

**STATE OF NEW MEXICO
ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION**

2006 NOV 13 PM 3 36

**IN THE MATTER OF THE HEARING
CALLED BY THE OIL CONSERVATION
COMMISSION FOR THE PURPOSE OF
CONSIDERING:**

**IN THE MATTER OF THE APPLICATION OF THE
NEW MEXICO OIL CONSERVATION DIVISION FOR
REPEAL OF EXISTING RULES 709, 710, 711
CONCERNING SURFACE WASTE MANAGEMENT
AND ADOPTION OF NEW RULES GOVERNING SURFACE
WASTE MANAGEMENT**

No. 13586

**REQUEST FOR RECONSIDERATION OF SURFACE
WASTE MANAGEMENT RULES**

Gandy Marley, Inc., by and through undersigned counsel of record, pursuant to 19.15.14.1223 NMAC, hereby submits the following request for reconsideration in the above-captioned matter. Gandy Marley filed an Entry of Appearance on January 4, 2006 and is therefore a party of record in this matter.

Gandy Marley requests that the Commission reconsider the following two sections of the Final Surface Waste Management Rules, as adopted by Order No. R-12460-B, dated October 19, 2006.

- 1) 19.15.2.53.G(6)(e).

Section G(6) Treatment Zone Closure Performance Standards, requires the operator to "demonstrate compliance with the closure performance standards by collecting and analyzing" soil samples for specific constituents identified in paragraphs (a) through (e). Paragraph (e) requires the operator to test for the "concentration of constituents listed in Subsections A and B

of 20.6.2.3103 NMAC," which are the "Standards for Groundwater of 10,000 mg/l TDS Concentration or Less." The Rule further states that:

If the concentration of those constituents exceed the POL or background concentration, the operator shall either perform a site specific risk assessment using EPA approved methods and shall propose closure standards based upon individual site conditions that protect fresh water, public health, safety and the environment, which shall be subject to division approval or remove pursuant to Subparagraph (b) of Paragraph (7) of Subsection G of 19.15.2.53 NMAC.

Gandy Marley requests that the Commission delete Section G(6)(e). There is an insufficient basis in the record for requiring testing for the constituents identified in 20.6.2.3103 NMAC. As its basis for requesting the Section G(6)(e) be deleted, Gandy Marley adopts the reasoning of the Stakeholder Task Force in the September 1, 2006 Memorandum, filed in this matter by Daniel Sanchez, Stakeholders Task Force Facilitator. (Exhibit A at pg. 2 of 7, attached hereto). As stated by the Task Force, there is insufficient information at this time to determine if the Section 3103 constituents need to be tested for and what the effect of the requirement will be on the owners and operators of landfarms. The Commission recognized that "there was insufficient evidence presented to establish that all of these constituents have been identified in crude oil or is found in contaminated soils what levels of such constituents pose a risk." (Order No. R-12460-B, ¶163). Because there is insufficient information in the administrative record to determine the need for the testing to protect human health and the environment, the provision should not be included in the final rule.

2) 19.15.2.53.L(1)

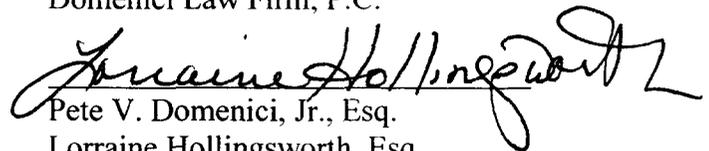
Gandy Marley requests that the Commission revise 19.15.2.53.L(1) as adopted in Order No. R-12460-B to allow existing cells at an existing landfarm to be closed "in accordance with the standards of its existing permit" if the cell is closed within ten years after the adoption of the new rule. Gandy Marley requests that the Commission adopt the language proposed by the

Stakeholder Task Force in the September 1, 2006 Memorandum. (Exhibit A at pg. 7 of 7). The language proposed by the Taskforce recognizes existing rights and obligations under current permits and ensures that operators, complying with their current permits, are given sufficient time to come into compliance with the closure standards of 19.15.3.53 NMAC. The language would only apply to existing cells. All new cells would have to comply with the new closure standard.

WHEREFORE, Gandy Marley requests that the Commission reconsider its decision on the two provisions discussed above and issue an Order adopting the proposed changes to the Final Rule 53.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2006, a copy of the foregoing was served by mail on the following:

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Santa Fe, New Mexico 87505

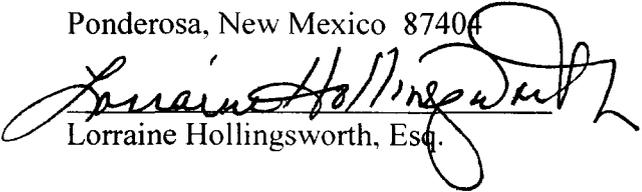
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Lorraine Hollingsworth, Esq.

MEMORANDUM

Date: September 1, 2006

TO: Mark Fesmire, OCD Director

FROM: Daniel Sanchez, Stakeholders Task Force Facilitator

Re: NMOCD Rules 51, 52 & 53 Stakeholders Task Force Recommended Changes

I. HISTORICAL SUMMARY

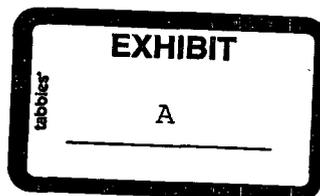
In accordance with the June 23, 2006 memorandum from Cabinet Secretary Prukop, the first meeting of the Surface Waste Management Stakeholder Task Force was held on June 28, 2006. The objective of the Stakeholder Task Force was to review the June 8, 2006 NMOCD proposed Rules 51, 52 & 53, and attempt to reach consensus on how parts of the rules could possibly be treated or revised. Members of the Stakeholder Task Force consisted of the following individuals:

Alan Alexander – Burlington Resources/ConocoPhillips
John Byrom – D.J. Simmons, Inc.
Carl Chavez – OCD Staff
Bill Marley – Gandy Marley
Raye Miller – Marbob Energy Corp.
Donald Neeper (John Bartlit) – New Mexico Citizens for Clean Air & Water
Dennis Newman – Occidental Permian Ltd.
Terry Riley – Theodore Roosevelt Conservation Partnership
Glenn Von Gonten – OCD Staff

Subsequent meetings were held on July 11, August 1-2, August 15-16, and August 29, 2006.

A subcommittee, consisting of Bill Marley, Dennis Newman, Don Neeper, and Terry Riley was formed to identify a list of issues to be discussed by the task force. The subcommittee decided initially on the first ten issues however issue eleven was also identified and amended during the August 29 meeting:

1. Vadose zone monitoring *
2. Closure standards for re-vegetation *
3. Bioremediation endpoint – no 80% reduction and 1% TPH residual *
4. Size of landfarm cell *
5. Chloride limits for landfarm waste loading – tiered approach
6. Financial assurance of landfarms *
7. Small landfarms *



8. Closure standards for landfarm wastes and vadose zone – selection of appropriate constituents of concern
9. Risk based decision making regulatory approach
10. Review of Section K – exceptions *
11. Grandfather Clause –Section L *

The asterisks * above indicate that the Stakeholder Task Force reached consensus on the issue.

II. GENERAL COMMENTS

The Stakeholder Task Force endorses only the suggested specific changes in wording of Rule 53 presented below. The reasoning for each suggested change is presented with each change. For ease of review, attached is a redline/strikeout document of the Stakeholder Task Force suggested changes to Rule 53.

In addition, the Stakeholder Task Force agreed on the following statement pertaining to **Section G (6)**:

In some areas of the state of New Mexico, the natural soil concentrations of some of the proposed regulated constituents, such as arsenic and other inorganics, may exceed the proposed closure standards. If such naturally occurring high-background soils were contaminated with petroleum hydrocarbons, and the waste-bearing soils were brought to a landfarm having a lower background concentration, it is likely that the final concentrations of these constituents in the landfarm treatment zone could exceed the proposed closure limits established by the original background soil concentrations of the landfarm.

This could be a significant problem for current and future landfarm operators, who may not meet the proposed closure limits, and who would need to apply for an exception or waiver or dispose of the waste-bearing soil that failed to meet closure limits at a landfill. This raises the serious question of whether petroleum-contaminated soils exceeding the closure limits of a landfarm should be transported to that landfarm.

All participants of the Stakeholder Task Force recognize this potential-problem. Determination of the extent of this problem will require more data and study regarding the appearance of arsenic and other inorganics in petroleum-contaminated soils.

III. SUGGESTED SPECIFIC CHANGES IN REGULATORY LANGUAGE

The Stakeholder Task Force reached consensus on the following language changes and/or amendments: The changes are shown in bold type.

CHANGE 1: The Stakeholder Task Force believes that a small landfarm should be restricted to a maximum area, and that the volume of treated waste should be consistent with that area. Therefore, the following changes in **A.(1)(e)** are recommended:

CHANGE 10: The Stakeholder Task Force believes that the meaning of "TPH" in the bioremediation endpoint be more clearly specified by inserting a phrase in the second sentence of **G.(8)(a)**.

G.(8)(a) *The bioremediation endpoint in soil occurs when TPH, as determined by EPA Method 418.1 or other EPA method approved by the division, has been reduced to a minimal concentration as a result of bioremediation and is dependent upon the bioavailability of residual hydrocarbons.*

CHANGE 11: The Stakeholder Task Force believes that the same numerical limit for TPH should apply to small landfarms, as would apply to registered landfarms in **G.(6)(c)**, above.

H.(5)(iii) *TPH, as determined by EPA SW-846 method 418.1 or other EPA method approved by the division, shall not exceed 2500 mg/kg....*

CHANGE 12: The Stakeholder Task Force believes that the specification of re-vegetation could be strengthened, by requiring comparison with native perennial cover. Because an example of the native condition might not be available in the vicinity of the landfarm, the Stakeholder Task Force also believes that an established scientific description of the appropriate native condition would suffice. Language would also be added regarding chloride concentrations and EC and SAR testing. Accordingly, the Stakeholder Task Force recommends that the following changes be made to **J.(1)** and **J.(4)(d)(viii)**:

J.(1) *Re-vegetation, except for landfill cells, shall consist of establishment of a vegetative cover equal to 70% of native **perennial** vegetative cover (unimpacted by overgrazing, fire or other intrusion damaging to native vegetation) or scientifically documented ecological site description consisting of at least three native plant species, including at least one grass, but not including noxious weeds, and maintenance of that cover through two successive growing seasons.*

J.(4)(d)(viii) *For operators who choose to utilize the landfarm methods specified Paragraph (8) of Subsection G of 19.15.3.53 NMAC, the operator shall ensure that the soil has an electrical conductivity (EC_s) of less than or equal to 4.0 mmhos/cm (dS/m) and a sodium adsorption ratio (SAR) of less than or equal to 13.0.*

CHANGE 13: The Stakeholder Task Force believes that the inclusion of a "Grandfather Clause" is necessary to ensure that operators, complying with their current permits, and are given sufficient time to come into compliance with the closure standards of **19.15.3.53 NMAC**. Therefore, the Stakeholder Task Force recommends the following changes be made to **L(1)**, **(2)**, **(3)** & **(4)**:

L. *Transitional provisions. Existing permitted facilities. Surface waste management facilities in operation prior to the effective date of 19.15.2.53 NMAC pursuant to permits or orders of the division may continue to operate in accordance with such permits or orders, subject to the following provisions.*

(1) *Except as provided in Paragraph (2) of Subsection L of 19.15.2.53 NMAC or as otherwise specifically provided in the applicable permit or order, or in any specific waiver, exception or agreement that the division has granted in writing to the particular facility, all existing facilities shall comply with the operational, waste acceptance and closure requirements provided in 19.15.2.53 NMAC.*

(2) *Landfarm cells existing as of May 18, 2006, shall either be closed within ten years after the effective date of 19.15.2.53 NMAC in accordance with the closure standards of its existing permit, or comply with the requirements provided in 19.15.2.53 NMAC. When an existing landfarm cell has been filled to capacity, no additional waste shall be placed in that landfarm cell. Any landfarm cell that the operator intends to reuse is subject to the requirements provided in 19.15.2.53 NMAC.*

(3) *Any major modification of an existing facility, and any new landfarm cells constructed at an existing facility, shall comply with all requirements of 19.15.2.53 NMAC.*

(4) *Any application for a surface waste management facility permit filed prior to May 18, 2006, shall be processed in accordance with 19.15.9.711 NMAC, and any application filed after May 18, 2006, shall be processed in accordance with 19.15.3.53 NMAC.*