BEFORE THE OIL AND GAS CONSERVATION COMMISSION
STATE OF COLORADO

IN THE MATTER OF CHANGES TO THE ) CAUSE NO. 1R
RULES AND REGULATIONS OF THE OIL ) DOCKET NO. _________
AND GAS CONSERVATION COMMISSION )
OF THE STATE OF COLORADO )

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BRIEF OF THE COLORADO PETROLEUM ASSOCIATION
IN SUPPORT OF POSITION THAT PIT LINER DISPOSAL
FALLS WITHIN THE JURISDICTION OF THE COGCC

COMES NOW the Colorado Petroleum Association (“CPA”), through its attorneys, and hereby submits its brief in support of its position that pit liner disposal falls within the jurisdiction of the Colorado Oil and Gas Conservation Commission (“COGCC” or “Commission”).

I. SUMMARY OF ARGUMENT

Pit liner disposal falls within the jurisdiction of the COGCC until such time as the liners are deposited at a commercial solid waste disposal facility. First, although the state law definition of “exploration and production waste” (“E&P waste”) is broader than the definition established by the Environmental Protection Agency (“EPA”), pit liners nonetheless fall within the EPA’s definition of E&P waste. Second, even if used pit liners are not E&P waste in and of themselves, they become E&P waste under the EPA’s mixing rules. Third, Colorado’s definition is broader than the EPA’s definition of E&P waste, and the liners fall within Colorado’s definition of such waste. Finally, the Commission’s general powers over oil and gas operations as set forth Article 60 of Title 34 encompasses jurisdiction over pit liner disposal.

II. PIT LINERS ARE E&P WASTE UNDER THE EPA DEFINITION

In the 1980 amendments to the Resource Conservation and Recovery Act (“RCRA”) Congress temporarily exempted “drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas” from the hazardous waste requirements of Subtitle C pending further study, a report to Congress, and a determination by the EPA as to proper course for managing of such wastes. 42 U.S.C. §§ 6921(b)(2), 6982(m). In late 1987, EPA issued its “Report to Congress, Management of Wastes from the Exploration, Development, and Production of Crude Oil, Natural Gas, and Geothermal Energy” (“Report to Congress”). Pertinent to our inquiry, this Report to Congress endeavors to clarify the types of waste which are exempt from RCRA regulation as E&P waste. Although there have been subsequent publications by the EPA and others on the issue, the EPA Report to Congress remains the authoritative document for purposes of identifying E&P wastes which are exempt from RCRA Subtitle C. Clarification of the Regulatory Determination for Wastes from the Exploration, Development and Production of Crude Oil, Natural Gas and Geothermal Energy, 58 Fed. Reg. 15284, 15285 (Mar. 22, 1993) (“Regulatory Clarification”).
A. The Two Criteria: Association with Primary Field Operations and “Intrinsically Derived” from Exploration, Development or Production

RCRA created three categories of E&P waste: drilling fluids, produced water, and other wastes associated with exploration, development or production. The question here is whether pit liners fall within the category of “other wastes associated with exploration, development or production” (i.e., “associated wastes”). There are essentially two criteria that have to be met for an associated waste to be E&P waste at the federal level. First, the waste must be associated with primary field operations. Second, the waste must be intrinsically derived from such operations. Each of these two criteria is elaborated upon below.

1. Association with Primary Field Operations

Waste is associated with primary field operations if it is associated with measures to locate, remove, or purify oil or natural gas (i.e., exploration, development or production operations, referred to as “E&P”). See Report to Congress, at 7. For oil, primary field operations encompass activities starting at or near the wellhead and ending at the point of transfer to a carrier. Id. at 7-8. For natural gas, primary field operations start at or near the wellhead or gas plant and end at the point where the gas reaches the market pipeline. Id. at 8. The intent of the first criterion is to help identify a point where “downstream” or subsequent processes no longer qualify as E&P operations (such as manufacturing or transportation). See id. at 8. This criterion can also be used to identify wastes that are generated prior to exploration, development or production operations, such as certain types of service company wastes. Pit liners satisfy this first criterion because they are unquestionably “associated” with primary field operations.

2. Intrinsically Derived from E&P

Second, the waste must be “intrinsically derived” from primary field operations. The “intrinsically derived” phrase is synonymous with the “uniquely associated” phrase, and the EPA expressly acknowledges that it uses the phrases interchangeably when describing E&P waste. Regulatory Clarification, at 15285. The focus is on whether the material becomes a waste from a process which is “essential” to E&P, i.e., intrinsically derived from E&P, as opposed to whether it is “unique,” i.e., distinctively characteristic to E&P. While the first criterion discussed above focuses on when E&P operations begin and end, the second criterion requires operators to consider the specific processes that generated the waste to assess whether the wastes were generated by a process which is intrinsic to E&P.

Not all materials brought to and used at a well site will necessarily qualify as E&P waste under the EPA definition. The fundamental purpose of the second criterion is to distinguish among wastes that meet the first prong. The focus of the inquiry is on the process that generated the waste. If either of the following questions can be answered in the affirmative, then the waste will satisfy the “intrinsically derived” test:
1. Was the waste generated from a process which is intrinsic to E&P? (Exemption of Oil and Gas Exploration and Production Wastes from Federal Hazardous Waste Regulations, at 18, 22 (October 2002) (“EPA Guidance”).

2. Was the waste created by agents which were used to facilitate E&P? (Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25447, 25454 (July 6, 1988) (“Regulatory Determination”).

Pit liners satisfy the “intrinsically derived” criterion and are therefore E&P waste. EPA looks to the process which generates the waste to determine whether the waste is an E&P waste. The process based nature of the E&P waste determination is underscored by EPA’s acknowledgement that the same waste could have a different characterization depending on how it was generated. EPA Guidance, at 18. The importance of understanding the proper analysis cannot be overstated, however, because it can easily be confused. As indicated, the correct question is whether the waste is derived from a process which is essential to E&P, not whether the unused material is unique to the oil and gas industry. See Statement of Basis, Specific Statutory Authority, and Purpose, 2 CCR 404-1, at p. 63 (2008). Numerous “virgin” and non-unique materials are recognized as E&P waste despite having utility in other industries and in other contexts. Amines and glycols are good examples. Other examples include water, rags, and sorbent materials—none of which can be viewed as “unique” materials. See Associated Waste Reports Executive Summary, at ES-2, 3 (EPA) (Jan. 2000).

EPA also provides examples of non-E&P waste, i.e., waste created via a non-intrinsic process. For example, a spent solvent that was used downhole to prevent freezing or buildup in the wellbore will qualify as an E&P waste. Report to Congress, at II-18. A spent solvent used to clean equipment at the well site, on the other hand, is not an E&P waste under the EPA definition. Id. Cleaning is not an intrinsic process – it can be done anywhere and it only secondarily relates to E&P. Drilling, completions and production operations, conversely, are essential processes that must occur at the well site, the pits are essential to those processes, and the pits are required by COGCC regulation to be lined.

The EPA stated in its Report to Congress that “[r]eserve pits are an integral part of the drilling process.” Report to Congress, at 12. This statement is dispositive on the question of whether pit liners are uniquely associated with/intrinsically derived from E&P. The liners placed in these “integral” pits per se satisfy the second criterion, particularly when the liners are mandated by the state agency that regulates oil and gas operations. Further, the liners become waste due to their contact with agents that are used to facilitate E&P (e.g., drilling fluid, produced water, frac fluid, cuttings, etc.), thereby satisfying each of the tests under the EPA’s second prong.

B. EPA Listings of Exempt and Non-Exempt Wastes

The parties opposing CPA’s application for rulemaking may attempt to place significance on the fact that the EPA does not identify pit liners in its lists of examples of E&P waste. The EPA has said repeatedly, however, that its lists of exempt and non-exempt wastes are intended to provide helpful examples and should not be construed as comprehensive. See, e.g., EPA
Guidance, at 9. Indeed, the absence of pit liners on the list of exempt wastes is no more persuasive than the fact that pit liners are likewise not listed under EPA’s listing of non-exempt wastes. EPA has not identified pit liners as something other than E&P waste.

Closer scrutiny of the EPA’s listings clears up potential misperceptions and affirms the conclusion that pit liners are EPA defined E&P waste. Items such as spent filters, filter media, cartridges, and canisters are E&P waste when used in the dehydration or gas sweetening process. Associated Waste Reports, Executive Summary, EPA, ES-2, 3 (Jan. 2000); Regulatory Determination, at 25454. The EPA considers these spent filters to be exempt E&P wastes if “the filter itself is not hazardous [prior to use] and the residue in it is from an exempt waste stream.” EPA Guidance, at 10. Pit liners fall within the same class as these filters, the only difference is that the liners are generated during drilling and production as opposed to treatment or dehydration. Moreover, like the filters, the liners themselves are nonhazardous and they come in contact with substances which are universally considered exempt (see argument concerning mixing, below).

Rags and sorbent materials are another comparable type of E&P waste (under the category of “oily debris”). Associated Waste Reports, Executive Summary, EPA, ES-2 (Jan. 2000). These, along with the sweetening and dehydration wastes discussed in the preceding paragraph, demonstrate that a waste does not have to be a fluid in order to meet the E&P waste definition. In fact, even pieces of downhole equipment can be E&P waste. Id. The listed E&P wastes also show how the EPA views the “intrinsically derived” standard. According to the EPA, cleaning equipment is not an intrinsic process while onsite response to a spill or leaking equipment is intrinsic to E&P (based on the listing of rags and sorbent materials). Certainly the drilling, completion, and production processes that necessitate pits and pit liners are more intrinsic to E&P than responding to production facility spills and leaks.

III. PIT LINERS ARE E&P WASTE IN ANY EVENT UNDER THE EPA’S MIXING RULES

Even if this Commission concludes that pit liners are not E&P waste in and of themselves as the term is defined by the EPA, the EPA’s mixing rules clearly render pit liners an exempt E&P waste. The EPA instructs that “[m]ixing a nonhazardous waste (exempt or non exempt) with an exempt waste results in a mixture that is also exempt.” EPA Guidance, at p. 14 (parenthetical in original). It is undisputed here that pit liners are nonhazardous. It is also undisputed that pit contents are E&P waste. Therefore, if a liner is mixed in any manner with pit contents, the result is an exempt E&P mixture.

Pit liners are mixed with pit contents because no reasonable amount of excavating and cleaning can completely separate the liner from the pit contents after the pit has been used. Pit contents would remain on the liner at some level even after Table 910-1 is satisfied and other extraordinary measures are taken to clean it. Pit liners are therefore akin to rags used to clean oil leaks which still contain some degree of residue after washing.
IV. PIT LINERS ARE E&P WASTE AS DEFINED UNDER COLORADO LAW

The Colorado definition of E&P waste, set forth in C.R.S. § 34-60-103(4.5), is broader than EPA’s definition of E&P waste. The State of Colorado, through CDPHE, administers the RCRA Subtitle C hazardous waste program. Further, the federal statute under which Colorado’s program operates provides that the state’s hazardous waste program operates “in lieu of the Federal program under [Subtitle C]” 42 U.S.C. § 6926(b). Subtitle D of RCRA addresses solid waste management. See 42 U.S.C.A. §§ 6941 – 6949a (1988). Under Subtitle D, states use federal financial and technical assistance to develop solid waste management plans in accordance with federal guidelines. While RCRA outlines how these wastes should be managed, RCRA is silent on which state agency(ies) are best suited to manage these wastes. In other words, the question of which agency(ies) at the state level manages E&P waste and/or solid waste is delegated to the State of Colorado by EPA.

Colorado has decided that the COGCC is the better regulatory agency at the state level, from a policy perspective, to manage all “oil field” wastes generated during primary field operations regardless of the precise parameters of the EPA’s definition of E&P waste. The expertise on the Commission itself (which includes the Executive Director of the CDPHE), along with that of its staff (who understand both the technical and environmental aspects of the industry), supports the conclusion that the COGCC’s waste management jurisdiction extends beyond EPA defined exempt E&P waste.

A. The Plain Language of C.R.S. § 34-60-103(4.5)

Colorado Revised Statute § 34-60-103(4.5) says:

“Exploration and production waste” means those wastes that are generated during the drilling of and production from oil and gas wells or during primary field operations and that are exempt from regulation as hazardous wastes under subtitle c of the federal “Resource Conservation and Recovery Act of 1976,” 42 U.S.C. sec. 6901 to 6934, as amended.

The plain language of the definition above identifies two classes of E&P waste under the Oil and Gas Conservation Act: (1) wastes which are generated during drilling and production, and (2) wastes which are generated during primary field operations which are also exempt from regulation as hazardous wastes under RCRA. This interpretation is bolstered by the canon of statutory construction which says that qualifying phrases at the end of a statute (“and that are exempt . . .”) relate only to the last subject mentioned (wastes generated during primary field operations”) rather than all prior subjects (wastes generated during drilling and production). Pit liners are E&P waste because they are generated during drilling and production operations.

B. Reading Other Statutes on The Same Subject

It is helpful to look at statutes outside of § 103(4.5) in determining the General Assembly’s intent in dividing waste management jurisdiction between the COGCC and CDPHE. Although it is undisputed that § 103(4.5) references “Subtitle C,” it is also undisputed that the
State of Colorado, through CDPHE, administers the RCRA Subtitle C hazardous waste program. As stated above, the federal statute under which Colorado’s program operates provides that the state’s hazardous waste program operates in lieu of the federal Subtitle C program. 42 U.S.C. § 6926(b). Colorado also manages Subtitle D solid waste issues. Thus, the scope of the E&P exemption from “Subtitle C” for purposes of drawing the jurisdictional dividing line between the COGCC and CDPHE, at the state level, depends upon Colorado’s hazardous waste and solid waste management provisions.

The applicable question is whether Colorado’s “Subtitle C,” i.e., C.R.S. § 25-15-101 et seq. and the associated regulations, set forth a broader state law definition of E&P waste. The Colorado Hazardous Waste Act effectively defines “E&P waste” when it says:

“Hazardous waste” does not include . . . [w]aste from oil and gas activities, including but not limited to drilling fluids, produced water, and other wastes associated with the exploration, development or production of crude oil, natural gas, or geothermal energy, which is disposed of in accordance with the requirements of the oil and gas commission pursuant to article 60 of title 34, C.R.S.

C.R.S. § 25-15-101(6)(b)(IX). This provision is significant because, consistent with the definition of E&P waste in the Oil and Gas Conservation Act, it includes both the RCRA exemption language and language unrelated to RCRA. The reference to “drilling fluid, produced water, and other wastes . . .” tracks the RCRA exemption language verbatim. The preceding clause, however, is broader in its initial reference to all wastes “from oil and gas activities.” That language certainly extends beyond the RCRA exemption, and its breadth is buttressed by the phrase “including but not limited to.” The exception under § 101(6)(b)(IX) is then wrapped up with an acknowledgment that all of the excepted wastes are to be disposed of in accordance with the requirements of the COGCC. Thus, it appears again outside of the Oil and Gas Conservation Act that the General Assembly intended to give the COGCC waste management jurisdiction beyond EPA defined E&P wastes, while at the same time emphasize its plenary and exclusive jurisdiction over that narrower class of wastes.

The notion of Commission jurisdiction over all wastes generated by primary field operations is also supported by other statutory provisions within the Oil and Gas Conservation Act and the Colorado Solid Waste Act. The Commission has jurisdiction over oil and gas exploration, drilling, deepening, completions, recompletions, reworking, production, and abandonment. C.R.S. § 34-60-103(6.5). In conjunction with authority over those activities, the Commission also has jurisdiction over “reclamation activities associated with such operations.” Id. In essence, the COGCC has comprehensive jurisdiction over all activities that require a pit in the first place, as well as associated reclamation activities. It would be incongruous to find that the COGCC has jurisdiction over the siting, site preparation, construction, operation and reclamation of pits, while at the same time carving out a narrow exception for pit liner disposal.

The Oil and Gas Conservation Act statutes outside of § 103(4.5) therefore provide an independent basis for asserting COGCC jurisdiction over liner disposal. The Act is clear that the
specific powers granted to the COGCC should not be read in derogation of the general powers. C.R.S. § 34-60-106(4). The definition of “oil and gas operations” in § 103(6.5) enumerates the operations over which the Commission has jurisdiction (most importantly, “reclamation activities associated with such operations”), and provides an independent basis for authority over liner disposal regardless of the scope of the specific power over E&P waste management.

A closer look at the Solid Waste Act confirms that General Assembly intended to grant the Commission jurisdiction over all pit related wastes, including liner material, until they are deposited at a commercial solid waste disposal facility. See C.R.S. § 30-20-101(6)(b)(VI). When the reference to E&P waste was first built into the Colorado Solid Waste Act, the General Assembly stated in its declaration that it had granted the COGCC exclusive and plenary jurisdiction over E&P wastes, except as to commercial facilities accepting such wastes. S.B. 95-17, § 1 (Colo. 1995). Further, the General Assembly noted that a conforming amendment in the Solid Waste Act was necessary “to specify that the [COGCC’s] jurisdiction is exclusive as to noncommercial exploration and production waste facilities.” Id. If the Commission’s jurisdiction over noncommercial pits is exclusive, then there is no room for any other state agency to regulate in that realm.

V. OTHER CONSIDERATIONS

A finding that pit liner disposal is not within the Commission’s jurisdiction creates a host of practical and legal problems for the oil and gas industry. Operators will be left with two options based on liners’ regulation under the solid waste scheme: Either pay the costs associated with removal, content management, hauling, and disposal at a commercial facility (which the CPA will show are excessive in relation to any benefits) or obtain a certificate of designation (“CD”) from the CDPHE and the local government for each buried liner under C.R.S. § 30-20-101 et seq. and 6 CCR 1007-2. Both options are disproportionately costly and the CD process is unduly time consuming. Further, the burdens are not the industry’s alone since requiring liner disposal at commercial facilities is highly taxing on local landfill capacity.

CPA examined the issue of liner disposal in Wyoming, Utah, New Mexico, and Oklahoma. In all of these states, it appears that the agency equivalent of the COGCC asserts jurisdiction over pit liner disposal, and all such agencies permit disposal in place. Wyoming and Utah appear to be most comparable to Colorado. The Wyoming Oil and Gas Conservation Commission, like the COGCC, has express authority over E&P waste and noncommercial pits. Wyo. Stat. § 30-5-104(d)(ii)(D), (d)(vi)(A). Much like Colorado, the Wyoming solid waste statutes except noncommercial pits from the definition of “solid waste management facility.” Id. § 35-11-103(d)(ii)(C). Similarly, the Utah Board of Oil, Gas and Mining asserts jurisdiction only over EPA defined E&P waste, and this includes liners. Utah Board of Oil, Gas & Mining R649-1-1, 2; Environmental Handbook, Utah Division of Oil, Gas and Mining, p. 27 (Jan. 1996).

VI. CONCLUSION

Based upon the evidence and research presented above, it is clear and beyond question that pit liners used in oil and gas exploration and production processes are appropriately characterized as E&P waste and thereby subject to COGCC jurisdiction:
• Pit liners are required to be used in and are clearly associated with primary field operations

• When used in conjunction with exploration and production activities, pit liners are considered a waste that is intrinsically derived from E&P operations;

• Regardless, the EPA’s own mixing rule renders pit liners an E&P exempt waste by virtue of the practical implications of pit operations and reclamation;

• Colorado’s broader statutory definition of E&P waste also compels this conclusion.

Despite the opponents’ arguments against the CPA’s petition for this rule change, the Commission must not let policy arguments at the present stage of these proceedings dictate its decision whether to initiate a rulemaking. The sole issue at this stage is whether pit liner disposal falls within the COGCC’s authority. The arguments above demonstrate the numerous grounds upon which such authority is vested. The evidence presented in a later rulemaking hearing will permit the COGCC to determine how such wastes must be managed as a matter of policy. A change in course from the legal interpretation in the 2008 rulemaking is warranted: “[A]n agency has the power and obligation to rectify what it deems to be an erroneous interpretation of the law or an injudicious policy. A shift in agency position to ensure affecting the statute’s purpose serves to indicate heightened agency consciousness, not arbitrariness.” In the Matter of Delese, 3 A.D.3d 612, 615 (N.Y. App. Div. 2004).

A correct reading and interpretation of the governing law compels that pit liners are classified as E&P waste. However, this conclusion does not automatically or necessarily commit the COGCC to the CPA’s rule change. Rather, this decision only commits the COGCC to a rulemaking hearing to determine the merits of the proposed rule change. During this rulemaking proceeding the substantive basis and policy implications of such a rule change will be weighed, analyzed and considered.

Respectfully submitted this 13th day of August, 2010.

The Colorado Petroleum Association

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