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May 22, 2018

via email: florene.davidson@state.nm.us

New Mexico Oil Conservation Commission
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
ATTN: Commission Clerk, Florene Davidson

RE: Proposed Rulemaking 19.15.29 NMAC

15959

To Whom It May Concern:

The Oil & Gas Accountability Project (OGAP), a program of Earthworks, respectfully submits these written comments on the New Mexico Oil Conservation Commission's proposed rulemaking 19.15.29 NMAC. These are in addition to those comments submitted by Environmental Defense Fund, to which we have joined. Earthworks is a nonprofit organization, with hundreds of members in New Mexico, whose mission is to reduce the impacts of energy extraction on the community's living with oil and gas development. Over the past fifteen years, through its Oil & Gas Accountability Project, Earthworks has participated extensively in rulemakings by OCC.

Release Notification

Under Section 19.15.29.8.A., we suggest that "or TENORM" be added after "NORM", for required reporting. In our experience across states, we find variability in use of NORM and TENORM and suggest that both be included to ensure there are no gaps in reporting.

Site Assessment

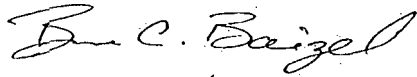
Under Section 19.15.29.11.A(5)(b), if liner integrity is unable to be demonstrated, then EPA guidance in Region 8 is that the liner without integrity is no longer RCRA 'C' exempt and must be treated according to those waste requirements. We suggest the addition of a sentence to that effect be added prior to the sentence beginning "The operator may use" in that subsection.

Restoration, Reclamation and Re-Vegetation

Under Section 19.15.29.13.E., we suggest that "or under surface use agreements with private landowners" be inserted after "...or owned by those agencies", in recognition that operators may have signed such agreements under the Surface Owners Protection Act.

OGAP appreciates the opportunity to present our recommendations and look forward to working with the Commission on this rulemaking.

Respectfully submitted,

A handwritten signature in black ink, reading "Bruce Baizel". The signature is fluid and cursive, with the first name "Bruce" and last name "Baizel" clearly distinguishable.

Bruce Baizel
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To Whom It May Concern:

Environmental Defense Fund (EDF), Natural Resources Defense Council (NRDC), and Earthworks respectfully submit these written comments on the New Mexico Oil Conservation Commission's proposed rulemaking 19.15.29 NMAC. EDF is a nonprofit organization representing over two million members, as well as more than 18,000 in New Mexico, many of whom care deeply about the environmental impacts associated with oil and gas development, public health, and clean water resources. The NRDC is a national non-profit advocacy organization with over 400,000 members nationally, over 4,000 of whom live in New Mexico. NRDC advances science-based safeguards for clean air, water and the environment. Earthworks is a nonprofit organization, with hundreds of members in New Mexico, whose mission is to reduce the impacts of energy extraction on the communities living with oil and gas development. Over the past fifteen years, through its Oil & Gas Accountability Project, Earthworks has participated extensively in rulemakings by the Oil Conservation Division.

Our organizations are collectively deeply concerned that with this proposed rulemaking. We fear that inadvertently New Mexico is putting land and water resources at risk.

We offer comments on the substance of the text of the proposed rulemaking in two main areas:

1. Release notification, closure reporting; and
2. Closure criteria for soils impacted by a release (Table 1).

Release Notification and Closure Reporting

In the proposed rule, Section 19.15.29.8 requires the notification of both a major and minor release using form C-141 to the division (19.15.29.8 A) and, if state, federal or tribal lands are involved, the

appropriate land managing agency including the State Land Office, the Bureau of Land Management or tribal authority, as applicable (19.15.29.8 B). In Section 19.15.29.12 D, the responsible party must submit to the division a closure report on form C-141.

Not included in the entities to be notified at the time of a release and at the conclusion of any required remediation and closure is the landowner. It is important that the landowner be kept fully apprised of impacts to their property. This notice should be given both when a spill occurs and at the conclusion of remediation and closure activities. Adequate notice to the surface owner of any potential risk or damage to his property is both appropriate not only for basic transparency, but also in line with the spirit of New Mexico's own Surface Owner Protection Act (NM Stat § 70-12-1 et seq.). It simply makes intuitive sense that if an operator is required to provide a landowner notice prior to entering his property along with a wide range of other information – including “actions to minimize surface damage to property” (NM Stat § 70-12-5(B)(4)(j)), that landowner should expect to be informed of potential impacts or damages from spills as they occur and upon remedy. The Groundwater Protection Council's report¹ on state oil and gas regulations designed to protect water resources indicates that at least eight other producing states require landowner notification of spills.

Recommended modifications to 19.15.29.8 A and 19.15.29.12 D:

19.15.29.8 RELEASE NOTIFICATION:

A. The responsible party must notify the division and landowner on form C-141 of a major or minor release occurring during the drilling, producing, storing, disposing, injecting, transporting, servicing or processing of oil, gases, produced water, condensate or oil field waste including regulated NORM, or other oil field related chemicals, contaminants or mixture of the chemicals or contaminants, in accordance with the requirements of 19.15.29 NMAC.

19.15.29.12 Remediation and Closure

D. Closure Reporting.

(1) The responsible party must submit to the division and landowner a closure report on form C-141, including required attachments, to document all closure activities including sampling results and the details on any backfilling, capping or covering, where applicable. The responsible party must certify that all information in the closure report and attachments is correct and that the responsible party has complied with all applicable closure requirements and conditions specified in division rules or directives. The responsible party must submit closure report along with form C-141 to the division within 90 days of the remediation plan approval. The responsible party may

¹ Groundwater Protection Council, State Oil and Natural Gas Regulations Designed to Protect Water Resources at p.78 fig.4-24 (November 2017), available at <http://www.gwpc.org/sites/default/files/State%20Regulations%20Report%202017%20Final.pdf>.

apply for additional time to submit the final closure report upon a showing of good cause as determined by the division. The final report must include:

- (a) a scaled site and sampling diagram;
- (b) photographs of the remediated site prior to backfill;
- (c) laboratory analyses of final sampling; and
- (d) a description of all remedial activities.

Closure Criteria for Soils Impacted by a Release (Table 1)

Table 1, as presented in the proposed rule, specifies the closure level for soils impacted by a release. The above mentioned groups have concerns that the Benzene limit of 10 mg/kg, and chloride concentrations of 10,000 mg/kg and 20,000 mg/kg under conditions of depth to groundwater of 50 feet to 100 feet and greater than 100 feet respectively are not protective enough of human health or the environment and would constitute the weakest standards in the region.

Benzene is a known carcinogen, is relatively mobile thus is likely to readily move through a soil column, and has a maximum contaminant level established under the Safe Drinking Water Act of 0.005 mg/l.

As a comparison from neighboring states, Colorado has a spill and release soil cleanup level of 0.17 mg/kg for Benzene.² The Texas Railroad Commission specifies a soil cleanup standard for benzene from a hydrocarbon condensate spill of 2.6 mg/kg for Class 3 groundwater (TDS greater than 10,000 mg/kg or a sustainable rate less than 150 gallons per day) and 0.026 mg/kg for Class 1 groundwater (TDS less than 1,000 mg/kg and sustainable rate of 5,000 gallons per day or TDS of 3,000 mg/kg and sustainable rate of 144,000 gallons per day) and Class 2 groundwater (TDS less than 10,000 mg/kg and sustainable rate of 150 gallons/day).³

These rules, in fact, diverge significantly from this state's own thinking on appropriate clean up levels from previous rulemakings. In 2008, New Mexico established strong rules for pits, closed loop systems, below-grade tanks and sumps (19.15.17 NMAC). The 2008 rules contained a number of well thought out provisions on pit design, construction, operation, and closure. These rules specified benzene in soil cleanup level of 0.2 mg/kg for all depth to groundwater conditions, and a maximum chloride concentration of 1,000 mg/kg or background, whichever is greater. Unfortunately these rules were repealed and replaced in 2013.

Based on both comparisons with other state programs and the previous work of New Mexico regulatory staff, we recommend a more protective soil cleanup standard for benzene to be set at 0.2 mg/kg for all depth of groundwater and a maximum chloride concentration of 1,000 mg/kg or background, whichever is greater for depth to groundwater 50 feet or greater as shown in the modified Table 1.

² COGCC Rule 906; Table 910-1.

³ Texas Railroad Commission, Field Guide for the Assessment and Cleanup of Soil and Groundwater Contaminated with Condensate From a Spill Incident (Statewide Rules 8, 20, and 91), available at <http://www.rrc.state.tx.us/oil-gas/environmental-cleanup-programs/guidance-documents-and-helpful-links/condensate-spill-guidance/>.

Table I Closure Criteria for Soils Impacted by a Release			
Depth below bottom of release to ground water less than 10,000 mg/l TDS	Constituent	Method*	Limit**
≤ 50 feet	Chloride***	EPA 300.0	600 mg/kg
	TPH	EPA SW-846 Method 8015M	100 mg/kg
	BTEX	EPA SW-846 Method 8021B or 8260B	50 mg/kg
	Benzene	EPA SW-846 Method 8021B or 8015M	10 mg/kg 0.2 mg/kg
51 feet-100 feet	Chloride***	EPA 300.0	10,000 mg/kg 1,000 mg/kg or background, whichever is greater.
	TPH	EPA SW-846 Method 8015M	2,500 mg/kg
	GRO+DRO	EPA SW-846 Method 8015M	1,000 mg/kg
	BTEX	EPA SW-846 Method 8021B or 8260B	50 mg/kg
	Benzene	EPA SW-846 Method 8021B or 8260B	10 mg/kg 0.2 mg/kg
➤ 100 feet	Chloride***	EPA 300.0	20,000 mg/kg 1,000 mg/kg or background, whichever is greater.
	TPH	EPA SW-846 Method 8015M	2,500 mg/kg
	GRO+DRO	EPA SW-846 Method 8015M	1,000 mg/kg
	BTEX	EPA SW-846 Method 8021B or 8260B	50 mg/kg
	Benzene	EPA SW-846 Method 8021B or 8015M	10 mg/kg 0.2 mg/kg

*Or other test methods approved by the division.

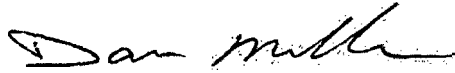
**Numerical limits or natural background level, whichever is greater.

***This applies to releases of produced water or other fluids which may contain chloride.

[19.15.29.12 NMAC – N, XX/XX/201?]

EDF, NRDC, and Earthworks appreciate the opportunity to present our recommendations and look forward to working with the Commission on this important rulemaking.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dan Mueller".

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