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October 12, 2005

VIA HAND DELIVERY

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

Re: Application for the New Mexico Oil Conservation Division for Repeal of Existing Rule 709, 710 and 711 Concerning Surface Waste Management and Adoption of New Rules Governing Surface Waste Management.

CRI's Preliminary Comments and Proposed Modifications

Dear Ms. Davidson:

Having attended the stakeholder's meeting concerning the proposed New Rule 53 (Surface Waste Management Facilities), and understanding that the Division intends to publish revisions to this proposed rule by October 14th, Controlled Recovery Inc. ("CRI") offers the following preliminary comments and proposed modifications:

Proposed Rule 53(B)(6): "major modification"

CRI believes that a major modification (and the resulting permitting requirements) should not include changes that simply increase the facilities' storage capacity for permitted wastes. The permitting process focuses on the particular geographic area dictated by the "footprint" of a proposed facility. Once a determination is made that the footprint is suitable for accepting wastes within specifically designed storage facilities, any additional storage capacity within the footprint should not require a full-blown permit review. Borrowing from the definition of major modification in NMED Regulation 20.2.74.7(X), CRI suggests the following changes to the proposed definition:

Strike the language "an increase in the total operational capacity for treatment or storage."

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Add the following italicized language:

> "A major modification is a modification of a facility that involves *a physical change in the method of operation, storage or treatment; a proposed increase in the geographic size of the permitted facility; a proposed change in the waste stream;* or addition of a new treatment process."

Proposed Rule 53(B)(2) and (G)(1): Landfarm definition and operational requirements

In March of 2005, the Division issued a directive clarifying that landfarms are authorized and designed to accept only remediable hydrocarbon contaminated soils. The first sentence of the definition of landfarms in 53(B)(2) reflects this point, but the last sentence creates ambiguity. Moreover, the last sentence of 53(B)(2) is really an operational provision. Accordingly, CRI suggests the following:

A. Move the second sentence in existing 53(B)(2) to become the first operational provision under 53(G) and change it to read:

> "A landfarm may accept only *hydrocarbon contaminated soils* that are exempt from RCRA Subtitle C and are not hazardous by listing or characteristic."

B. Add a definition of "soils" to the proposed rule. CRI suggest the following definition, which was taken from the "Interm Pit And Below-Grade Tank Guidelines"

> "Soil is defined as that earth material which as been so modified and acted upon by physical, chemical, and biological agents that it will support rooted plants."

C. Add to the prohibitions set forth in 53(G)(12) "*mole sieve, metals, or other non-remediable materials.*"

D. Confirm whether the 2,000 ppm standard in 53(G)(12) will support root growth if the subject area has stacking or recurring chloride concentrations of 2,000 ppm.

Proposed Rule 53(C)(7): Denial due to a history of noncompliance.

The Division has always had the authority to deny an application if the applicant "has a history of failure to comply with division rules and orders or state or federal environmental laws." *See* Rule 711(B)(5). Despite the objections noted at the stakeholder's meeting, CRI believes this screening criteria should be carried over to the new rule. From a due process standpoint, any denial by the Division based on a history of noncompliance will occur at the end of the permitting process, will likely occur after a hearing, and will be subject to the general rehearing and appeals process. Accordingly, there is no reason to shy away from this important screening criteria.

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Proposed Rule 53(D)(3)(a): "and not mixed with non-exempt waste"

As discussed at the stakeholder's meeting, CRI questions the need for the language "and not mixed with non-exempt waste" due to the problems it creates for waste haulers. CRI understands that Ed Martin is going to review whether this language is necessary to maintain the RCRA exemption for oilfield wastes.

Proposed Rule 53(D)(3)(c): "has tested non hazardous"

CRI believes the language "has tested non-hazardous" in subparagraph (c) should be stricken to conform with subparagraph (b), which recognizes that testing is not always necessary to properly characterize wastes. Indeed, the last sentence in subparagraph (c) references the "acceptable documentation" standard found in subparagraph (b). The "acceptable documentation" standard is sufficient, and recognizes that testing is not always necessary to properly characterize certain wastes (i.e. concrete).

Proposed Rule 53(D) and (E): Form C-117-A

At the stakeholder's hearing, everyone agreed that the C-117-A forms have "lost their purpose" and impose an unnecessary administrative hardship on operators and the Division. Since they serve no purpose for surface waste management facilities, form C-117-A filings should not be required under the proposed new rule.

Proposed Rule 53 (E): Form C-138

CRI does not believe a C-138 is appropriate for tank bottoms or other wastes accepted by oil treating plants, and understands the Division is looking into the whether this filing requirement is really necessary.

Proposed Rule 53(F): Double liners for landfills

CRI applauds the Division for imposing a general requirement that oil & gas waste landfills have double liners with leak detection systems, subject to modification based on site specific information. However, it may be useful to define the types of liners by referencing the hazardous waste liners approved by the NMED.

Proposed Rule 53(H/I)(3)(a): "Closure Standards"

CRI believes there will be circumstances when the removal of tanks and equipment used for oil treatment is not necessary or prudent, so long as the equipment is cleaned to OCD standards. For example, tanks and other equipment may be useful to subsequent operations. Accordingly, CRI suggest adding the following italicized language:

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"(i) All tanks and equipment used for oil treatment shall be *cleaned or* removed from the site and recycled or properly disposed of."

Proposed Rule 53(H/I)(3)(i) – 40 mil thick cap liner for landfills

CRI believes the available research indicates it is not prudent for the Division to require a plastic 40-mil thick liner cap for landfills.

Proposed Rule 53(H/I)(3)(iii) – Groundwater monitoring wells

The word *"Existing"* should be placed before "groundwater" in this provision to clarify that it only applies where groundwater monitoring wells were part of the operating requirements.

Proposed Rule 53(I/J) (last page) – Existing facilities

All existing facilities operate under site specific orders or permits issued by the Division. In contrast, the proposed new rule is one of general applicability. Accordingly, to the extent that the operational or bonding requirements in existing orders or permits differ from those in the proposed rule, the site specific provisions should govern – unless modified or withdrawn for good cause after notice and hearing. Accordingly, CRI suggests adding the following italicized language to the paragraph:

"Existing facilities. Surface waste management facilities in operation prior to the effective date of 19.15.2.53 shall comply with all provisions of 19.15.2.53 *unless they conflict with existing provisions in written permits, orders, waivers or other exceptions* heretofore *issued* to any such facility in writing by the division. *All existing permits, orders, waivers or exceptions* shall continue in effect unless modified or withdrawn for good cause after notice and opportunity for hearing.

Thank you for your attention to these matters. CRI will comment further after publication of the revised proposed rules on October 14th.

Sincerely,

Michael H. Feldewert

cc: Mark Fesmire
David Brooks
Ed Martin

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October 14, 2005

VIA EMAIL david.brooks@state.nm.us
David Brooks, Esq.
New Mexico Oil Conservation Division
1220 S. St. Francis Dr.
Santa Fe, New Mexico 87505

RE: OCD's Proposed Rules on Surface Waste Management Facilities

Dear Mr. Brooks:

On behalf of Gandy Marley, Inc., I am submitting the following comments on the OCD's Proposed Rules for Surface Waste Management Facilities. The comments address two issues-the definition of "major modification" of permits and the addition of language clarifying that the new rules will not apply to pending permit applications.

1) 19.15.2.53.B.(6) Definition of "major modification." The definition of "major modification" proposed by OCD is as follows:

> A major modification is a modification of a facility that involves an increase in the total operational capacity for treatment or storage of waste or addition of a new treatment process.

The proposed definition is too broad and potentially requires permit modifications for activities that may be allowable under existing permit conditions or for permit modifications that do not require public comment or participation. We propose that the following alternate definition be adopted:

> A major modification is one that substantially alters the facility or its operation.

The proposed language is based on the definition of a Class 3 permit modification for RCRA permits, found at 40 CFR §270.42(d)(2)(iii). The proposed language balances the need for facilities top be able to modify their permits without having to go through an extensive public hearing process with the opportunity for public participation in major permit modifications.

2) Pending Matters: We propose that the following language be added to 19.15.2.53:

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J. Pending matters. Permit applications, including applications for permit modifications, appeals of Division Orders and appeals of Commission orders concerning permit applications or matters related to such applications or appeals that are on file with either the Division staff, the Division, or the Commission prior to the effective date of 19.15.2.53 shall be considered pending matters that are required to be determined under the provisions of 19.15.9.711. Any permit order or decision issued on such pending matters shall entitle the facility receiving such permit, order or decision to be treated as an existing facility under I. above with respect to all terms, permit conditions, orders or decisions issued in such pending matter.

The proposed language is supported by the New Mexico Constitution and New Mexico caselaw. The New Mexico Constitution states: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." Article IV, section 34. The New Mexico Court of Appeals has found that article IV, section 34 applies to administrative agencies. *Pineda v. Grande Drilling Corp.*, 111 N.M. 536, 538-539, 807 P.2d 234 (Ct.App. 1991). The Court specifically stated that "our supreme court's broad application of the provision compels the conclusion that the word 'case' should include not just judicial proceedings, but also adjudicative proceedings" before administrative agencies. *Id.* If the new enactment comes into effect after the date an adjudicatory proceeding has been filed with the agency, the new enactment is not applicable to the pending matter. *Id.* at 539. An adjudicatory hearing or proceeding is a "proceeding before an administrative agency in which the rights and duties of particular persons are adjudicated after notice and opportunity to be heard." Black's Law Dictionary, 5th Edition Abridged. Permit applications, including permit modifications, that have been filed with Division staff, or directly with the Division or the Commission, are adjudicatory proceedings because they determine the rights and duties of particular permit holders and facilities. A matter is pending as of the date it is filed with the appropriate reviewing body, whether that be Division staff, a Hearing Examiner or the Commission. The proposed language reflects the specific language of article IV, section 34 and applicable caselaw.

Thank you for your consideration of the preceding comments.

Sincerely,

Original signed by Pete Domenici, Jr.
Pete V. Domenici, Jr., Esq.

cc: Dale Gandy
Bill Marley
File 1548