

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

CASE NO. 15617

**APPLICATION OF CK DISPOSAL, LLC
FOR A PERMIT TO OPERATE A COMMERCIAL
SURFACE WASTE MANAGEMENT FACILITY,
LEA COUNTY, NEW MEXICO**

**LOUISIANA ENERGY SERVICES, LLC'S RESPONSE TO
CK DISPOSAL, LLC'S MOTION TO LIMIT THE SCOPE OF HEARING ISSUES**

Louisiana Energy Services, LLC ("LES"), opposes CK Disposal, LLC's ("CK's"), Motion to Limit the Scope of Hearing Issues. No Oil Conservation Division ("OCD") regulation limits the scope of the hearing on CK's oil field waste disposal facility permit application to only those issues discussed in detail in LES' November 22, 2016 hearing request letter, and other OCD regulations as well as New Mexico Supreme Court case law provide to the contrary.

I. CK'S ARGUMENT THAT THE ISSUES HEARD AT HEARING SHOULD BE LIMITED TO THOSE ISSUES DISCUSSED IN LES' HEARING REQUEST IS MERITLESS.

A. 19.15.36.10.A NMAC Does Not Require a Listing of All Factual and Legal Points To Be Addressed in a Hearing.

CK argues that the hearing should be limited to the hydrogen sulfide, VOC, NMED permitting, traffic safety and groundwater issues discussed in detail in LES' November 22, 2016 hearing request letter.¹ (Mot. at 2-3.) The OCD regulation applicable to the hearing requested by LES does not require that LES state in the hearing request all factual and legal points that will be made at hearing: "A request for a hearing shall be in writing and shall state specifically the

¹ CK is simply wrong in suggesting that LES' June 2 and 22, 2016 protest letters to the OCD did not raise issues in addition to these four. In fact, in those letters LES addressed, among other issues, migratory birds, financial assurance, and the lack of justification for CK's proposed facility in light of the existing Sundance facility.

reasons why a hearing should be held.” 19.15.36.10.A NMAC. The only requirement of the regulation is to state specifically reasons why a hearing should be held. Thus, the reasons need only be sufficient to establish a basis for holding a hearing and showing standing to request one: “The director may deny a request for hearing if the director determines the person requesting the hearing lacks standing.” *Id.* It is apparent that the focus of the OCD requirement to “state specifically the reasons” is to ensure that the issues raised are specific to the application and the objector rather than to oilfield waste disposal facilities in general.

B. CK’s Request is Contrary to Other OCD Regulations.

LES is entitled to a “full opportunity ... to present evidence.” See 19.15.4.17.A NMAC. Nothing in 19.15.4.17.A NMAC limits LES to issues previously raised. In addition, the OCD requires that the pre-hearing statement include “a statement of the extent to which the party ... opposes the issuance of the order the CK seeks and the reasons for such ... opposition.” 19.15.4.13.B.2 NMAC. This requirement would be pointless if all the reasons had to be set forth in the hearing request.

II. LES IN FACT RAISED MORE THAN FIVE ISSUES IN ITS NOVEMBER 22, 2016 HEARING REQUEST LETTER.

In its hearing request letter, LES discussed in detail issues related to hydrogen sulfide, volatile organic compounds, permitting by the New Mexico Environment Department (“NMED”), traffic, and groundwater as reasons for having a hearing. But LES also expressly incorporated all of the other points it raised in its comment letters of June 2, 2016 and June 22, 2016 as reasons for having a hearing. H. Bohnhoff Nov. 22, 2016 Letter to D. Catanach, at 3. LES then expressly reserved its right to raise other issues at hearing: “However, *and without limiting the scope of the evidence it would present*, LES seeks a hearing to address the following general and/or additional concerns” *Id.* (emphasis added). It was appropriate for LES to do

so as it had only received responses to its requests regarding the application under the Inspection of Public Records Act in early and late September and LES was still in the process of evaluating the responses at the time the request for hearing was due. For this reason as well, LES is entitled to raise additional issues.

III. **LES' POINTS RAISED REGARDING THE NEARBY SUNDANCE SERVICES, INC. FACILITY ARE RELEVANT.**

A. **The OCD Regulation Governing Issuance of a Permit Articulates Three Basic Requirements That CK Must Prove, But Does Not Prohibit the OCD From Considering Other Factors As Part of Its Permitting Decision.**

In its June 2, 2016 letter commenting on CK's application, LES made the point that CK's proposed oil field waste disposal facility is unnecessary given that Sundance Services, Inc., already operates another such facility nearby. CK claims that any consideration of the Sundance facility is "unnecessary, irrelevant, and a waste of limited hearing time," but this argument is negated by the OCD standard that establishes CK's burden of proof as well as relevant case law.

The OCD regulation states:

The division may issue a permit for an new surface waste management facility or major modification upon finding that an acceptable application has been filed, that the conditions of 19.15.36.9 NMAC and 19.15.36.11 NMAC have been met and that the surface waste management facility or modification can be constructed and operated in compliance with applicable statutes and rules and without endangering fresh water, public health, safety or the environment.

19.15.36.12.A NMAC. Thus, there are essentially three prongs to CK's minimum burden of proof:

1. CK must comply with or show that it can comply with the OCD's own regulations: a) submit an acceptable application (set forth in 19.15.36.8 NMAC, which in turn incorporates by reference other OCD regulations), meet notice requirements (set forth in 19.15.36.9 NMAC) and meet financial assurance requirements (set forth in 19.15.36.11 NMAC);

2. CK must comply with or show that it can comply with applicable statutes and rules; and

3. CK must show it can construct and operate the facility without endangering fresh water, public health, safety or the environment.

The second and third prongs require that the OCD look beyond its own regulations in issuing a permit, including whether the facility can be constructed and operated in accordance with other agency permitting requirements. Traffic, which is a part of safety and the environment, necessarily requires consideration of CK's surroundings, including other existing facilities such as LES and Sundance.

B. **The OCD Regulation Governing Issuance of a Permit Does Not Limit the OCD's Discretion to Consider Other Factors; New Mexico Supreme Court Case Law Mandates Doing So.**

Importantly, 19.15.36.12.A NMAC does not limit the OCD's discretion to consider other factors, and in fact, case law informs us that it is required. First, 19.15.36.12.A provides only that the OCD "may" grant an oil field waste disposal facility permit if the applicant can satisfy the three express requirements. The regulation does not state that the OCD must or shall grant the permit if the three requirements are met. It follows that the OCD may consider, and deny the permit on the basis of, other factors.

Second, in *In re Rhino Environmental Services*, 2005-NMSC-024, 138 N.M. 133, the New Mexico Supreme Court considered an application for a solid waste facility that had been approved by the NMED. The applicable regulation for issuance of a permit in that case had prongs similar to the OCD's regulation at issue in this proceeding: "The regulations regarding permit issuance direct the Secretary to issue a permit if the applicant fulfills the technical requirements *and* the solid waste facility application demonstrates that neither a hazard to public

health, welfare, or the environment nor undue risk to property will result.” *Id.* ¶ 31 (emphasis in original) (citing 20.9.1.200(L)(10) NMAC and 20.9.1.200(L)(16)(c) NMAC (providing that a specific cause for denying a permit application is a determination that the permitted activity “endangers” public health, welfare or the environment)).² The court held that the NMED Secretary “abused his discretion by limiting the scope of testimony during the public hearing and interpreting the Department’s role as confined to technical oversight.” *Id.* ¶ 27. The court stated that the regulations “clearly extend to the impact on public health or welfare resulting from the environmental effects of a proposed permit.” *Id.* ¶ 31. The court noted New Mexico courts’ recognition that “a certain amount of discretion is necessary to administer and enforce regulations so as to implement legislative enactments and meet the needs of individual justice.” *Id.* ¶ 35. To that end, the court held that the NMED had to consider public comment regarding the impact of the landfill on the community’s quality of life, provided the impact had a “nexus” to the regulation. *Id.* ¶ 29. The court found that nexus was present, because “the impact on the community from a specific environmental act, the proliferation of landfills, appears highly relevant to the permit process.” *Id.* ¶ 30. The court stated that the “adverse impact of the proliferation of landfills on a community’s quality of life is well within the boundaries of environmental protection.” *Id.* ¶ 32.

Just as the proliferation of landfills provided a nexus to the regulation in *In re Rhino Environmental Services*, the proposed addition of CK’s facility in the area of the Sundance’s existing facility and LES provides a nexus to the OCD regulation that requires the OCD to address endangerment of fresh water, public health, safety or the environment. Further, the OCD’s regulations provide for public comment on oilfield waste disposal facilities just as NMED’s did for waste landfills. *See* 19.15.36.10.A NMAC. The OCC must take that comment

² This “endangers” language is now found at 20.9.3.19.A(4) NMAC.

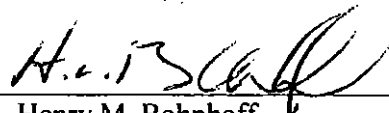
into account when it makes its decision on CK's application. It follows from the reasoning of the New Mexico Supreme Court that the existence of existing facilities surrounding the proposed facility are a factor in and relevant to determining the impact on the community from the proposed oilfield waste disposal facility, and that the impact on the community must be considered. Thus, LES' concerns regarding traffic and environmental impacts of the proposed facility in light of existing facilities must be considered. In addition, community quality of life can be expressed in terms of future economic development, and that must be considered by the OCC as well. LES therefore is entitled to address these issues, notwithstanding that they were not addressed at length in its November 22, 2016 letter.

IV. CONCLUSION

For all of these reasons, CK's motion should be denied.

Respectfully submitted,

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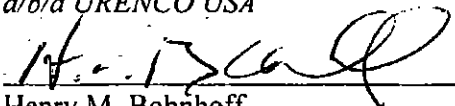
CERTIFICATE OF SERVICE:

We hereby certify that a copy of the foregoing pleading was e-mailed on February 2, 2017, to the following:

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