



Ms. Florene Davidson
New Mexico Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Re: Energen Resource's comments
Draft Surface Waste Management Rules (Rev. 2/27/2006)
19.15.2.51, .52 and .53

Dear Oil Conservation Commission:

Energen Resources (Energen) appreciates the ongoing opportunity to provide written comments on the Oil Conservation Division's (OCD's) proposed changes to the Surface Waste Management Facility (SWMF) rule, 19.15.2.53 NMAC, and related provisions, based on the most recent February 27, 2006 draft. While Energen appreciates this opportunity, its ability to provide effective comments is limited by the very restricted time frame which requires comments and proposed amendments to the Commission no later than March 9, 2006, less than nine business days after release of the comments.

Energen is a member of the Industry Committee and fully supports the comments of the Industry Committee and its technical experts, Drs. Ben Thomas, Kerry Sublette, Daniel Stephens, and Mr. Mark Miller, on the proposed rule. Energen urges the Commission to follow the "state of the art" that was presented by these recognized experts in the field and to adopt appropriate regulatory standards. Energen, the Industry Committee, and the experts themselves are disappointed in the OCD staff's response to the science and state of the art presentations. Too often, it appears that rather than determine the best regulatory approach, the staff has chosen merely to gather all available measures, such as the triple-liner systems used on hazardous waste landfills or "one-size-fits-all" chloride restrictions, and impose them without regard as to whether they advance the mandates of the Oil and Gas Act (OGA) or actually are necessary to protect human health, fresh water and the environment.

Energen supports good, science-based regulation of the petroleum industry, including surface waste facilities. A good regulatory regime protects fresh water and the environment while allowing efficient extraction of valuable petroleum resources and protecting the legitimate interests of oil and gas operators and royalty owners. Energen requests that the Commission challenge OCD on the following issues:

- Who or what OCD is trying to protect with each proposed provision?
- Does the proposed provision in fact achieve appropriate protection?
- Is the proposed provision technically feasible?
- Is the proposed provision appropriately tailored to achieve protection at reasonable cost?
- Are the measures, considered in the aggregate, protective and reasonable?

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Unfortunately, the answers to many of these questions are not clear. Energen does not believe that the OCD can articulate scientific basis for many of its positions taken in the proposal. If an adequate basis cannot be articulated by staff, then what basis supports Commission action?

Energen wishes to express its concern over the "new" rulemaking approach adopted by the Department and the Division in this matter. In the past, technical rules were vetted through a joint OCD/industry committee prior to being sent out for public notice and comment. This process allowed industry and OCD staff to reach a mutual technical understanding about the basis for the proposed rules. As a result, the proposals placed before the public and the Commission were practicable and stronger technically. The new process, which eliminated the joint OCD/industry committee in favor of a stakeholder process, has resulted in a proposal with little technical basis. As a result, OCD has placed the burden on the Commission to develop the entire technical basis for the rule in the hearing process. Given the manifest issues, only some of which are highlighted in this letter, both the duration and contentiousness of the hearing are likely to be unparalleled. This seems like a heavy burden to place on the Commission.

1. The Commission and OCD must regulate based on reasonably anticipated waste management scenarios, not theoretical possibilities.

The Industry Committee and its experts presented a risk-based approach to regulating oilfield wastes based upon extensive knowledge of the wastes and their constituents. These recommendations were conservative and based on considered opinion. They are protective of fresh water, public health and the environment. Staff questioned these recommendations, appearing to take the position that risk-based standards could not be considered unless risk was eliminated in all situations. For example, Dr. Kerry Sublette testified that achieving the bioremediation endpoint indicates that petroleum toxicity has, essentially, been eliminated, and cited numerous studies documenting this conclusion. Staff's response was whether this included residential use. Dr. Sublette responded it would. Staff then asked whether Dr. Sublette would let his children play in and eat the treated dirt. Dr. Sublette quite reasonably demurred. Staff then indicated that it believed this indicated that the material remained unacceptably risky. Sadly, Dr. Sublette's recommendation is more protective of human health in more situations than the numeric standards proposed by the OCD staff. Yet it appears that OCD let itself be distracted by the mere theoretical possibility that oilfield waste might end up in a nursery school playground. A similar exchange occurred between staff and Dr. Thomas, when Dr. Thomas indicated that extractable compounds presented a greater risk than non-extractable compounds. Staff immediately questioned whether this meant Dr. Thomas was saying that non-extractable compounds would "never" reach groundwater. He, of course, demurred, because "never" is an impossible burden.

Neither the Commission nor OCD can regulate based upon the theoretical possibility that something might happen. Instead, the Commission and OCD must consider what is reasonably likely to occur and to adopt measures that are protective for the reasonably foreseeable occurrences. Trying to eliminate "all" risks to ensure that there is "never" any possibility of exposure

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imposes a heavy cost on operators and ultimately the entire state with little, if any, corresponding benefit.

2. **The Commission and OCD should adopt a "tiered" regulatory structure that provides certainty to operators, guidance to OCD staff, and protection to human health, fresh water and the environment.**

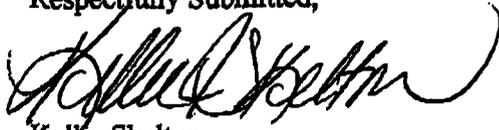
Energen and the Industry Committee have consistently urged OCD, and now the Commission, to adopt a "tiered" approach to regulating surface waste management facilities. Tiering allows the Commission and OCD to give increasing degrees of flexibility without significantly increasing risk because each tier requires a better demonstration that conditions are as represented. Tiering allows excess conservatism in the models and regulations to be determined and then removed so that the final regulatory approach is more finely calibrated to the risks presented. Therefore, Energen supports the Industry Committee's comments with regards to the tiered approach to regulating surface waste management facilities.

3. Specific Comments

Energen supports the specific comments as documented in the Industry Committee Comments and Recommended Modifications.

Energen Resources appreciates the opportunity to submit comments to the New Mexico Oil Conservation Division. Thank you for your careful consideration of comments from Energen's and the Industry Committee.

Respectfully Submitted,



Kellie Skelton
Environmental Coordinator
Energen Resources