

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

APPLICATION OF GANDY MARLEY, INC.
TO MODIFY THEIR EXISTING NMOCD RULE 711
PERMIT NO. NM-01-019 SO THEY MAY ACCEPT
SALT-CONTAMINATED OILFIELD WASTES

APPEAL OF ORDER NO. R-12306-B

CASE NO. 13480

2005 SEP 14 PM 9 38

GANDY MARLEY INC.'S REPLY TO
CONTROLLED RECOVERY INC.'S RESPONSE
TO GMI'S REQUEST FOR REVIEW OF
DENIAL OF REQUEST FOR PARTIAL STAY OF DIVISION ORDER R-12306-B

In opposing Gandy Marley Inc.'s (GMI) request that the Commission review the Director's denial of GMI's request for a partial stay, Controlled Recovery Inc. (CRI) misstates or ignores the basis for the Commission's jurisdiction over this matter, misstates the standard for granting a stay, misstates or ignores the basis for GMI's request for a partial stay, and misinterprets or ignores relevant portions of Order R-12306-B.

CRI argues that the Commission does not have jurisdiction over this matter and that GMI is asking the Commission to "intercede." However, CRI ignores the procedural status of this matter. GMI has filed a request for de novo review, as allowed by 19.15.14.1220 NMAC. GMI has asked for a stay of the de novo review because Order R-12306-B states that GMI should be allowed to submit a revised permit modification application, which will be referred directly to the Commission rather than being referred to a hearing examiner. (Order R-12306-B, p. 19, ¶¶9—11, p. 20, ¶¶4-5).¹ GMI is following the procedure established by the Division in Order R-

¹ A copy of Order R-12306-B is attached as Exhibit A to GMI's Request for Partial Stay of Division Order R-12306-B, which is attached as Exhibit 2 to GMI's Request for Review of Denial of Request for Partial Stay of Division Order R-12306-B, filed with the Commission on September 2, 2005.

12306-B. This matter is clearly pending before the Commission and the Commission has jurisdiction to review the Director's denial of GMI's request for a partial stay.

In arguing that GMI has not met the requirements for a stay, CRI quotes only a selected portion of 19.15.14.1220.B NMAC and misstates the standard for granting a stay. In its entirety, Section 1220.B states:

"Any party requesting a stay of a division order must file the request with the division and provide copies of the request to the parties of record or their attorneys in the case at the time the request is filed. The request must have attached a proposed stay order. The director may grant stays under other circumstances if such a stay is necessary to prevent waste, protect correlative rights, protect public health and the environment or prevent gross negative consequences to any affected party."

Based on the language of Section 1220.B, there are two situations in which a stay can be granted. First, a party can request a stay of a division order. Second, a stay may be granted "under other circumstances," that is circumstances other than a party requesting a stay of a division order. If a stay is requested "under other circumstances," then the director must determine if a stay is necessary to "prevent waste, protect correlative rights, public health and the environment or prevent gross negative consequences to any affected party." The standard of review identified in Section 1220.B only applies to requests for stays "under other circumstances." Section 1220.B does not state the standard of review when a party requests the stay of a division order.

A request for a stay of a division order is governed by the standard set forth in *Tenneco Oil Co. v. New Mexico Water Quality Control Commission*, 105 N.M. 708, 735 P.2d 986 (N.M.App. 1986). A stay of a division order may be issued upon a showing of "(1) likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless a stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest." *Id.* at 710.

GMI's Request for Partial Stay of Division Order R-12306-B addressed each of the elements required under *Tenneco*.² Neither the denial of the stay nor the response filed by CRI addressed the requirements *Tenneco*. The denial of the stay did not provide any reasons supporting the denial.

CRI also ignores the basis for GMI's request for a partial stay of Order R-12306-B. The request for a partial stay is based on the existing Emergency Order Extension, issued by the Division on March 25, 2005. GMI has requested that the portion of Order R-12306-B rescinding the Emergency Order Extension be stayed. The reason stated in the Order for rescinding the Emergency Order Extension was the Division's concern about the accuracy of the data provided by GMI in support of the emergency application. (Order R-12306-B, p.17-18). It is apparent from the language of the Order that the Division was rescinding the Emergency Order Extension because it was concerned about groundwater protection. (*Id.*) Not only does the request for stay provide evidence demonstrating that allowing GMI to continue accepting salt-contaminated waste pending approval of a revised permit application will not adversely impact groundwater but GMI has agreed to implement the suggestions made by the Division in the Technical Issues section of the Order. (*See* Order R-12306-B at 15-17). The installation of a clay liner and a leachate collection system will provide protection to any groundwater underlying the GMI facility. GMI has provided the Commission with adequate information to review the denial of the request for partial stay and to issue a stay allowing GMI to continue operating pending a final decision by the Commission.

Order R-12306-B itself indicates that, if certain technical issues are addressed in a revised permit application, GMI will be issued a revised permit for the acceptance of salt-contaminated

² A copy of GMI's Request for Partial Stay of Division Order R-12306-B is attached as Exhibit 2 to GMI's Request for Review of Denial of Request for Partial Stay of Division Order R-12306-B, filed with the Commission on September 2, 2005.

waste. The specific technical issues discussed in the Order that address the Division's concerns about the protection of groundwater and the environment concern the design of the landfill cells. The technical issues address the installation of a clay liner, the use of a cap on the landfill cells and the installation of a leachate collection system. (Order R-12306-B at 15-17). The installation of the clay liner, the cap and the leachate system will address the technical concerns raised in the Order and will protect groundwater and the environment. GMI's engineering consultants are preparing engineering designs that will be submitted to the Division for approval prior to construction, as required by the Rule 711 Guidelines. (Guidelines for Permit Applications, Design, and Construction of Surface Waste Management Facilities, ¶7.A). It is anticipated that the engineering design drawings will be complete within 10 to 14 days. An order from the Commission allowing GMI to operate pending a final decision on the permit modification application could be conditioned on the Division's review and approval of the engineering design drawings, thus ensuring that the cell construction meets the Division's requirements.

Finally, the proposal in the Order to require GMI to demonstrate a history of compliance before an amended permit is issued is not supported by the OCD regulations and is inconsistent with the Division's written enforcement policy. (See Order R-12306-B at 18). The Order does not provide any regulatory or statutory support for the proposal that GMI should not be allowed to operate for a period of time between six months and one year. Rule 711(B)(5) states that a permit "may be denied, revoked or additional requirements imposed by a written finding of the Director that a permittee has a history of failure to comply with Division rules and orders and state and federal environmental laws." (Emphasis added). The Director has not made any such finding for the GMI facility. In addition, the OCD enforcement guidelines provide specific step-

by-step procedures that require the Division to give notice of alleged violations and provide the permittee with the opportunity to respond to the allegations. The enforcement guidelines ensure that any actions taken by the Division are consistent with the severity of the violation. If the Division is allowed to use a permit modification hearing to suspend a permit based on alleged permit violations, it will lead to potentially disproportionate treatment of permit holders and potentially grossly disproportionate impacts on permit holders that are not supported by a carefully developed compliance record.

The compliance issue raised in Order R-12306-B was GMI's failure to submit quarterly and annual reports required by its Rule 711 permit. The matter has been resolved following the Division's enforcement procedures. On September 6, 2005, GMI received a Notice of Violation. (Exhibit 1, attached hereto). On Monday, September 12, 2005, GMI met with the Division and resolved all issues addressed in the Notice of Violation. The Division and GMI have executed an agreed order fully settling the compliance issue and GMI has paid the \$2,000 fine. (Exhibit 2, Agreed Order Directing Compliance and Assessing Civil Penalty). The Agreed Order specifically states that "Gandy Marley has submitted timely reports in 2005 showing that all regulated contaminants are within acceptable limits." (*Id.* at p. 2, ¶10).

There is a substantial likelihood of a disproportionate, and possibly unconstitutional, impact on GMI if GMI is denied its ability to operate based on a permit violation that was settled for \$2,000. The penalty amount indicates that this is not a serious violation and the Agreed Order did not find any impacts to the environment. The Notice of Violation states that §70-2-31(A) of the Oil and Gas Act allows for penalties of up to \$1,000 per day for violations of the Act. The penalty amount paid by GMI is based on \$1,000 per year for each year GMI was in violation of the permit conditions. (Exhibit 1). The Division found that, based on the 2005

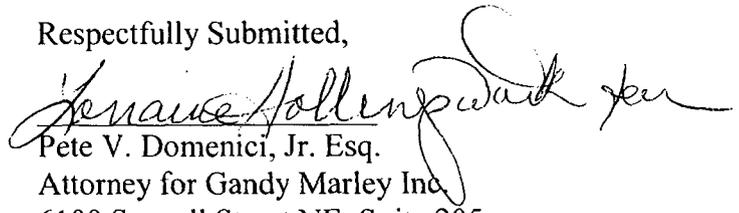
reporting, all regulated contaminants are within acceptable limits. The use of a compliance issue, which has been resolved by the Division and GMI, to prevent GMI from receiving a permit for 6 to 12 months would very likely be a violation of GMI's due process rights. The Division should carefully weigh the propriety of using a permit violation that has been recently resolved for a payment of \$2,000 to prevent GMI from operating for a period of 6 to 12 months, as recommended in Order R-12306-B.

In conclusion, the Commission has the authority to review the denial of GMI's request for a partial stay of Order R-12306-B. GMI has provided information demonstrating that it meets the standard for the issuance of a stay. GMI has also provided information demonstrating that, if it is allowed to continue to accept salt-contaminated oilfield waste, the acceptance of such waste will not adversely impact groundwater resources or the environment. GMI's proposal to install clay liners, a leachate collection system and a cap on the landfill cells meets the technical issues identified in Order R-12306-B. GMI will submit engineering designs to the Division for review prior to construction, as required by the Rule 711 guidelines.

Therefore, GMI requests that the Commission

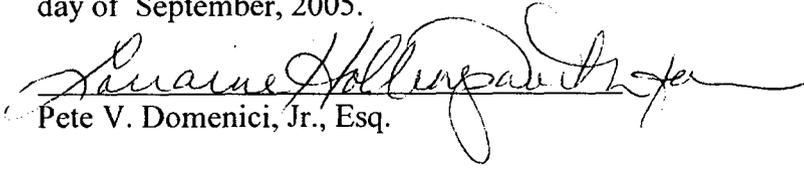
- 1) exercise its jurisdiction in this matter and review the denial of GMI's request for a partial stay of Order R-12306-B;
- 2) overturn the denial of GMI's request for partial stay;
- 3) overturn the rescission of the Emergency Order Extension, Order No. 12306-A;
- 4) allow the disposal of salt-contaminated waste at the GMI facility in clay-lined cells with a leachate system after the engineering design has been approved by the Division.

Respectfully Submitted,



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I hereby certify that a true and
correct copy of the foregoing was
served on all parties of record on the 13th
day of September, 2005.



Pete V. Domenici, Jr., Esq.