

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

**IN THE MATTER OF APPLICATION
OF C.K. DISPOSAL, LLC, FOR PERMIT
TO CONSTRUCT AND OPERATE A
COMMERCIAL SURFACE WASTE
MANAGEMENT FACILITY, PERMIT
NO. NM1-61**

CASE NO. 15617

REPLY IN SUPPORT OF MOTION FOR CONTINUANCE

Interested and protesting party Louisiana Energy Services, LLC, d/b/a URENCO USA (“LES”), replies as follows to Applicant C.K. Disposal, LLC’s (“C.K. Disposal’s”), Response to LES’ Motion for Continuance.

1. Timeliness of Notice. C.K. Disposal’s analysis of the timeliness of the hearing notice that has been provided is flawed. Its so-called “mailbox rule,” whatever applicability it may or may not have in other settings, clearly does not apply here. Instead, 19.15.4.9(B)(2) NMAC requires that the Oil Conservation Division (“OCD”) “deliver[]” – i.e., not just place in a mailbox – notice “at least 20 days before the hearing.”¹

C.K. Disposal also glosses over its own failure to provide notice. Independent of the notice to be provided by the OCD pursuant to 19.15.4.9(B) NMAC, 19.15.4.12(B) NMAC requires the applicant to provide notice of a hearing as well. In contrast to the “delivery” requirement of 19.15.4.9(B), 19.15.4.12(B) permits the applicant to “send” notice at least 20 days before the hearing. However, C.K. Disposal did not even meet that lesser requirement.

¹ LES notes that, on December 27, 2016, its counsel received in the mail a copy of the OCD’s December 13, 2016 “Order Scheduling Hearing.” LES’ copy of the order is attached hereto as Exhibit 1. The timing of delivery of the order reflects the extremely poor U.S. mail service out of Santa Fe, which was the basis for LES’ counsel’s previous, repeated requests to OCD personnel that they communicate with LES counsel by email. (Further, the postmark indicates that the mailing may not have been delivered to the U.S. Postal Service until December 20.) More fundamentally, however, if delivery of the hearing notice to LES was delayed this long, how many other persons who have requested a hearing notice, see 19.15.4.9(B)(2) NMAC, have also not received their notice until less than two weeks before the start of the January 9-11, 2016 hearing?

C.K. Disposal attempts to excuse this failure by arguing that 19.15.4.12(E) NMAC eliminates its notice obligation if the OCD has provided notice. But this construction makes no sense, because it would simply render meaningless the provisions of 19.15.4.12(B). Cf. State v. Javier M., 2001-NMSC-030, ¶ 32, 131 N.M. 1 (“[A] statute must be construed so that no part of the statute is rendered surplusage or superfluous.”).

2. Prejudice to LES. C.K. Disposal suggests that LES will suffer no prejudice from the bare-minimum 20-day (including Christmas and New Year holidays) notice of the hearing, because LES received notice at the end of October of the OCD’s tentative decision to grant a permit to C.K. Disposal. C.K. Disposal ignores the reality that it takes more than two months to thoroughly prepare to address the scientific issues raised by its application

LES is further prejudiced in its ability to prepare for a hearing that begins on January 9, 2017, simply as a result of the intervening holidays and the fact that many people take time off from work, LES is hampered in its counsel’s ability to obtain exhibits, contact witnesses, and arrange for issuance and service of subpoenas. An example is LES’ efforts to obtain certified copies of documents from the New Mexico State Land Office. In response to such request, LES counsel received the following automatic email response on December 28:

Thank you for your email. In observance of the Holiday Season, the State Land Office will be closed for business from Friday, December 23rd through Monday, January 2nd and reopening on Tuesday, January 3rd. I will respond to your email as soon as possible upon my return.

As a result of the SLO’s closure, it will be difficult if not impossible for LES to obtain the certified copies before the start of the January 9, 2017 hearing, and impossible to meet the requirement set forth in 19.15.4.13(B)(2) for submission of exhibits by January 3.

3. Prejudice to C.K. Disposal; Venue Change. C.K. Disposal makes only a tepid argument that it will be prejudiced if the hearing is rescheduled for February, speculating that it could lose profits if the granting of a permit is delayed by a month. In any event, C.K. Disposal

effectively concedes it will suffer no prejudice by stating that it will agree to a continuance so long as the rescheduled hearing takes place in Santa Fe. C.K. Disposal articulates no connection, and none is apparent, between the location of the hearing and the consequences – prejudicial or otherwise – to C.K. Disposal of a hearing delay. Rather, the likely benefit that C.K. Disposal would gain by such a change of venue is unrelated to the requested continuance: that is, it would be difficult for concerned citizens in the Eunice area to travel to the State Capitol to voice their concern to the Oil Conservation Commission (“OCC”) about the public health and environmental problems that C.K. Disposal’s proposed facility would create for the immediate neighborhood and rest of the local community. C.K. Disposal is simply trying to leverage its consent to a continuance in order to gain the tactical advantage of minimizing the number of voices that object to its proposal.

As LES stated in its continuance motion, it needs additional time to properly prepare the case it will present at the hearing. If the OCC determines that, to accommodate OCD staff and the legislators who have expressed a wish to appear at the hearing, the hearing should be moved to Santa Fe, LES will accept that condition. However, LES respectfully submits that the result that is fairest to all the interested parties would be to reschedule the hearing for late March 2017 in Eunice. Such an arrangement would avoid any constraints presented by the legislative session while at the same time not sacrifice the interests of the public at large; any theoretical prejudice that C.K. Disposal might claim it would suffer from an additional month or so delay beyond that to which it has signaled its consent is de minimis.²

4. Conclusion. LES’ Motion for Continuance should be granted. LES respectfully requests that a decision on the motion be made by Friday, December 30, 2016.

² It should be noted that C.K. Disposal has failed to respond at all to LES’ separate argument that the hearing should be continued to allow the New Mexico Environment Department’s Air Quality Bureau to address, in advance of the hearing, the extent to which C.K. Disposal will be subject to that agency’s regulatory compliance requirements.

Respectfully submitted:

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CERTIFICATE OF SERVICE:

We hereby certify that a copy of the foregoing pleading was e-mailed on December 29, 2016 to the following:

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