timber harvesting in New Mexico." 303 F.3d at 1205. As for conflict preemption, the plaintiff argued, and the district court concluded, that, because the Conservation Act permits clear cutting[41] but the county ordinance prohibits it, the ordinance conflicts with state law. See 303 F.3d at 1205. The Tenth Circuit, however, held that, because the Conservation Act did not create a right to clear cutting or state that clear cutting is permitted, the ordinance's prohibition did not conflict with Conservation Act. See 303 F.3d at 1205.

The Oil and Gas Act is focused primarily on the prevention of waste and the drilling and maintenance of oil-and-gas wells. The Oil and Gas Act prohibits the production or handling of oil and gas in a manner that constitutes or results in waste. See N.M. Stat. Ann. § 70-2-2. Waste is interpreted with its ordinary meaning, and the Oil and Gas Act also provides a number of specific examples that can be summed up as the inefficient, excessive, or improper use of oil and gas. See

[41]"Clearcutting, clearfelling, or clearcut logging is a forestry/logging practice in which most or all trees in an area are uniformly cut down." Clearcutting, Wikipedia.org, http://en.wikipedia.org/wiki/Clearcutting (last visited Jan. 14, 2014).

N.M. Stat. Ann. § 70-2-3. The Oil and Gas Act provides the Oil Conservation Division with a number of powers concerning the regulation of drilling for, and producing, oil and gas. See N.M. Stat. Ann. § 70-2-12. The Oil and Gas Act, however, does not address "the kinds of . . . issues 'with which local governments are traditionally concerned.'" Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204 (quoting San Pedro Mining Corp. v. Bd. of Cnty. Comm'rs, 1996-NMCA-002, ¶ 12). The Oil and Gas Act does not address issues such as traffic that oil-and-gas production creates; noise limitations for production near residential areas; potential nuisance issues from sound, dust, or chemical run-off; or the impact of oil-and gas production on neighboring properties.[42] There is thus "room for concurrent regulation" by Mora County. Rancho Lobo, LTD v. Devargas, 303 F.3d at 1200. Because there is room for concurrent regulation, State law does not preempt the entire oil-and-gas field. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204-05; San Pedro Mining Corp. v. Bd. of Cnty. Comm'rs, 1996-NMCA-002, ¶ 12.

In the 1986 advisory letter, Assistant Attorney General Stephenson focused on the Oil Conservation Division's authority and jurisdiction in concluding that the Oil and Gas Act preempted the entire oil-and-gas field. See N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *2. That the Legislature has authorized the Oil Conservation Commission to pass regulations and has passed extensive regulations does not change the conclusion that there is no field preemption. Both the Mining Act and the Conservation Act created state agencies with the authority to enact extensive regulations. See N.M. Stat. Ann. § 69-36-6 (creating the Mining Commission); N.M. Stat. Ann. § 69-36-7 (providing the Mining Commission with authority to enact regulations); N.M. Stat. Ann. § 68-2-16 (noting that the Forestry Division has the authority to enforce and enact rules

[42]The Surface Owners Protection Act, N.M. Stat. Ann. §§ 70-12-1 through 70-12-10, provides protections to surface owners, but the definition of "surface owner" is limited to the "person who holds legal or equitable title . . . to the surface of the real property on which the operator has the legal right to conduct oil and gas operations." N.M. Stat. Ann. § 70-12-3(D). Consequently, it does not apply to neighboring properties.

and regulations). The existence of a state agency with regulatory authority, however, did not lead the Tenth Circuit or the Court of Appeals of New Mexico to conclude that the Mining Act or the Conservation Act preempted their respective fields. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204-05; San Pedro Mining Corp. v. Bd. of Cnty. Comm'rs, 1996-NMCA-002, ¶ 12. Similarly, the existence of the Oil Conservation Division, and its abilities to enact and enforce regulations, does not cause the Oil and Gas Act to preempt the entire oil-and-gas field. Instead, the correct question to ask is whether the Oil and Gas Act left room for concurrent jurisdiction with local governments. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205. To answer this question, the Court must examine whether the Oil and Gas Act addresses the issues with which local governments are traditionally concerned.[43] See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204. As the Court has already concluded, it does not address with which local governments are traditionally concerned. There is thus room for concurrent jurisdiction with local

[43]The statutory provision, on which the Ms. Stephenson relied, gives further evidence that there is no field preemption. That provision states:

> The [Oil Conservation Division] shall have, and is hereby given, jurisdiction and authority over all matters relating to the conservation of oil and gas and the prevention of waste of potash as a result of oil or gas operations in this state. It shall have jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations.

N.M. Stat. Ann. § 70-2-6. Ms. Stephenson focused on the language that says the Oil and Gas Division has "jurisdiction and authority over all matters," and over "all persons, matters or things necessary or proper to enforce effectively the provisions of this act." N.M. Att'y Gen. Op. 86-2, 1986 WL 220334, at *2 (quoting N.M. Stat. Ann. § 70-2-6)(emphasis omitted). The rest of the statutory provision, however, indicates that there is no field preemption. The statute states that the Oil Conservation Division has jurisdiction and authority over "matters relating to the conservation of oil and gas and the prevention of potash as a result of oil and gas operations." N.M. Stat. Ann. § 70-2-6. This provision, thus, bolsters the argument that the Oil and Gas Act is focused on the prevention of waste and conservation of oil and gas, and not on matters in which local governments are traditionally concerned. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1204.

governments. Because of this room for concurrent jurisdiction, the Oil and Gas Act does not completely preempt the field of oil-and-gas production despite Assistant Attorney General Stephenson's contrary conclusion in her advisory letter. Professor Alex Ritchie of the University of New Mexico School of Law, who teaches oil-and-gas law at the Law School, has reached a similar conclusion concerning Ms. Stephenson's advisory letter: "Finally, the New Mexico Attorney General's office authored an opinion in 1986 concluding that county regulation was preempted by the Oil and Gas Act. The opinion has little analysis and predates more current judicial precedent that trends towards concurrent jurisdiction." Alex Ritchie, On Local Fracking Bans: Policy and Preemption in New Mexico, 54 Nat. Resources J. 255, 317 n.349 (2014). Accordingly, the Ordinance is not invalidated under the field preemption doctrine.

2. The Ordinance Conflicts With State Law.

The Ordinance conflicts with New Mexico state law and must be invalidated. The Supreme Court of New Mexico first articulated the conflict preemption test in State ex rel. Coffin v. McCall, 1954-NMSC-076, 273 P.2d 642, where it stated that "the test is whether the ordinance permits an act the general law prohibits, or vice versa." 1954-NMSC-076, ¶ 9. "[G]eneral law" means "a law that applies generally throughout the state, or is of statewide concern as contrasted to local or municipal law." Apodaca v. Wilson, 1974-NMSC-071, ¶ 16, 525 P.2d 876, 881. The Supreme Court of New Mexico later clarified that "'an ordinance will conflict with state law when state law specifically allows certain activities or is of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy.'" Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21, 326, 176 P.3d 309, 315 (quoting New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 43, 126 P.3d 1149, 1166). If a county or municipal law conflicts with state law, it must be invalidated. See Bd. of Comm'rs of Rio Arriba

Cnty. v. Greacen, 2000-NMSC-016, ¶ 17 (invalidating provisions of county ordinance that conflicted with state law). However, "an ordinance is not necessarily invalid because it provides for greater restrictions than state law." Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205.

By banning hydrocarbon exploration-and-extraction activities, the Ordinance is antagonistic to state law, because it prohibits activities that New Mexico state law permits. New Mexico courts have generally applied the conflict preemption doctrine when local laws permit conduct that state law prohibits. For example, in Board of Commissioners of Rio Arriba County v. Greacen, the Supreme Court of New Mexico held that a county ordinance, which imposed penalties for driving under the influence ("DUI") that were more severe than penalties that a state statute expressly limited, conflicted with state law. 2000-NMSC-016, ¶ 18. Additionally, in Protection and Advocacy System v. City of Albuquerque, 2008-NMCA-149, 195 P.3d 1, the Court of Appeals of New Mexico held that a city ordinance, which permitted a court to order an individual to take medication, conflicted with a state law that prohibited forced medications. See 2008-NMCA-149, ¶¶ 58-59.

The Court has been unable to find, and the parties have not cited, any case in which a New Mexico court found conflict preemption based on a local ordinance prohibiting conduct that state law permits. The Court, however, has been unable to find a New Mexico case in which a court considered an ordinance as extreme as this one.[44] If the Supreme Court of New Mexico's words that "an ordinance will conflict with state law when state law specifically allows certain activities or is of such a character that local prohibitions on those activities would be inconsistent with or

[44]Other states' courts that have considered local bans on oil-and-gas extraction activities have reached differing conclusions. Compare Clouser v. City of Norman, 393 P.2d 827 (Okla. 1964)(holding that municipality could not ban all oil-and-gas drilling), and Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992)(en banc)(holding that Colorado state law preempted municipal ordinance banning oil-and-gas drilling), with Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S. 2d 714 (N.Y. App. Div. 2013)(holding that New York state law did not preempt municipal ordinance banning hydrocarbon extraction activities).

antagonistic to that state law or policy" have any meaning, Stennis v. City of Santa Fe, ¶ 21 (citation omitted)(internal quotation marks omitted), they must mean that a county cannot outright ban an activity that is highly regulated by that State and of which the State impliedly encourages. Most ordinances that New Mexico courts have upheld are merely more restrictive than state law without banning an entire area of conduct that is permitted by state law. They concern regulating the drilling and location of water wells, see Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 22; stricter punishments and increased enforcement of DUI offenses, see Inc. Cnty. of Los Alamos v. Montoya, 1989-NMCA-004, ¶ 14-16; higher minimum wage requirements, see New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 43; and stricter timber harvesting regulations, see Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205. No court has considered a ban on an activity that that State heavily regulates. Rather, each case concerns an ordinance affecting an area on which state law is silent. See New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 41 ("For example, where state law is silent on smoking in public places, that silence likely would not be deemed permission by state law such that a municipality could never restrict smoking in public places."). For instance, state law is silent on whether a person may engage in clear cutting, and, thus, a county may ban it, even if the state has other regulations concerning timber harvesting. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205. Additionally, while state law may require businesses to pay their employees a specific minimum wage, it does not explicitly permit businesses to pay employees that amount; state law only prohibits businesses from paying less than the minimum wage -- i.e. state law is silent on whether businesses can pay at or just above minimum wage. See New Mexicans For Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 43.

State law is not silent on the exploration and extraction of hydrocarbons. The State has created an extensive statutory and regulatory scheme to regulate oil-and-gas production. See generally N.M. Stat. Ann. § 70-2-1. By extensively regulating oil-and-gas production in a manner that is intended to prevent waste, see N.M. Stat. Ann. § 70-2-2, the State has indicated that oil-and-gas extraction is permitted. This focus on preventing waste also highlights the Oil and Gas Act's focus on the efficient production of oil and gas. Furthermore, if state law did not permit oil-and-gas production, the State would not so heavily regulate oil-and-gas production. A complete ban on oil-and-gas extraction would be "antagonistic" to state law. Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21, 326. As the Supreme Court of New Mexico has stated, state law may be "of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy." Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21. The Oil and Gas Act is such a state law so that prohibiting all oil-and-gas extraction "would be inconsistent or antagonistic to" state law. Stennis v. City of Santa Fe, 2008-NMSC-008, ¶ 21. If a complete ban on all hydrocarbon extraction activities does not constitute a county ordinance that conflicts "with state law when state law . . . is of such a character that local prohibitions on those activities would be inconsistent with or antagonistic to that state law or policy," then no county ordinance will ever fall within this standard. Stennis v. City of Santa Fe, ¶ 21 (citation omitted)(internal quotation marks omitted). Consequently, the Ordinance's hydrocarbon-extraction ban conflicts with state law.

At the hearing, in addressing SWEPI, LP's argument that state law preempts the entire oil-and-gas field and that a county cannot regulate oil-and-gas activities, the Defendants argued that the Ordinance does not regulate oil-and-gas extraction, because it bans all such activities. See Tr. at 145:9-19 (Haas, Court). In the field preemption context, a ban rather than a regulation

would be a distinction without a difference, because a county could not legislate in that field regardless how the legislation is characterized. For conflict preemption, however, the distinction makes a difference, and it is a difference that hurts the Defendants' position. If the Defendants had merely regulated oil-and-gas production in Mora County, those regulations may not conflict with state law, even if they were stricter than state law. See Rancho Lobo, LTD v. Devargas, 303 F.3d at 1205 (noting that an ordinance may provide for greater restrictions than state law). As long as the regulations did not prohibit conduct that state law permits or permit conduct that state law prohibits, the regulations would likely be upheld. The Defendants decided, however, to ban all hydrocarbon extraction activities rather than enacting specific regulations. Because the Oil and Gas Act permits oil-and-gas production, such a ban conflicts with state law by prohibiting conduct that state law permits.[45]

Moreover, the Ordinance's ban conflicts with state law by creating waste and not recognizing correlative property rights, which the Oil and Gas Act prohibits. As the University of New Mexico School of Law's oil-and-gas professor, Alex Ritchie, explains:

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[45]The Defendants argue that the Oil and Gas Commission lacks the authority to assess civil penalties for violations of the Oil and Gas Act. See Response at 16-18. They also argue that the State is not enforcing the Oil and Gas Act by punishing individuals for oil-and-gas leaks and spills. See Tr. at 92:19-21 (Haas). Even if these assertions are true, they would not affect whether the Ordinance conflicts with state law. "'A county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers.'" Bd. of Comm'rs of Rio Arriva Cnty. v. Greacen, 2000-NMSC-016, ¶ 5 (quoting El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm'rs, 1976-NMSC-029, ¶ 6, 551 P.2d 1360, 1364). If a county lacks a certain authority to enact an ordinance, because the ordinance conflicts with state law, the ordinance is invalid. See Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen, 2000-NMSC-016, ¶ 17. New Mexico courts do not look to the county's justifications for enacting the unlawful ordinance; they just invalidate it. Without authority to enact an ordinance, it is invalid, regardless of a county's justifications for enacting it. The Defendants' arguments concerning the enforcement of oil-and-gas leaks and the authority of the Oil and Gas Commission are best left for the New Mexico Legislature. The Defendants are free to call on the Legislature to grant the Oil and Gas Commission greater enforcement authority, or to more vigorously enforce the Oil and Gas Act. The Defendants may not, however, circumvent state law and enact an ordinance without the authority to do so.

> First, an outright ban on oil and gas results in the waste of oil and gas in every pool where such a ban is in place. Opponents might respond that the O&G Act only prohibits waste in connection with "the production or handling of crude petroleum oil or natural gas." It follows that without production or handling (activities that are banned in Mora County), there can be no prohibited waste. Such an argument, however, fails to recognize that pools do not conform to local boundaries. Instead of drilling in an efficient pattern prescribed by reservoir characteristics, a ban requires an inefficient, irregular pattern of production from outside the local boundary in a manner that impedes the state's interest in the efficient production of the pool.
>
> Second, the argument that New Mexico law only governs the manner of production, but not the ability to produce at all, ignores the relationship between waste and correlative rights. A ban on production eviscerates the correlative rights of an owner by denying that owner the opportunity to produce her just and equitable share, or any share. While all manner of federal and state laws that protect the environment may impair correlative rights, allowing a local government to ban oil and gas operations fails the basic preemption test. It arguably goes even further by prohibiting not just something that the law allows, but something that an entire agency is bound by state law to protect. A local ban also discriminates against the owners of a common pool with mineral interests inside the boundaries of the locality as owners outside the boundary would effectively have the right to drain the entire pool. Further, because an owner has such an opportunity to produce under state law, it follows that a prohibition on fracking, a lawful method required for the extraction of oil and gas in shale and other tight formations, also wastes oil and gas that cannot be produced by other methods, thereby impairing correlative rights.
>
> A ban allows for no permit, variance, or other procedure, but simply declares illegal an act that New Mexico law permits and comprehensively regulates, and that legislative history declares critically important to the state and its economy.

Ritchie, supra at 310-11 (footnotes omitted). Accordingly, the Ordinance's ban conflicts with state law.

Because certain provisions in the Ordinance conflict with state law, they must be invalidated. See Bd. of Comm'rs of Rio Arriba Cnty. v. Greacen, 2000-NMSC-016, ¶ 17 (invalidating provisions of county ordinance that conflicted with state law). These provisions include Sections 5.1, 5.2, 5.3, 5.4, and 8.5. These provisions provide:

Section 5.1: It shall be unlawful for any corporation to engage in the extraction of oil, natural gas, or other hydrocarbons within Mora County.

Section 5.2: It shall be unlawful for any corporation to engage in the extraction of water from any surface or subsurface source within Mora County for use in the extraction of subsurface oil, natural gas, or other hydrocarbons, or for any director, officer, owner, or manager of a corporation to use a corporation to extract water from any surface or subsurface source, within Mora County, for use in the extraction of subsurface oil or natural gas or other hydrocarbons. It shall be unlawful for a corporation to import water or any other substance, including but not limited to, propane, sand, and other substances used in the extraction of oil, natural gas, or other hydrocarbons, into Mora County for use in the extraction of subsurface oil, natural gas, or other hydrocarbons; or for any director, officer, owner, or manager of a corporation to do so.

Section 5.3: It shall be unlawful for any corporation, or any director, officer, owner, or manager of a corporation to use a corporation to deposit, store, transport or process waste water, "produced" water, "frack" water, brine or other materials, chemicals or by-products used in the extraction of oil, natural gas, or other hydrocarbons, into the land, air or waters within Mora County.

Section 5.4: It shall be unlawful for any corporation, or any director, officer, owner, or manager of a corporation to use a corporation to construct or maintain infrastructure related to the extraction of oil, natural gas, or other hydrocarbons within Mora County. "Infrastructure" shall include, but not be limited to, pipelines or other vehicles of conveyance of oil, natural gas, or other hydrocarbons, and any ponds or other containments used for wastewater, "frack" water, or other materials used during the process of oil, gas, or other hydrocarbon extraction.

. . . .

Section 8.5. Reinstatement of Moratorium on Oil and Gas Extraction. In the event that this ordinance is overturned or nullified, for any reason, a moratorium on the extraction of oil and gas within the County of Mora shall become effective on the date that this ordinance becomes inactive. That temporary moratorium shall have a duration of no more than six months, during which the Board of County Commissioners shall adopt another ordinance which permanently bans hydrocarbon extraction within the County of Mora.

Ordinance §§ 5.1-5.4, at 4; id. § 8.5, at 6.