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October 14, 2005

RECEIVED

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Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87505

VIA EMAIL david.brooks@state.nm.us

David Brooks, Esq.
New Mexico Oil Conservation Division
1220 S. St. Francis Dr.
Santa Fe, New Mexico 87505

RE: OCD's Proposed Rules on Surface Waste Management Facilities

Dear Mr. Brooks:

On behalf of Gandy Marley, Inc., I am submitting the following comments on the OCD's Proposed Rules for Surface Waste Management Facilities. The comments address two issues-the definition of "major modification" of permits and the addition of language clarifying that the new rules will not apply to pending permit applications.

1) 19.15.2.53.B.(6) Definition of "major modification." The definition of "major modification" proposed by OCD is as follows:

A major modification is a modification of a facility that involves an increase in the total operational capacity for treatment or storage of waste or addition of a new treatment process.

The proposed definition is too broad and potentially requires permit modifications for activities that may be allowable under existing permit conditions or for permit modifications that do not require public comment or participation. We propose that the following alternate definition be adopted:

A major modification is one that substantially alters the facility or its operation.

The proposed language is based on the definition of a Class 3 permit modification for RCRA permits, found at 40 CFR §270.42(d)(2)(iii). The proposed language balances the need for facilities to be able to modify their permits without having to go through an extensive public hearing process with the opportunity for public participation in major permit modifications.

2) Pending Matters: We propose that the following language be added to 19.15.2.53:

J. Pending matters. Permit applications, including applications for permit modifications, appeals of Division Orders and appeals of Commission orders concerning permit applications or matters related to such applications or appeals that are on file with either the Division staff, the Division, or the Commission prior to the effective date of 19.15.2.53 shall be considered pending matters that are required to be determined under the provisions of 19.15.9.711. Any permit order or decision issued on such pending matters shall entitle the facility receiving such permit, order or decision to be treated as an existing facility under I. above with respect to all terms, permit conditions, orders or decisions issued in such pending matter.

The proposed language is supported by the New Mexico Constitution and New Mexico caselaw. The New Mexico Constitution states: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." Article IV, section 34. The New Mexico Court of Appeals has found that article IV, section 34 applies to administrative agencies. *Pineda v. Grande Drilling Corp.*, 111 N.M. 536, 538-539, 807 P.2d 234 (Ct.App. 1991). The Court specifically stated that "our supreme court's broad application of the provision compels the conclusion that the word 'case' should include not just judicial proceedings, but also adjudicative proceedings" before administrative agencies. *Id.* If the new enactment comes into effect after the date an adjudicatory proceeding has been filed with the agency, the new enactment is not applicable to the pending matter. *Id.* at 539. An adjudicatory hearing or proceeding is a "proceeding before an administrative agency in which the rights and duties of particular persons are adjudicated after notice and opportunity to be heard." Black's Law Dictionary, 5th Edition Abridged. Permit applications, including permit modifications, that have been filed with Division staff, or directly with the Division or the Commission, are adjudicatory proceedings because they determine the rights and duties of particular permit holders and facilities. A matter is pending as of the date it is filed with the appropriate reviewing body, whether that be Division staff, a Hearing Examiner or the Commission. The proposed language reflects the specific language of article IV, section 34 and applicable caselaw.

Thank you for your consideration of the preceding comments.

Sincerely,

Original signed by Pete Domenici, Jr.
Pete V. Domenici, Jr., Esq.

cc: Dale Gandy
Bill Marley
File 1548