

November 3, 2023

Rules Coordinator
Railroad Commission of Texas
1701 Congress Avenue
Austin, TX78701

Re: Comments to Proposed Changes to 16 TAC §3.8 and §3.57, and 16 TAC Chapter 4

Dear RRC:

Thank you for the opportunity to provide input regarding the proposed water protection and commercial recycling rule changes. The wording in this letter is intentionally strong however, it is not personal. I can only begin to imagine the challenges posed the RRC in attempting to regulate an industry with the diversity and span seen with Texas's oil and gas industry. Too, I have little doubt that decision makers and administrators at the RRC are well intended. However, having been an environmental professional in the oil and gas industry for 35 years, I feel it a duty and an important part of the rule making process to highlight that the RRC is failing its responsibilities. Furthermore, the RRC itself represents one of the largest risk factors to the business stability of oil and gas operators and service providers in Texas. Fortunately, if the RRC is willing, corrections to these failings are readily available.

Personal Background

To provide possible credibility to my observations and recommendations, I'll briefly share parts of my background. I've been an environmental scientist and manager and project and business consultant to the oil and gas industry since 1989. In that time I have had the unique opportunity to work at both Corporate and field levels with literally 100s of operators and all the majors, including across 3 continents. I was an early stage NORM (naturally occurring radioactive material) consultant and am now considered a foremost expert. In those 35 years, 28 of which have included work with Texas operators and waste facilities, my expertise expanded to all the stages within the environmental and waste management life cycle but, particular to these comments, to waste acceptance, permitting, and compliance. Importantly to my comments to Rules §3.8 and §3.57, I have been and continue to be involved with numerous commercial and non-commercial oil and gas waste management facilities that provide solids, fluid, and/or NORM disposal and/or recycling. For reference, my involvement connects to between 50MM and 100MM bbls of non-hazardous waste disposal and literally 100s of generators and 1000s of loads.

RRC Fundamental Responsibility and Failing

The fundamental responsibility and current failing of the RRC is to **provide clear, unambiguous, consistent and written guidance or direction** regarding its rules, their implementation, and expectations regarding their compliance. Professionals tasked with regulatory compliance recognize that (1) the statutory rule or code is only the beginning component in understanding, implementing, and complying with any particular rule and (2) that the regulatory authority, such as the RRC, must make interpretations

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and decisions in implementing a rule. Understandably, and as the RRC stated in the synopsis to these proposed rule changes, expectations evolve. Without a clear understanding of the RRC's interpretations, decisions, and expectations, and especially given their 'evolving' nature, industry is faced with an unknown and insurmountable compliance task and business are exposed to a very real instability risk by the RRC itself. An example may benefit...

The following are facts and the related documents can be provided as proof.

- A RRC permitted commercial oil and gas non-hazardous waste facility received a letter from the Environmental Permits & Support (EP) Manager on July 1, 2014 stating that a professional engineer (PE) certified waste holding structure consisting of an above ground steel tank and a concrete secondary containment was not considered a pit requiring permitting.
- On March 4, 2021 the facility received a NOV for that exact same PE certified structure from the same Environmental Permits and Support department declaring it in violation and that use of that structure was not authorized and must be ceased.
- In the interim:
 - The RRC did not send a letter or email declaring a change in RRC EP expectations;
 - The District inspector who frequents the facility did not communicate any change of requirements;
 - The RRC did not provide any written or oral clarification on when above ground tanks and secondary containments might require a pit permit; and
 - The existing rule does not provide a level of detail sufficient for industry to understand when above ground storage tanks and secondary containments might require pit permitting; and
 - There is no guidance document related to the RRC's expectations in these instances.
- The facility immediately accepted the need to obtain pit permits and submitted the applications but was repeatedly denied the authority to use the pits despite the RRC's role and despite the fact that the structure posed no real environmental risk and that groundwater monitoring was in place.
- The business was forced to shutdown and as a result lost over \$500,000 in revenue.

The above example is not offered as a complaint but as a factual example of what occurs when RRC expectations are not communicated clearly. It is also a factual example of why the RRC can itself be a significant risk to business stability for oil and gas operators and service providers in Texas.

Truly, the RRC's and EP's role and authority to establish pit permitting requirements is not in question. But certain questions should be asked:

- What does RRC and EP expect regarding industry's understanding of its own evolving decisions and expectations regarding its rules?
- Should industry call RRC EP periodically to ask what changes have been made on literally dozens of interpretations and decisions? Is industry expected to read the RRC's mind?

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- Is the RRC and EP willing to assume responsibility for its role in rule implementation?
- Are RRC senior administrators and Commissioners willing to hold departments accountable by requiring that all administrative policies, interpretations, and/or decisions related to a rule that can result in a NOV be made available to the public clearly, unambiguously, and in writing as a condition of authority to issue the NOV?

RRC Accountability

I believe it essential that the RRC acknowledge its role and hold itself accountable to industry for its responsibilities. In particular, the RRC must assume greater responsibility and accountability in providing clear, unambiguous, consistent and written guidance or direction regarding its rules, their implementation, and expectations. Without self accountability, industry will always be at risk to unknown and insurmountable compliance tasks and risks to business stability arising from the RRC's failings.

Recommendation: Add a condition to proposed rules §3.8 and §3.57 that a NOV cannot be issued unless the specific details of the non-compliance condition have been publicly communicated clearly, unambiguously, and in writing prior to the NOV.

Writing to Which Audience? Simpler, clear language available?

To whom is this rule written? While consistent with traditional approaches to rule making, the language can be oblique and cross pointing, as if written for attorneys or professionals highly experienced in these topics and the process of interpreting a rule. In my experience, most people who attempt to read these rules often give up in frustration. They have no idea what is being said and no hope in discerning what is needed. *Is it necessary that everyone in Texas to whom this rule applies hire an environmental attorney or senior professional?* Personally, it can be difficult to fully uncover what is being inferred and I am often left with concern.

Recommendation: To the extent possible in the rule, say what you mean as simply, directly and with as much specificity as possible. When cross referencing, please cite the specific sub condition as much as possible. Too, please consider that when multiple conditions establish the same requirement, the inference is that the later references to that requirement is somehow different. Removing unnecessary duplicity is helpful.

Topics to Clarify

Please consider clarifying the following:

1. §4.102 (a) authorizes use of process knowledge for categories in §4.110, however, the only apparent waste category in §4.110 is §4.110 (65)(B) which refers to is gas plant hazardous waste.
 - If only referring to gas plant hazardous vs. non-hazardous waste, is §4.102 (a) not duplicative of §4.102 (c)?
 - Could you not be more specific to what you are referring?

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2. §4.102 (a) thru (c) does not clarify when use of 'process knowledge' is acceptable vs. when testing is required. Is it intended to allow generators to use 'process knowledge' at their discretion or are their limitations to when it can be applied? Please note that the current phrasing is likely to lead to minimal if any testing.

Recommendation: Clarify in rule or separately establish in writing RRC expectations on when process knowledge can be applied and when laboratory testing is needed. For example:

- Process knowledge may be applied when laboratory testing has been previously performed on the waste material from the specific activity, process, and system and there has been no change to system operations or other condition which may result in a change of the physical/chemical nature of the waste. In other words, process knowledge is predicated on laboratory testing and not conjecture.
- Process knowledge may be applied when laboratory interpretation is unavailable or inappropriate, such as with material reactivity.

Notes: Clarifying this in writing is absolutely essential given the rule's expectation that commercial waste facilities 'validate' and are held complicit to the accuracy of generator waste profiling.

3. Pits, Container, and Tank definition, §4.110 (70) establishes that a pit is, in part, a container that includes a concrete floor or sidewall or a container for which earthen materials provide structure, shape and foundation support. §4.110 (25) establishes a container as including a pit or a tank. §4.110 (85) specifies tank to include rigid, non-concrete, non-earthen container that provides its own structure.

Comment 1: In the rule's present form the entire range of produced saltwater tank batteries in the state of Texas could be considered pits. Any steel, fiberglass, or polyethylene tank in either earthen or concrete secondary containment is subject to pit requirements.

Recommendations: (1) Reconsider the risks and costs you see posed by above ground storage tanks (especially those ASME certified) within impermeable secondary containments (especially those PE certified); (2) Clarify your expectations in rule or guidance document; (3) Exclude standard ASTs and certified secondary containments from pit permit requirements.

4. Oil and Gas Waste Definition, §4.110 (65) and all related RRC technical documents insufficiently detail RRC's policy when wastes related to E&P in Texas leave RRC jurisdiction. In particular, there is a lack of clarity regarding gas facilities and more particularly regarding gas related transportation.

Comment 1: The RRC's Interim Guidance for Statewide Rule 98, Standards for Management of Hazardous Oil and Gas Waste, begins to address these details but does not do so sufficiently to provide clarity to operators.

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Comment 2: The importance of clarification is amplified with the RRC's proposed condition that commercial waste facilities 'validate' and are held complicit to the accuracy of generator waste profiling.

Recommendation: (1) RRC provide more specificity via published guidance document or the RRC website. (2) Following guidance document publication, provide industry an input path so that the RRC can further clarify specific scenarios.

5. Exempt vs. Non-Exempt Waste. §4.102 (c) establishes the need to differentiate wastes that are exempt from RCRA C requirements from those that are not.

Comment 1: RRC documentation is inconsistent on what are RCRA exempt wastes. Online lists of exempt and non-exempt wastes differ from RRC's Interim Guidance for Statewide Rule 98

Comment 2: The RRC's Interim Guidance for Statewide Rule 98, Standards for Management of Hazardous Oil and Gas Waste, begins to address these details but does not do so sufficiently to provide clarity to operators.

Recommendation: (1) RRC provide more specificity via published guidance document or the RRC website. (2) Following guidance document publication, provide industry an input path so that the RRC can further clarify specific scenarios.

6. Inert Oil and Gas Wastes. §4.110 (47) establishes a new waste category including those that are non-reactive and non-toxic but does not clarify how these wastes are differentiated at a given site or facility where non-hazardous, hazardous, or strictly solid waste are also present.

Question 1: By referencing 'nonreactive' and 'nontoxic', is the RRC expecting laboratory analysis for these characterization categories? If not, how might this determination be made? Of course, these are terms directly refer to two (2) of the EPA and RRC's criteria for differentiating hazardous from non-hazardous waste.

Question 2: Presuming these wastes arise from an oil and gas production, drilling, or waste management facility, how are they differentiated from non-hazardous oil and gas waste at that site? For example, soil, dirt, clay, sand, gravel, and trash may have originated within a tank battery holding produced saltwater, crude, or other wastes. These same materials may have come in direct contact with hydrocarbons and are otherwise considered non-hazardous (exempt) oil and gas waste.

Recommendation: Clarify how inert oil and gas wastes are differentiated from other oil and gas wastes when generated at the same site. For example, they may be wastes that have not contacted or potentially contacted production hydrocarbons or their wastes or equipment.

Other Comments

7. §4.190 (b)(1) provides content that will be included in the RRC's Waste Profile Form (WPF).

Comment 1: I can assert definitively that this information is insufficient to evaluate whether a waste is RCRA exempt. Considerations related to 'uniquely associated with primary field operations' cannot be sufficiently evaluated using only this information.

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Recommendation: While the WPF's direct purpose may not be proof of compliance with non-hazardous criteria, the waste acceptance is enhanced by including on the form (a) the specific oil and gas activity which generated the waste – exactly how and (b) the specific location on the lease at which the waste was generated – exactly where.

8. §4.192 (b) and (c) require a waste generator request a Special Waste Authorization (SWA) from both RRC and TCEQ if the generator seeks to use a non-RRC regulated facility for oil and gas waste management.

Comment 1: There are current TCEQ Regulated commercial facilities, such as HPP Recycles, which have permits from TCEQ and written authorization from the RRC to receive certain amounts of oil and gas waste. Are these authorizations no longer sufficient? In the event no, please consider, that SWA submittal, review and approval could become burdensome and result in delays which shipments are frequent,

9. §4.193 (b)(2) appears to divert from the RRC's current policy that transporters of NORM possess RRC issued waste hauler's permits. Please clarify.
10. §4.193 and §4.195 appear to divert from the RRC's current policy that wastes originating outside of Texas are not required to possess RRC issued waste hauler's permits. Please clarify.

Summary

As stated, I believe it essential that the RRC be clear, unambiguous, and published regarding the decisions, policies, and expectations regarding its rules. Whether by revising the proposed rules for more clarity or issuing guidance documents afterward, clear and written guidance is essential.

Additionally, those of us experienced in these issues recognize that the larger simultaneous goals of natural resource management and environmental protection require a very real partnership between regulators and industry. The creation of the Produced Saltwater Consortium is a direct reflection of the importance of that partnership and the understanding by some of its need. Unfortunately, the area of waste management does not have such a hopeful outcome. In the absence of a partnership, and given the historical dynamic where RRC EP is making and enforcing rule interpretations outside the view and much needed input of industry, industry is left to wait for the next proverbial 'bomb to drop'. With that likelihood, industry needs the RRC to hold itself accountable and ensure that the stoppage of oil and gas production and support services via hidden requirements and unpredictable NOV does not occur. I reemphasize the importance of a condition in proposed rules §3.8 and §3.57 that a NOV cannot be issued unless the specific details of the non-compliance condition have been publicly communicated clearly, unambiguously, and in writing prior to the NOV.

Thank you.

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