

Gregory D. Huffaker, Jr.
Michael J. Moffett*

huffaker@handmllc.com
mmoffett@handmllc.com

*Also admitted in Georgia

HUFFAKER & MOFFETT LLC

ATTORNEYS AT LAW

126 E. De Vargas St.
Post Office Box 1868
Santa Fe, New Mexico
87504-1868

Telephone: (505) 988-8921
Facsimile: (505) 983-3927

October 22, 2007

VIA HAND DELIVERY

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

**Re: Case 14015: Application of the New Mexico Oil Conservation Division for
Repeal of Existing Rule 50 Concerning Pits, etc.**

Controlled Recovery Inc.'s Notice of Recommended Modifications and Proposals for Alternatives

Dear Ms. Davidson:

Pursuant to Division Procedural Rules 1203 and 1204 and the Division's October 11, 2007 Notice, Controlled Recovery Inc. ("CRI") hereby submits its Notice of Recommended Modifications and Proposals for Alternatives in the above Oil Conservation Commission proceeding.

Recommended Modification No. 1

Remove all provisions for on-site burial.

Recommended textual change. Delete subparagraphs 9c.(1), 10.c., 11.j., 13.B.(2), 13.F., 13.g.(2).

Explanation and reasons for the recommended modification. The proposed Rule proposes to allow on-site burial (as an "alternative closure method" called "on-site disposal") as a standard exception to the requirement to dig and haul drilling and workover pit contents for those pits located further than 100 miles from a disposal facility. This proposal would violate the principals of waste minimization and centralization.

Drilling and workover pit contents are oil field waste as defined in OCC regulations. Permitting on-site burial would carpet parts of the State with hundreds, perhaps thousands of small, unmonitored, permanent waste dumps containing extremely high levels of chloride.

The proposed Rule would not require more than minimal testing of pit contents before burial on-site, and it would not require any post-burial monitoring of any kind. This proposal is

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inconsistent with the OCC's own 2007 revisions to Rule 36, the rule that covers surface waste management, and with other EMNRD and NMED regulations. All this could occur with no public notice, not even to those subsurface owners whose property would be permanently appropriated under this regime.

CRI opposes any on-site burial exceptions for the principal reason that on-site burial presents grave risks to soil and groundwater.

- Thousands of small, unmonitored, permanent waste dumps

Permanent waste dumps should not be allowed unless they can be rigorously regulated in a manner consistent with the precise and demanding requirements applied to other types of permanent waste sites and mine reclamation sites by the OCC, NMED, EMNRD, EPA and other state and federal agencies.

- No requirement for testing of pit contents

It is a fact that testing of pit materials undertaken by members of the Pit Rule Task Force showed that many contaminant levels were significantly greater than the "common wisdom," especially in the Northwest, including chloride, sodium, TDS, TPH, benzene, BTEX, DRO/GRO, barium, chromium, fluoride, mercury, and lead. Accordingly, the OCC should take heed that many of the prevailing guidelines may not have a strong scientific basis for support. Under the proposed Rule on-site burials would be closed with minimal supervision by the OCD and with virtually no regulation of the contents of these permanent waste dumps. No one would know what will be buried in these dumps, or what risk they will present to the environment.

- No requirement for post-burial monitoring

The proposed Rule contains no requirement for inspection, sampling or monitoring once the waste has been capped, and no prohibition against the discharge of pollutants to the groundwater that violates state water quality standards. The operator is allowed to place his waste and walk away forever. In previous public meetings related to the Rule frequent comments were made to the effect that every drilling and workover pit leaks, but still there is no defined process for effective monitoring or enforcement.

- Inconsistency with previous OCC and other EMNRD and NMED regulations.

The permanent dumps proposed in this Rule would not even meet OCD standards for temporary pits in this same proposed Rule, or the standards for landfarms in Rule 36. For instance, an application for a permanent pit (other than an on-site burial permanent pit) must include a design and a commitment to construct the pit that is subject to stringent requirements for the foundation, for grades and slopes, for double liners with leak detection, etc., etc. See Section 11.G. No such rigor or requirements apply to permanent on-site burial dumps. Small landfarms may only be established where testing shows chloride concentrations of the contents are 500 mg/kg or less. The standard for on-site dumps is about 100,000 mg/kg.

CRI recommends that permanent on-site buried waste dumps should not be allowed unless they can be rigorously regulated in a manner consistent with the precise and demanding requirements applied to other types of permanent waste sites and mine reclamation sites by the OCC, NMED, EMNRD, EPA and other state and federal agencies. The long-term solution to any perceived cost-distance problem is to encourage waste minimization practices such as closed loop drilling or to license additional centralized disposal sites. This Rule should encourage waste minimization and centralization, not an untold number of permanent, unmonitored waste dumps.

Recommended Modification No. 2

Remove all references to “appropriate division district office” or “division” processing and approval of pit permit applications, exceptions and waivers, including for on-site burial. Provide for permit processing at the environmental bureau in Santa Fe.

Recommended textual change. Delete the phrase “appropriate district office,” or “division,” and substitute “environmental bureau in the division’s Santa Fe office” in subparagraphs 9.B.(2), 9.D.(2), 10.A.(1)(b), 10.A.(1)(g), 10.A.(1)(h), 10.C.(2), 10.C.(7), 10.C.(8), 11.F.(2), 11.F.(3), 11.J.(3), 11.J.(4), 11.J.(10), 12.B.(4), 12.B.(5), 13.A.(6), 13.B., and 13.F.(2)(e).

Explanation and reasons for the recommended modification. The proposed Rule provides that permit applications for drilling and workover pits that include applications for exceptions and waivers to the Rule, including for on-site burial, are to be submitted to the “appropriate division district office.” For instance, district offices would have discretion to grant siting exceptions, see 10.A., (2), 10.C.(7), and 10.C.(8), to decide when geotextile is “needed”, see 11.F.(6), J.(3), and to approve industry-proposed “treatment” methods, see 13.F.(2)(c), among many other exceptions.

Division offices do not have sufficient staff or expertise to evaluate applications for exceptions that depend on, among other things, evaluating geology, hydrogeology, plastic liner technology and other permit issues that must provide protection to fresh water, public health and the environment. The proposed Rule would put utterly standardless discretion in the hands of those who have limited education, training, or experience upon which to base an exercise of that discretion.

There is an obvious risk of inconsistent standards arising between different districts in the state where each of the several districts could be granting (or refusing to grant) exceptions, alternatives and waivers on a basis inconsistent with those of other districts. Inconsistent administrative decisionmaking is arbitrary administrative action.

OCC’s recently adopted Rule 36 for surface waste facilities, such as landfills and landfarms, requires all applications for permits, for major modifications to permits, and even for minor modifications to permits, be submitted to the OCD Environmental Bureau in Santa Fe. The district offices play no part in Rule 36. There is no justification for treating waste disposal of permanent or temporary pits containing oil field waste any differently.

District office participation should be limited to reviewing applications that do not request any exception, including any exception for on-site burial.

Recommended Modification No. 3

The Rule should provide for public notice of permit applications, for public participation, and for hearings, especially for those applications containing requests for exceptions and waivers, including for on-site burial, and for requests for modifications to permits that would amount to an exception or waiver.

Recommended textual modifications. Subparagraphs 15.A.(2),(3), 16. E. should be modified as follows:

19.15.17.15 EXCEPTIONS:

A. General exceptions.

(2) The operator shall give written notice by certified mail, return receipt requested, to the surface and subsurface owners and lessees of record where the pit, closed-loop system, below-grade tank or other proposed alternative is, or will be, located, to surface and subsurface owners and lessees of record within one-half mile of such location, to the county commission of the county where the pit, system or tank is, or will be, located, to the appropriate city officials if the pit, system or tank is, or will be, located within city limits, within one-half mile of the city limits, or within the city's zoning and planning jurisdiction, to affected federal, tribal or pueblo governmental agencies, and to such other persons as the environmental bureau in the division's Santa Fe office may direct by certified mail, return receipt requested, and issue public notice. The operator shall issue public notice by publication one time in a newspaper of general circulation in the county where the pit, closed-loop system, below-grade tank or other proposed alternative will be located. Required written and public notices require the environmental bureau in the division's Santa Fe office's approval. The division shall distribute notice of the application to persons who have requested notification and shall post notice of the application on the environmental bureau's web pages.

(3) Any person wishing to comment on an application may file comments or request a hearing within 30 days after the later of the date when the applicant mails the notice required by Subsection A (2) of 19.15.17.15 NMAC or when the division distributes or posts the notice provided in Subsection A (2) of 19. 15.17.15 NMAC. A request for hearing must set forth the reasons why a hearing should be held.

(4) The environmental bureau in the division's Santa Fe office may grant the exception administratively if either the operator files with the environmental bureau in the division's Santa Fe office written waivers from all persons to whom notice is required or the environmental bureau in the division's Santa Fe office receives no objection comments or requests for hearing within 30 days of the time the applicant gives notice the time for commenting established in Subsection A (3) of 19.15.17.15 NMAC. If the environmental bureau in the division's Santa Fe office receives a n-objectioncomment or request for hearing and the

director determines that the ~~objection-comment~~ or request presents issues that have~~as~~ technical merit or that there is significant public interest, then the director ~~may~~shall set the application for hearing. The director, however, may set any application for hearing. If the environmental bureau in the division's Santa Fe office schedules a hearing on an application, the hearing shall be conducted according the procedures in 19.15.14.1206 through 19.15.14.1215 NMAC.

(5)(3) If the director does not determine that a hearing is necessary due to an ~~objection-comment or request~~'s technical merit, significant public interest or otherwise, then the environmental bureau in the division's Santa Fe office may grant the exception without a hearing notwithstanding the filing of an ~~objection-comments or requests for a hearing~~. If, however, the environmental bureau in the division's Santa Fe office determines to deny the exception, then it shall notify the operator of its determination by certified mail, return receipt requested, and if the operator requests a hearing within 10 days after receipt of such notice shall set the matter for hearing, with notice to the operator and to any party who has filed an ~~objection to the proposed exception~~ a comment or requested a hearing.

19.15.17.16 PERMIT APPROVALS, CONDITIONS, DENIALS, REVOCATIONS, SUSPENSIONS, MODIFICATIONS OR TRANSFERS:

E. Revocation, suspension or modification of a permit. The operator may apply to the division for a modification of the permit pursuant 19.15.17 NMAC. The operator shall demonstrate that the proposed modification complies with the applicable provisions of 19.15.17 NMAC. The provisions of Subsection A of 19.15.17.15 NMAC shall apply to modifications of a permit pursuant to this Subsection. The division may revoke, suspend or impose additional operating conditions or limitations on a permit at any time, after notice and opportunity for a hearing, if the division determines that the operator or the permitted facility is in material breach of any applicable statutes or rules, or that such action is necessary for the protection of fresh water, public health or the environment. The division shall notify the operator by certified mail, return receipt requested, of any intended revocation, suspension or imposition of addition conditions, and the operator shall have 10 days after receipt of notification to request a hearing. The division may suspend a permit or impose additional conditions or limitations without hearing in an emergency to forestall an imminent threat to fresh water, public health, safety or the environment, subject to the provisions of NMSA 1978, Section 70-2-23, as amended.

Explanation and reasons for the recommended modification. In marked contrast to its other rules and the rules of other state agencies, including other divisions of EMNRD, in this proposed Rule only the surface owners of record where the pit or on-site burial is proposed to be located are entitled to direct notice of a permit application and/or an application for exceptions or modifications to the requirements of the Rule, including an application to allow on-site burial. The proposed Rule does not provide for any public notice other than a one-time newspaper publication. Newspaper notices are a notoriously ineffective means of giving public notice.

Left out of notice are lessees of the surface, subsurface owners, neighbors, water rights owners and users of water resources, local and tribal government, and even persons who have requested OCD to give them notification of significant environmental decisions.

The proposed Rule provides no opportunity for anyone to comment on proposed exceptions or modifications.

Finally, the proposed Rule provides virtually no opportunity for a hearing. The OCD “may” schedule a public hearing on the application if the director determines that there is technical merit or “significant public interest” in the application. How there could be any public interest if the public is not given any notice is not evident.

New Mexico’s Executive Order for Environmental Justice requires state agencies to provide meaningful opportunities for the involvement of all people, regardless of race, color, ethnicity, income or education level, in decisions that may affect the environment and public health. The proposed Rule does not comply with this mandate because it does not provide for public notice or public participation in the pit permitting process.

CRI recommends that, following adequate public notice and an adequate opportunity for public comment, hearings should be mandatory (“shall schedule”), not optional (“may schedule”), where there are expressions of significant public interest or technical merit.

Recommended Modification No. 4

The 50 Foot to Groundwater Siting Requirement Should be Replaced with a 100 Foot to Groundwater Requirement.

Recommended textual change. Delete the number “50,” and substitute “100” in subparagraphs 10.A.(1)(a), 10.A.(2)(a), and 10.C.(1).

Explanation and reasons for the recommended modification. The proposed Rule would allow pits and on-site burial facilities to be located as little as 50 feet above groundwater. This shallow siting depth creates an undue risk of groundwater contamination given the incidence of focused recharge through preferential pathways to groundwater in New Mexico. It is inconsistent with this Commission’s Rule 36 and with the Solid Waste regulations of the New Mexico Environment Department. In order to protect groundwater, the minimum depth to groundwater should be 100 feet below the lowest elevation at which waste will be placed at a facility.

This Commission’s Surface Waste Rules provide that no landfill and no landfarm that accepts drill cuttings with a chloride concentration that exceeds 1,000 mg/kg may be located where ground water is less than 100 feet below the lowest elevation at which the operator will place oil field waste. NMED Solid Waste regulations provide that no municipal or special waste landfill shall be located where depth to seasonal high water table will be closer than 100 feet to the bottom of the fill.

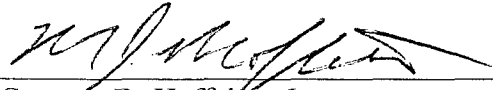
The risk to groundwater represented by the 50 foot standard is manifest. The Division’s own Generalized Record of Groundwater Impact Sites, found at www.emnrd.state.nm.us/emnrd/ocd/documents/rptGeneralizedGWImpact.pdf shows that 91%

of the 400-odd historic groundwater contamination events within the Division's jurisdiction occurred at sites where the depth to groundwater is less than 100 feet.

NMED and the State Engineer are re examining the definition of fresh water and groundwater that should be protected. The Pit Rule should be adopted to provide that no pit or on-site burial facility (if any are allowed at all) may be located where groundwater is less than 100 feet below the lowest elevation at which waste will be placed at the facility.

Respectfully submitted,

Huffaker & Moffett LLC

A handwritten signature in black ink, appearing to read "G. D. Huffaker, Jr.", written over a horizontal line.

Gregory D. Huffaker, Jr.

Michael J. Moffett

Attorneys for Controlled Recovery, Inc.