

Gregory D. Huffaker, Jr.
Michael J. Moffett
♦
huffaker@handmlc.com
mmoffett@handmlc.com

HUFFAKER & MOFFETT LLC
ATTORNEYS AT LAW

155 Grant Avenue
Post Office Box 1868
Santa Fe, New Mexico
87504-1868

Telephone: (505) 988-8921
Facsimile: (505) 983-3927

2005 DEC 1 PM 2 28

December 1, 2005

VIA HAND DELIVERY

Ms. Florene Davidson
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87504

Re: Case 13586: Application of the New Mexico Oil Conservation Division for Adoption of New Rules Governing Surface Waste Management.

CRI's Comments, Pre-Hearing Statement and Recommended Modifications.

Dear Ms. Davidson:

Pursuant to Division Rules 1203 and 1204, the instructions from the Commission at the November 10th hearing, and the Division's various notices of hearing, Controlled Recovery Inc. ("CRI") hereby submits its comments, pre-hearing statement and recommended modifications in Case 13586 regarding the proposed Rules Governing Surface Waste Management. CRI may submit additional comments, pre-hearing statements or recommended modifications, including exhibits, before the January 12, 2006 hearing.

A. Proposed Rule 19.15.1.7(O)(3) and Rule 53(E)(5)(c): Definition of "oilfield wastes" and repeal of authority to take "non-hazardous, non-oilfield wastes."

Rule 19.15.9.711(C)(4)(c) currently provides that non-oilfield wastes generated by oilfield facilities may be deposited at surface waste management facilities under certain conditions and with prior approval of the OCD:

(c) Non-oilfield Wastes: Non-hazardous, non-oilfield wastes may be accepted in an emergency if ordered by the Department of Public Safety. Prior to acceptance, a "Request To Accept Solid Waste", OCD Form C-138 accompanied by the Department of Public Safety order will be submitted to the appropriate district office and the division's Santa Fe office. *With prior approval from the division, other non-hazardous, non-oilfield waste may be accepted into a permitted surface waste management facility if the waste is similar in physical and chemical composition to the oilfield wastes authorized for disposal at that facility and is either: (1) exempt from the "hazardous waste" provisions of Subtitle C of the federal Resource Conservation and Recovery Act; or (2) has tested*

non-hazardous and is not listed as hazardous. Prior to acceptance, a "Request for Approval to Accept Solid Waste," OCD Form C-138, accompanied by acceptable documentation to characterize the waste shall be submitted to and approved by the division's Santa Fe office. [emphasis added]

Accordingly, surface waste management facilities have been authorized on occasion under this provision to enter into business arrangements with oilfield facilities to accept general types of wastes. Affording refineries, processing plants, and similar oilfield facilities the ability to use a single disposal site for most of its wastes offers important economic and practical benefits to the industry, without endangering the public health or the environment. Indeed, the benefits afforded by Rule 711(C)(4) are mirrored in Rule 19.15.9.712, which likewise allows NMED permitted landfills to take oilfield wastes under certain conditions.

Without input from or notice to the stakeholders, the November 14th draft, at 53(E)(5)(c), eliminates the italicized portion of the current Rule 711(C)(4)(c) thereby eliminating the approval authority provided by the second sentence of Rule 711(C)(4)(c) without any corresponding change to Rule 712. Indeed, if Rule 712 continues to allow oilfield waste disposal in NMED permitted landfills on a case by case basis, why shouldn't OCD permitted facilities continue to have the ability to accept non-oilfield wastes on a case by case basis?

More importantly, the Division has authorized CRI under the provisions of Rule 711(C)(4)(C) to enter into business arrangements to take pallets, pipes, tanks, office trash, concrete, and other ordinary refuse generated by oilfield facilities. Oilfield waste generators have exclusive disposal cells dedicated to their wastes at CRI's facility. These existing business arrangements provide generators with the important economic and environmental security associated with complete control over the wastes deposited into their cells. For the Division to now change this status quo raises due process concerns, regulatory takings issues, and other legal concerns without any apparent benefit to the public health or the environment. CRI suggests that the more reasoned approach is to address any concerns the Division may have with the acceptance of non-hazardous, non-oilfield wastes on a case by case basis, as is the present situation under Rule 711, rather than suddenly prohibiting this practice.

CRI therefore suggests that the Commission reject the proposed modifications to the definition of "oilfield wastes" in 19.15.1.7(O)(3); and retain in proposed Rule 53(E)(5)(c) the above italicized language from Rule 711(C)(4)(c).

B. Proposed Rule 53(E)(5)(a): Exempt oilfield wastes.

1. CRI questions the need for the language "and not mixed with non-exempt waste" in 53(E)(5)(a) due to the problems it creates for waste haulers and generators. CRI understands the Division is going to examine whether this language is necessary to maintain the RCRA exemption for oilfield wastes.

2. The Division has eliminated the "forms of its choice" language in existing Rule 19.15.9.711(C)(4)(a) in favor of a new form entitled C-142. This proposed change was not

submitted at the October 11th stakeholder's meeting, and the Division has never discussed with the stakeholders the reason for creating this new form. CRI believes the existing "forms of its choice" language is sufficient and has worked well for the Division and operators. Indeed, many operators have load tickets that meet this classification requirement. CRI believes a new form is not necessary, and that a requirement for a new form will place an unnecessary paperwork burden on operators, generators and the Division.

Accordingly, CRI requests that the following language – which is the language presented at the stakeholders meeting - be utilized in 53(E)(5)(a): "The operator shall have the option to accept certifications, on forms of its choice, on a monthly, weekly, or per load basis. Both the generator and the operator shall maintain and shall make said certificates available for inspection by the division."

C. Proposed Rule 53(F): Landfill operating sizes, active cover requirements, and active cell limitations.

The revised draft of proposed Rule 53 imposes several operational requirements on Division approved landfills that have not been discussed with the stakeholders, and which were not contained in prior drafts of the rule. There are a number of concerns with these new provisions.

1. Proposed Rule 53(F)(1) limits a landfill cell to five acres in size, but does not indicate whether that acreage limitation includes the closed portions of the landfill cell. CRI excavates unused areas of a cell and covers the wastes in the older portion of the cell over time, thereby resulting in cells that exceed 5 acres if you include the closed portion. However, CRI recognizes the need to limit the open and exposed portions of a landfill cell. Accordingly CRI suggests the following change: "The open and exposed portion of a landfill cell shall not exceed five acres in size."

2. Proposed Rule 53(F)(8) and (9) places daily and intermediate cover requirements on all active landfill cells regardless of the types of waste being accepted. The purpose for requiring landfill cells to cover the active face is to prevent trash from blowing away or being transported by other vectors. This need for cover is not present where a landfill cell does not accept wastes capable of movement by wind or other means, and imposing a cover requirement in that circumstance places an unnecessary operational and economic burden on that facility and will increase the cost to the generator. Accordingly, CRI suggests the following changes to 53(F)(8) and (9): "Any landfill cell accepting wastes capable of blowing away or being transported by other vectors must be covered."

3. Proposed Rule 53(F)(10) limits surface waste management facilities to two active landfill cells. This proposal is not practical. CRI has active waste cells that are dedicated to specific customers, thereby providing them with the economic and environmental security associated with complete control over the wastes deposited in their dedicated cells. This benefit to the industry will be lost under this proposed provision. In addition, CRI has active cells dedicated to particular types of oilfield wastes. CRI believes segregation of certain types of

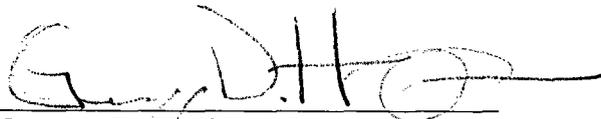
oilfield waste is important to the proper management of wastes and their long-term disposal. It is therefore necessary to have many active cells in an oilfield surface waste management facility to properly and safely manage the oilfield wastes. Limiting surface waste management facilities to only two active cells is not practical and would needlessly and adversely affect the efficiency of waste management facilities. Restricting segregation of wastes in multiple cells could pose a threat to the public health and the environment. CRI therefore suggests that the sentence "No more than two landfill cells may be opened at a facility at the same time" be deleted from the proposed rule, so that 53(F)(10) reads: "Once a landfill cell has been filled it shall be closed pursuant to the conditions contained in the surface waste management facility closure plan. The operator shall notify the division's environmental bureau 72 hours prior to closure of a landfill cell."

D. Proposed Rule 53(I)(3)(a)(i): Equipment removal at oil treating plants.

In its present form, the rule requires removal of tanks and equipment as part of the closure process. CRI believes there will be circumstances where tanks or equipment formerly used for oil treatment could be used in subsequent operations or activities on the property. A blanket prohibition on subsequent use, if that is the intent of this part of the proposed rule, would increase the cost of disposal without providing any benefit to the environment. This would not be in the best interests of the oil and gas industry. Accordingly, CRI suggests adding the following language to proposed Rule 53(I)(3)(a)(i) to allow the equipment to remain, so long as it is properly cleaned: "All tanks and equipment used for oil treatment are cleaned or removed from the site and recycled or properly disposed of in accordance with division rules;"

Respectfully submitted,

Huffaker & Moffett LLC



Gregory D. Huffaker, Jr.

Attorneys for Controlled Recovery, Inc.