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May 25, 1995

Mr. William J. LeMay, Chairman
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

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MAY 25 1995

Oil Conservation Division

RE NMOCC Case 11216 - NMOCD Rule 711 Changes
Commercial Surface Waste Disposal Facilities

Dear Mr. LeMay:

Thank you for the opportunity to submit post-hearing comments on the proposed changes to NMOCD Rule 711, which was heard by the Commission on May 11. The New Mexico Oil & Gas Association (NMOGA) would also like to compliment OCD Environmental Bureau Chief Roger Anderson and the Rule 711 Task Force for undertaking this difficult task and providing such a comprehensive document for our review and comment.

NMOGA fully supports the draft language outlined by Mr. Anderson at the May 11 hearing, with the exception of Sections A.3.b., g. and h., B.3 , B.4, C.4.aand E.4. The consensus changes supported by Mr. Anderson May 11 have been included in the attached draft. NMOGA's suggested language changes are also shown in the attached draft and are intended to provide the agency and the regulated community with a regulation that will ease enforcement and compliance.

Section A.3.b. as proposed would allow an exemption from the "centralized" definition for facilities that receive less than 16 barrels of exempt liquid waste per day. However, 16 barrels in unnecessarily restrictive, and a more realistic volume would be 50 barrels per day.

Section 3. g. And h. add an exemption from the "centralized" definition for pit remediations already falling under Commission Order No. 7940-C, and an exemption for facilities that are shown by the operator not to show a risk to public health and the environment.

Section B.3. as proposed would greatly increase the amount of bonding required in many cases, to the extent that such bonding may be impossible for an operator to obtain and imposing unnecessary economic hardship. Our deletions in this section would limit bonding to $25,000 in a form approved by the Director.

We further recommend that bonding requirements be the subject of a task force study before such sweeping and far-reaching changes are made.

Section B.4 as proposed would provide several vehicles for financial assurance and bonding, based on the language in B.3. that would greatly increase the amounts of bonding required. Without alternatives to cash or surety bonds, such large amounts may be impossible to obtain and create an economic hardship.

We recommend that a task force to study bonding requirements also study alternatives that might be suitable before such language is adopted.

Section C.4.a. as proposed would require generator certification of exempt oilfield wastes. Since these wastes are exempt, such certification seems to be unnecessary and cumbersome. Most operators have a waste tracking system in place for such disposal. Those who do not may request a generic waste tracking program that has been developed by Texaco and provided to NMOGA for distribution (copies attached). Therefore, we recommend this subsection be deleted.

Section E.4. deletes language tied to increased bonding requirements.

We appreciate the Commission's consideration of these important issues. If you have questions, or if we may be of service, please don't hesitate to contact me.

Sincerely,

Ruth Andrews
Director

NMOGA Post-Hearing Submittal
May 25, 1995

May 11, 1995 CONSENSUS DRAFT

(Underlined or ~~stricken~~ language reflects additional changes that NMOGA witnesses requested at the May 11 hearing)

RULE 711 - SURFACE WASTE MANAGEMENT FACILITIES

A. A surface waste management facility is defined as any facility that receives for collection, disposal, evaporation, remediation, reclamation, treatment or storage any produced water, drilling fluids, drill cuttings, completion fluids, contaminated soils, Bottom Sediment & Water (BS&W), tank bottoms, waste oil or, upon written approval by the Division, other oil field related waste.

1. A commercial facility is defined as any waste management facility that receives compensation for waste management unless the facility is operating under a joint operating agreement.

2. A centralized facility is defined as a waste management facility other than a commercial facility that is:

   a. used exclusively by one owner or operator; or

   b. used by more than one operator under an operating agreement and which receives wastes that are generated from two or more production units or areas or from a set of jointly owned or operated leases.

3. Waste management facilities exempt from the "centralized" definition are:

   a. facilities that receive wastes from a single well;

   b. facilities that receive less than ~~16~~ 50 barrels of exempt liquid waste per day or have a capacity to hold 500 barrels of liquids or less or 1400 cubic yards of solids or less;

   c. underground injection wells subject to regulation by the Division pursuant to the federal Safe Drinking Water Act;

d. facilities, such as tank only facilities, that do not manage oil-field wastes on the ground in pits, ponds, below grade tanks or land application units;

e. emergency pits that are designed to capture fluids during an emergency upset period only and provided such fluids will be removed from the pit within twenty-four (24) hours from introduction;

f. facilities subject to Water Quality Control Commission regulations;

g. pits that are being remediated or closed onsite pursuant to Commission Order No. 7940-C;

h. Facilities that do not meet the requirements of the foregong exemptions in Section A.3., but are shown by the operator not to present a risk to public health and the environment.

B. Facilities in operation on the effective date of this rule are subject to the requirements in section E. Prior to construction or major modification of any facility after the effective date of this rule a permit must be obtained from the Division in accordance with the following requirements:

1. An application, Form C-137, for a permit for a new facility or to modify an existing facility shall be filed in DUPLICATE with the Santa Fe Office of the Division and ONE COPY with the appropriate Division district office. The application shall comply with Division guidelines and shall include:

a. The names and addresses of the applicant and all principal officers of the business if different from the applicant;

b. A plat and topographic map showing the location of the facility in relation to governmental surveys (1/4 1/4 section, township, and range), highways or roads giving access to the facility site, watercourses, water sources, and dwellings within one (1) mile of the site;

c. The names and addresses of the surface owners of the real property on which the management facility is sited and surface owners of the real property of record within one (1) mile of

the site;

d. A description of the facility with a diagram indicating location of fences and cattle guards, and detailed construction/installation diagrams of any pits, liners, dikes, piping, sprayers, and tanks on the facility;

e. A plan for management of approved wastes.

f. A contingency plan for reporting and cleanup of spills or releases;

g. A routine inspection and maintenance plan to ensure permit compliance;

h. A Hydrogen Sulfide (H_2S) Prevention and Contingency Plan to protect public health;

i. A closure plan including a cost estimate sufficient to close the facility to protect public health and the environment;

j. Geological/hydrological evidence, including depth to and quality of groundwater beneath the site, demonstrating that disposal of oil field wastes will not adversely impact fresh water;

k. Proof that the notice requirements of this Rule have been met;

l. Certification by an authorized representative of the applicant that information submitted in the application is true, accurate, and complete to the best of the applicant's knowledge; and

m. Such other information as is necessary to demonstrate that the operation of the facility will not adversely impact public health or the environment and that the facility will be in compliance with OCD rules and orders.

2. Notice Requirements

a. Prior to public notice, the applicant shall give written notice of application to the surface owners of record within one (1) mile of the facility, the county commission where the facility is located or is proposed to be located, and the appropriate city official(s)

if the facility is located or proposed to be located within city limits or within one (1) mile of the city limits. The distance requirements for notice may be extended by the Director if the Director determines the proposed facility has the potential to adversely impact public health or the environment at a distance greater than one (1) mile. The Director may require additional notice as needed. A copy and proof of such notice will be furnished to the Division.

b. The applicant will issue public notice in a form approved by the Division in a newspaper of general circulation in the county in which the facility is to be located. For permit modifications, the Division may require the applicant to issue public notice and give written notice as above.

c. Any person seeking to comment or request a public hearing on such application must file comments or hearing requests with the Division within 30 days of the date of public notice. Requests for a public hearing must be in writing to the Director and shall set forth the reasons why a hearing should be held. A public hearing shall be held if the Director determines there is significant public interest.

d. The Division will distribute notice of the filing of an application for a new facility or major modifications with the next OCD and OCC hearing docket following receipt of the application.

3. Upon determination by the Director that the permit is approvable, all waste management facilities shall have financial assurance in the amount of ~~the closure cost estimate or $25,000, whichever is less~~, in a form approved by the Director~~. Before the end of the fourth year of operations, all waste management facilities will have financial assurance in the amount of the closure cost estimated in B.1.i. above according to the following schedule:~~

~~within one (1) year of commencing operations or when the facility is filled to 25% of the permitted capacity, whichever comes first, the financial assurance must be increased to 25% of the estimated closure cost;~~

- within two (2) years of commencing operations or when the facility is filled to 50% of the permitted capacity, whichever comes first, the financial assurance must be increased to 50% of the estimated closure cost;

- within three (3) years of commencing operations or when the facility is filled to 75% of the permitted capacity, whichever comes first, the financial assurance must be increased to 75% of the estimated closure cost;

- within four (4) years of commencing operations or when the facility is filled to 100% of the permitted capacity, whichever comes first, the financial assurance must be increased to the estimated closure cost.

The financial assurance shall be payable to the State of New Mexico and conditioned upon compliance with statutes of the State of New Mexico and rules of the Division, and acceptable closure of the site upon cessation of operation, in accordance with Part B.16 of this Rule. If adequate financial assurance is posted by the applicant with a federal or state agency and the financial assurance otherwise fulfills the requirements of this rule, the Division may consider the financial assurance as satisfying the requirement of this rule. The applicant must notify the Division of any material change affecting the bond financial

4. The Director may accept the following forms of financial assurance:

a. Surety Bonds

(1) A surety bond shall be executed by the operator and a corporate surety licensed to do business in the State.

(2) Surety bonds shall be noncancellable during their terms.

b. Collateral Bonds

(1) Collateral bonds, except for letters of credit, cash amounts, and real property, shall be subject to the following conditions:

(a) The Director shall keep custody of collateral deposited by the applicant until authorized for release or replacement as provided

~~in this section.~~

~~(b) The Director shall value collateral at its current market value, not at face value.~~

~~(c) The Director shall require that certificates of deposit be made payable to or assigned to the State of New Mexico, both in writing and upon the records of the bank issuing the certificates. If assigned, the Director shall require the banks issuing these certificates to waive all rights of setoff or liens against those certificates.~~

~~(d) The Director shall not accept an individual certificate of deposit in an amount in excess of $100,000 or the maximum insurable amount as determined by the Federal Deposit Insurance corporation or the Federal Savings and Loan Insurance Corporation.~~

~~(2) Letter of credit shall be subject to the following conditions:~~

~~(a) The letter may be issued only by a bank organized or authorized to do business in the United States;~~

~~(b) Letters of credit shall be irrevocable during their terms. A letter of credit used as security in areas requiring continuous financial assurance coverage shall be forfeited and shall be collected by the State of New Mexico if not replaced by other suitable financial assurance or letter of credit at least 30 days before its expiration date.~~

~~(c) The letter of credit shall be payable to the State of New Mexico upon demand, in part or in full, upon receipt from the Director of a notice of forfeiture.~~

~~(3) Real property posted as a collateral bond~~

shall meet the following conditions:

(a) The applicant shall grant the State of New Mexico a first mortgage, first deed of trust, or perfected first-lien security interest in real property with a right to sell in accordance with state law or otherwise dispose of the property in the event of forfeiture.

(b) In order for the Director to evaluate the adequacy of the real property offered to satisfy collateral requirements, the applicant shall submit the following:

i) a description of the property;

ii) the fair market value as determined by an independent appraisal conducted by a qualified appraiser, previously approved by the Director; and

iii) proof of possession and title to the real property.

(4) Cash accounts shall be subject to the following conditions:

(a) The Director may authorize the operator to supplement the financial assurance through the establishment of a cash account in one or more federally insured or equivalently protected accounts made payable upon demand to, or deposited directly with, the State of New Mexico.

(b) Any interest paid on a cash account shall be retained in the account and applied to the account unless the Director has approved the payment of interest to the permittee.

(c) Certificates of deposit may be substituted for a cash account with the approval of the Director.

(5) If the nature of the collateral proposed

~~to be given as security for financial assurance is subject to fluctuations in value over time, the Director shall require that such collateral have a fair market value at the time of permit approval in excess of the required financial assurance amount by a reasonable margin. The amount of such margin shall reflect changes in value anticipated as probable of occurrence over a period of five years, including depreciation, appreciation, marketability and market fluctuation. In any event, the Director shall require a margin for legal fees and costs of disposition of the collateral.~~

~~(6) An annual report shall report percentage changes in the fair market value of any collateral accepted by the Director pursuant to this section since the time of the last report.~~

~~(7) The value of collateral may be evaluated at any time but it shall be evaluated as part of permit review and, if necessary, the financial assurance amount increased or decreased. In no case shall the financial assurance amount of collateral exceed the market value.~~

~~(8) Persons with an interest in collateral posted as financial assurance, and who desire notification of actions pursuant to the financial assurance, shall request the notification in writing to the Director at the time collateral is offered.~~

~~**c. Self-bonding**~~

~~(1) The Director may accept a self-bond from an applicant for a permit if all of the following conditions are met annually by the applicant, or its parent corporation guarantor, or a separate guarantor:~~

~~(a) the applicant designates a suitable agent to receive service of process in the State.~~

~~(b) the applicant has been in continuous~~

~~operation as a business entity for a period of not less than 5 years. Continuous operation shall mean that business was conducted over a period of 5 years immediately preceding the time of application.~~

~~i) The Director may allow a joint venture or syndicate with less than 5 years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least 5 years immediately preceding the time of application.~~

~~ii) When calculating the period of continuous operation, the Director may exclude past periods of interruption to the operation of the business entity that were beyond the applicant's control and that do not affect the applicant's likelihood of remaining in business during the life of the facility.~~

~~(c) The applicant submits financial information in sufficient detail to show that the applicant meets one of the following criteria:~~

~~i) the applicant has a current rating for its most recent bond insurance of "A" or higher as issued by either Moody's Investor Service or Standard and Poor's Corporation;~~

~~ii) the applicant has a tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or~~

~~iii) the applicant's fixed assets in~~

the United States total at least $20 million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater.

(d) The applicant submits:

i) financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

ii) unaudited financial statements for completed quarters in the current fiscal year; and

iii) additional unaudited information as requested by the Director.

(2) The Director may accept a written guarantee for an applicant's self-bond from a parent corporation guarantor or a separate guarantor, if the guarantor meets the conditions of c(1)(a) through c(1)(d) of this Section as if it were the applicant. Such a written guarantee shall be referred to as a "corporate guarantee". The terms of the corporate guarantee shall provide for the following:

(a) If the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide funds to the State of New Mexico sufficient to complete the closure plan, but not to exceed the bond amount.

(b) The corporate guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the Director at least 90 days in advance of the cancellation date, and the Director accepts the cancellation.

(c) The cancellation may be accepted by the Director if the applicant obtains suitable replacement bond before the cancellation date, or if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed.

(3) For the Director to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds of the applicant shall not exceed 25 percent of the applicant's tangible net worth in the United States. For the Director to accept a corporate guarantee, the total amount of the corporate guarantor's present and proposed self-bonds and guaranteed self-bonds shall not exceed 25 percent of the guarantor's tangible net worth in the United States.

(4) If the Director accepts an applicant's self-bond, an indemnity agreement shall be submitted subject to the following requirements:

(a) The indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the corporate guarantor, and shall bind each jointly and severally.

(b) Corporations applying for a self-bond, and parent and non-parent corporations guaranteeing an applicant's self-bond shall submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of such authorization shall be provided to the Director along with an affidavit certifying that such an agreement is valid under all applicable Federal

~~and State laws. In addition, the guarantor shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement.~~

~~(c) If the applicant is a partnership, joint venture or syndicate, the agreement shall bind each partner or party who has a beneficial interest, directly or indirectly, in the applicant.~~

~~(d) The applicant or corporate guarantor shall be required to complete the approved closure plan for the lands in default or to pay to the State of New Mexico an amount necessary to complete the approved closure plan, not to exceed the bond amount.~~

~~(5) The Director may require self-bonded applicants and corporate guarantors to submit an update of the information required under paragraphs c(1)(c) and c(1)(d) of this Section within 90 days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee.~~

~~d. Replacement of financial assurances.~~

~~(1) The Director may allow a permittee to replace existing financial assurances with other financial assurances that provide equivalent coverage.~~

~~(2) The Director shall not release existing financial assurances until the permittee has submitted, and the Director has approved, acceptable replacements.~~

5. A permit may be denied, revoked or additional requirements imposed by a written finding by the Director that a permittee has a history of failure to comply with Division rules and orders and state or federal environmental laws.

6. The Director may, for protection of public health and the environment, impose additional requirements such as setbacks from an existing occupied structure.

7. The Director of the Division may issue a permit upon a finding that an acceptable application has been filed and that the conditions of part 2 and 3 above have been met. All permits are revocable upon showing of good cause after notice and,if requested. Permits shall be reviewed a minimum of once every five (5) years for compliance with state statutes, Division rules and permit requirements and conditions.

C. Operational requirements

1. All surface waste management facility permittees shall file forms C-117-A, C-118, and C-120-A as required by OCD rules.

2. Facilities permitted as treating plants will not accept sediment oil, tank bottoms and other miscellaneous hydrocarbons for processing unless accompanied by an approved Form C-117A or C-138.

3. Facilities will only accept oil-field related wastes except as provided in C.4.c. below. Wastes which are determined to be RCRA Subtitle C hazardous wastes by either listing or characteristic testing will not be accepted at a permitted facility.

4. The permittee shall require the following documentation for accepting wastes, other than wastes returned from the wellbore in the normal course of well operations such as produced water and spent treating fluids, at commercial waste management facilities:

~~a. Exempt Oilfield Wastes: A "Certification of Waste Status" signed by the generator certifying that the wastes are: generated from oil and gas exploration and production operations; exempt from Resource Conservation and Recovery Act (RCRA) Subtitle C regulations; and not mixed with non-exempt wastes.~~

a.~~b.~~ Non-exempt, Non-hazardous Oilfield Wastes: Prior to acceptance, a "Request For Approval To Accept Solid Waste", OCD Form C-138, accompanied by acceptable documentation to determine that the waste is non-hazardous shall be submitted to the appropriate District office. Acceptance will be on a case-by-case basis after approval from the Division's Santa Fe office.

b.~~c.~~ Non-oilfield Wastes: Non-oilfield wastes may be accepted in an emergency if ordered by the

Department of Pubic 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 Division's Santa Fe office.

5. The permittee of a commercial facility shall maintain for inspection the records for each calendar month on the generator, location, volume and type of waste, date of disposal, and hauling company that disposes of fluids or material in the~~ir~~ facility. Records shall be maintained as required in Rule 1100.C.

6. Disposal at a facility shall occur only when an attendant is on duty unless loads can be monitored or otherwise isolated for inspection before disposal . The facility shall be secured to prevent unauthorized disposal when no attendant is present.

7. No produced water shall be received at the facility from motor vehicles unless the transporter has a valid Form C-133, Authorization to Move Produced Water, on file with the Division.

8. To protect migratory birds, all tanks exceeding 16 feet in diameter, and exposed pits and ponds shall be screened, netted or covered. Upon written application by the permittee, an exception to screening, netting or covering of a facility may be granted by the district supervisor upon a showing that an alternative method will protect migratory birds or that the facility is not hazardous to migratory birds.

9. All facilities will be fenced.

10. A permit may not be transferred without the prior written approval of the Director. Until such transfer is approved by the Director and the required financial assurance is in place, the transferor's financial assurance will not be released.

D. Facility closure

1. The permittee shall notify the Division thirty (30) days prior to its intent to cease accepting wastes and close the facility. The permittee shall then begin closure operations unless an extension of time is granted by the Director. Closure shall be in accordance with the approved closure plan and any modifications or additional requirements imposed by the Director to protect public health and the environment. At all times the permittee must maintain the facility to protect public health and the environment. Prior to release of the financial assurance covering the facility,

the Division will inspect the site to determine that closure is complete.

2. If a permittee refuses or is unable to conduct operations at the facility in a manner that protects public health or the environment or refuses or is unable to conduct or complete the closure plan, the terms of the permit are not met, or the permittee defaults on the conditions under which the financial assurance was accepted, the Director shall take the following actions to forfeit all or part of the financial assurance:

a. Send written notice by certified mail, return receipt requested, to the permittee and the surety informing them of the decision to close the facility and to forfeit all or part of the financial assurance, including the reasons for the forfeiture and the amount to be forfeited and notifying the permittee and surety that a hearing request must be made within ten (10) days of receipt of the notice.

b. Advise the permittee and surety of the conditions under which the forfeiture may be avoided. Such conditions may include but are not limited to:

(1) An agreement by the permittee or another party to perform closure operations in accordance with the conditions of the permit, the closure plan and these Rules, and that such party has the ability to satisfy the conditions.

(2) The Director may allow a surety to complete closure if the surety can demonstrate an ability to complete the closure in accordance with the approved plan. No surety liability shall be released until successful completion of closure.

c. In the event forfeiture of the financial assurance is required by this rule, the Director shall proceed to collect the forfeited amount and use the funds collected from the forfeiture to complete the closure. In the event the amount forfeited is insufficient for closure, the permittee shall be liable for the deficiency. The Director may complete or authorize completion of closure and may recover from the permittee all reasonably incurred costs of closure and

forfeiture in excess of the amount forfeited. In the event the amount forfeited was more than the amount necessary to complete closure and all costs of forfeiture, the excess shall be returned to the party from whom it was collected.

d. Upon showing of good cause, the Director may order immediate cessation of operations of the facility when it appears that such cessation is necessary to protect public health or the environment, or to assure compliance with Division rules and orders.

e. In the event the permittee cannot fulfill the conditions and obligations of the permit, the State of New Mexico, its agencies, officers, employees, agents, contractors and other entities designated by the State shall have all rights of entry into, over and upon the facility property, including all necessary and convenient rights of ingress and egress with all materials and equipment to conduct operation, termination and closure of the facility, including but not limited to the temporary storage of equipment and materials, the right to borrow or dispose of materials, and all other rights necessary for operation, termination and closure of the facility in accordance with the permit.

E. Waste management facilities in operation at the time this rule becomes effective shall:

1. within one (1) year after the effective date permitted facilities submit the information required in B.1.a, h, i and m not already on file with the Division;

2. within one (1) year after the effective date unpermitted facilities submit the information required in B.1.a through j and B.1.l and m;

3. within one (1) year after the effective date comply with sections C and D unless the Director grants an exemption; and

4. provide financial assurance required in Section B.3. ~~the amount of the closure cost estimated in B.1.i. according to the following schedule unless the terms of the current permit require a different schedule:~~

- ~~within two (2) years of the effective date the financial assurance amount must be increased to 25% of the estimated closure cost;~~

- ~~within four (4) years of the effective date the financial assurance amount must be increased to 50% of the estimated closure cost;~~

- ~~within six (6) years of the effective date the financial assurance amount must be increased to 75% of the estimated closure cost;~~

- ~~within eight (8) years of the effective date the financial assurance amount must be increased to the estimated closure cost.~~