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October 22, 2007

Ms. Florene Davidson
NMOCC
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

RE: Proposal for Alternatives to the Proposed Rule 50

Dear Ms. Davidson:

On behalf of R.T. Hicks Consultants, Ltd., I offer the following alternatives to the proposed "Pit Rule". While I do not believe the suggestions offered below constitute technical testimony, I am prepared to read these suggestions into the record and be subject to cross examination by all parties. Therefore, please contact me if you require additional paper copies of this correspondence.

From my perspective, the most important alternative language is associated with the exception process. NMOCD must encourage alternative and innovative processes that create a net environmental benefit while protecting property and human safety. The review time for approval or rejection of proposed exceptions should also be sufficiently long to permit complete review and reasonably short to allow operators to submit alternatives with the APD. Below I present the language of the Proposed Rule with my comments and alternative language following each citation.

Proposed Rule

Page 1

19.15.17.6 OBJECTIVE: To regulate pits, closed-loop systems, below-grade tanks and sumps used in connection with oil and gas operations for the protection of public health, welfare and the environment. [19.15.17.6 NMAC - N, 1/07]

19.15.17.7 DESCRIPTION:

Hicks Comment and Alternative

Throughout the NMOCD Rules are the words "protect fresh water, public health, the environment, human safety and property". When dealing with drilling fluids management, human safety must be an issue for NMOCD consideration. I recommend the following change:

"...protection of fresh water, public health, welfare, the environment, human safety and property"

October 22, 2007

Page 2

Proposed Rule

Page 4

- (3) An operator shall not locate material excavated from the construction of the pit:
- (a) within 300 feet of a continuously flowing watercourse, or 200 feet of any other watercourse, lakebed, sinkhole or playa lake (measured from the ordinary high-water mark), unless the division approves an alternative distance based upon the operator's demonstration that surface and ground water will be protected;
 - (b) within 500 feet of a wetland; or
 - (c) within a 100-year floodplain.

Hicks Comment and Alternative

Excavated material should be clean dirt, similar to that excavated for a building foundation. Therefore I do not understand the basis of this part of the Rule. I recommend:

"...shall not locate material excavated from the construction of a pit that is impacted from oilfield operations, as determined from visual or olfactory methods,"

Proposed Rule

Page 4

- C. An operator shall not implement an on-site closure method:
- (1) where ground water is less than 50 feet below the bottom of the waste;
 - (2) within 300 feet of a continuously flowing watercourse, or 200 feet of any other watercourse, lakebed, sinkhole or playa lake (measured from the ordinary high-water mark), unless the division approves an alternative distance based upon the operator's demonstration that surface and ground water will be protected;
 - (3) within 300 feet from a permanent residence, school, hospital, institution or church in existence at the time of initial application;
 - (4) within 500 horizontal feet of a private, domestic fresh water well or spring less than five households use for domestic or stock watering purposes or within 1000 horizontal feet of any other fresh water well or spring, existing at the time the operator files the application for exception;
 - (5) within incorporated municipal boundaries or within a defined municipal fresh water well field covered under a municipal ordinance adopted pursuant to NMSA 1978, Section 3-27-3, as amended, unless the municipality specifically approves;
 - (6) within 500 feet of a wetland;
 - (7) within the area overlying a subsurface mine, unless the division specifically approves the proposed location based upon the operator's demonstration that subsurface integrity will not be compromised;
 - (8) within an unstable area, unless the operator demonstrates that it has incorporated engineering measures into the design to ensure that the on-site closure method will prevent contamination of fresh water and protect public health and the environment; or
 - (9) within a 100-year floodplain.
- [19.15.17.10 NMAC - Rp, 19.15.2.50 NMAC, 1/07]

Hicks Comment and Alternative

On-site closure may be the best method within 300 feet of a residence and residents may prefer on-site closure relative to the truck traffic associated with other methods. Assuming that exception language is modified appropriately, I have no recommended alternatives for this language proposed by NMOCD.

October 22, 2007

Page 3

Proposed Rule

Page 8

(2) The operator shall recycle, reuse or reclaim all drilling fluids in a manner that prevents the contamination of fresh water and protects public health and the environment.

Hicks Comment and Alternative

For reasons stated earlier, I recommend:

"...and protects public health, the environment, human safety and property."

Proposed Rule

Page 9

(5) If a lined pit develops a leak, or if any penetration of the liner occurs below the liquid's surface, then the operator shall remove all liquid above the damage or leak line from the pit within 48 hours and repair the damage or replace the liner.

Hicks Comment and Alternative

Because some operators may install a double-lined pit, I recommend:

"If a lined pit releases material to underlying soil or ground water..."

Proposed Rule

Page 9

19.15.17.13 CLOSURE REQUIREMENTS:

A. Time requirements for closure. An operator shall close a pit, closed-loop system or below-grade tank within the time periods provided in 19.15.17.13 NMAC, or by an earlier date that the division requires because of imminent danger to fresh water, public health or the environment.

Hicks Comment and Alternative

For reasons outlined previously, I recommend:

"...public health, the environment, human safety or property"

Proposed Rule

Page 10

(3) Alternative closure methods. If the environmental bureau in the division's Santa Fe office grants an exception approving a closure method for a specific temporary pit other than as specified in Paragraphs (1) or (2) of Subsection B of 19.15.17.13 NMAC, then the operator shall close that temporary pit by the method that the environmental bureau in the division's Santa Fe office approves.

Hicks Comment and Alternative

Without a limit of time for the NMOCD to review alternative closure plans, this is of little value. I recommend:

"...methods. Within 60 days after submission of a proposed exemption to the rule, the district office or the environmental bureau must notify the operator that compliance with the rule is required or the exemption is approved. If the environmental bureau or district office grants..."

Proposed Rule

Page 12

(1) General requirements.

(a) The operator shall demonstrate, at the time of initial application for the permit, that the site where the operator proposes to implement an on-site closure method is not located within a 100 mile radius of a division-approved facility or an out-of-state waste management facility. If the operator demonstrates that neither a division-approved facility nor an out-of-state waste management facility is available within the prescribed distance, then the operator may pursue the on-site closure method.

Hicks Comment and Alternative

I do not understand the rationale for 100 miles rather than 1000 miles or 1 mile. This mandate appears arbitrary to this geologist. I recommend deletion of this language.

Proposed Rule

Page 12

(c) The operator shall obtain the surface owner's written consent to the operator's proposal of an on-site closure method. The operator shall attach the original, signed consent to the permit application.

Hicks Comment and Alternative

While I agree that the operator should notify the owner of site activities, this appears to delegate regulatory authority to the landowner rather than maintaining the authority with the technical and regulatory experts at NMOCD. On-site closure at some sites can meet the mandates of the Rule, including protection of property. If the landowner requires off-site disposal, despite approval of NMOCD for on-site disposal, and trucking the material off-site results in a threat to human safety and the environment that is not effectively offset by any perceived benefit to property – off site disposal will violate NMOCD Rules. I recommend:

"...the operator shall provide the surface owner with a copy of any plan submitted to NMOCD that calls for on-site closure. The operator shall attach verification that the surface owner received the plan"

Proposed Rule

Page 13

(2) The soil cover for on-site deep trench burial shall consist of a minimum of four feet of compacted, non-waste containing, earthen material. The soil cover shall include either the background thickness of topsoil or one foot of suitable material to establish vegetation at the site, whichever is greater.

October 22, 2007

Page 5

Hicks Comment and Alternative

At many sites, the cuttings from fresh water drilling may be able to be mixed with native soil to create a better soil for re-vegetation. I recommend:

"...four feet of compacted earthen material that can sustain native plant growth. The soil cover..."

Proposed Rule

Page 14

19.15.17.15 EXCEPTIONS: **A. General exceptions.**

(1) The operator may apply to the environmental bureau in the division's Santa Fe office for an exception to a requirement or provision of 19.15.17 NMAC other than the permit requirements of 19.15.17.8 NMAC; the closure requirement of Subparagraph (c) of Paragraph (1) of Subsection F of 19.15.17.13 NMAC; the exception requirements of 19.15.17.15 NMAC; or the permit approval, condition, denial, revocation, suspension, modification or transfer requirements of 19.15.17.16 NMAC. The environmental bureau in the division's Santa Fe office may grant an exception from a requirement or provision of 19.15.17 NMAC, if the operator demonstrates to the satisfaction of the environmental bureau in the division's Santa Fe office that the granting of the exception provides equivalent or better protection of fresh water, public health and the environment. The environmental bureau in the division's Santa Fe office may revoke an exception after notice to the operator of the pit, closed-loop system, below-grade tank or other proposed alternative and to the surface owner, and opportunity for a hearing, or without notice and hearing in event of an emergency involving imminent danger to fresh water, public health or the environment, subject to the provisions of NMSA 1978, Section 70-2-23, if the environmental bureau in the division's Santa Fe office determines that such action is necessary to prevent the contamination of fresh water, or to protect public health or the environment.

Hicks Comment and Alternative

For reasons outlined previously, the alternative method demonstration should also consider human safety and property in making a showing if equivalent or better protection. If a child is killed by a truck hauling cuttings in order to protect 2 acres of habitat or to protect fresh water that may never be used – was the exportation of waste worth the price of a life? While the illustration suggested above may be hyperbole, the point of consideration of human safety to the public and to the drilling crew must be considered. I recommend:

"...operator may apply to the District Office or to the environmental bureau...16 NMAC. The NMOCD may grant the exception from ... granting the exception provides equivalent or better protection of fresh water, public health, the environment, human safety and property. The NMOCD may revoke an exception...public health, the environment, human safety or property, subject to the ...if the NMOCD determines that such action is necessary to prevent the contamination of fresh water, or to protect public health, the environment, human safety or property."

October 22, 2007
Page 6

Proposed Rule

Page 15

B. **Alternative closure methods.** The operator of a temporary pit or a closed-loop system may apply to the environmental bureau in the division's Santa Fe office for an exception to the closure methods specified in Paragraphs (1) and (2) of Subsection B of 19.15.17.13 NMAC or Paragraphs (1) and (2) of Subsection D of 19.15.17.13 NMAC. The environmental bureau in the division's Santa Fe office may grant the proposed exception if all of the following requirements are met.

(1) The operator demonstrates that the proposed alternative method provides equivalent or better protection of fresh water, public health and the environment.

(2) The operator shall remove all liquids prior to implementing a closure method and dispose of the liquids in a division-approved facility or recycle or reuse the liquids in a manner that the environmental bureau in the division's Santa Fe office approves.

Hicks Comment and Alternative

For the reasons previously stated, I recommend inclusion of human safety and property for consideration by NMOCD when granting, revoking or denying an exception request. Moreover, the request for an exception should be submitted to the District Office with a copy to the environmental bureau with the decision on granting or denying the exception resting with the District Office with a right to appeal to the environmental bureau. I also recommend that NMOCD adopt the 60-day time limit for decisions to be consistent with the time limits now in force for Notices of Intent under the WQCC Regulations. My recommended alternative language is:

"may apply to the NMOCD for an exception... The NMOCD must notify the operator that compliance with the rule is required within 60 days of submission of the exception request and identify which of the following requirements were not met by the proposed exception.

1. the operator ..."

I thank you for your consideration of this alternative language and I am pleased to present this as sworn testimony subject to cross examination.

Sincerely,
R.T. Hicks Consultants, Ltd.



Randall Hicks
Principal