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STATE OF NEW MEXICO
ENERGY MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION
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CASE NO. 15617

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

**APPLICANT'S CLOSING STATEMENT, INCLUDING BRIEFING ON JURISDICTION
ISSUES, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

COMES NOW, CK Disposal, LLC ("Applicant"), and files this Closing Statement, including Briefing on Jurisdiction Issues, and Proposed Findings of Fact and Conclusions of Law,¹ and would show the following:

I. INTRODUCTION AND SUMMARY

The Oil Conservation District's ("OCD") Part 36 regulation presents a new state-of-the-art standard for surface waste disposal facilities in New Mexico. To date, a Part 36 disposal facility has not yet been constructed or operated in New Mexico. The subject Application of CK Disposal, LLC ("Applicant") meets the stringent siting, design, and operational criteria of Part 36, and promises to provide a necessary and environmentally protective disposal and processing service to New Mexico's oil and gas industry. Applicant respectfully requests that the Commission approve its Application for a Part 36 permit for the proposed facility.

A Part 36 permit may be issued when: (1) an acceptable application has been filed; (2) notice requirements have been met; (3) financial assurance requirements have been met; and (4) the facility can be constructed and operated in compliance with applicable statutes and rules

¹ See Attachment A: Applicant's Proposed Findings of Fact and Conclusions of Law.

without endangering fresh water, public health or the environment.² In this case, each of these prerequisites has been satisfied and issuing the permit is appropriate. The Application and evidence from the hearing demonstrate that the Part 36 requirements have been met. In this hearing, the Applicant demonstrated the three central pillars of its proposed facility and acceptable Application: (a) superior geologic location; (b) state-of-the-art environmentally protective design; and (c) responsible operations using best management practices. Because the regulatory requirements are met, issuance of a permit for the proposed facility is warranted.

Protestant URENCO did not even attempt to show failure to comply with the enumerated requirements of Part 36. Instead, they presented fundamentally flawed analyses relating to H₂S, stormwater modeling, migratory bird protection, and windblown chlorides. Each of these presentations ignored facts in the Application and lacked sound reasoning. Protestant URENCO also inappropriately attempted to present analysis of permitting requirements of other agencies, including New Mexico Department of Transportation ("NMDOT") permitting and New Mexico Environment Department ("NMED") air permitting requirements. URENCO's attempts to present this immaterial evidence were correctly dismissed by the Commissioners, as this information will be subject to proceedings of other agencies with the proper areas of expertise prior to construction or operation of the proposed facility.

Viewing the record, Applicant has demonstrated that this Application meets the Part 36 requirements. Protestant URENCO has not proven otherwise. This facility is necessary to serve the oil and gas industry, and represents a step forward in the permitting of environmentally protective, state-of-the-art surface waste disposal facilities in State of New Mexico. Therefore, Applicant respectfully requests that the Commission approve its Application and issue the requested Part 36 permit authorization.

² NMAC 19.15.36.12.A(1).

II. APPLICANT'S CLOSING STATEMENT

A. The applicable Part 36 standard for permit issuance is satisfied.

Applicant, CK Disposal, LLC has demonstrated that it meets the Part 36 requirements for issuance of a surface waste management facility permit. The proposed location has ideal geology that ensures groundwater protection, the state-of-the-art design meets and exceeds the Part 36 design requirements, and the operator is committed to responsible operations using best management practices. The Applicant has met applicable notice and financial security requirements. The facility can be constructed and operated in compliance with applicable statutes and rules without endangering fresh water, public health or the environment. Therefore, in accordance with the applicable regulations, the Commission should approve the application of CK Disposal, LLC for Surface Waste Management Permit No. NM1-61.

1. The Part 36 standard for issuing a surface waste management facility permit.

The Part 36 standard for permit issuance is found in New Mexico Administrative Code (NMAC) 19.15.36.12.A(1). The section states in full:

A. Granting of permit. (1) 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.

Accordingly, it is appropriate to issue a Part 36 permit when: (1) an acceptable application has been filed; (2) notice requirements have been met; (3) financial assurance requirements have been met; and (4) the facility can be constructed and operated in compliance with applicable statutes and rules without endangering fresh water, public health safety or the environment. In this case, each of these prerequisites has been satisfied.

2. **The application is acceptable to OCD: The proposed facility is at an ideal geologic location, has a highly protective state-of-the-art design, and an applicant that is committed to responsible operations.**

The record demonstrates that an acceptable application has been filed. On November 6, 2015, a draft application was submitted.³ On May 1, 2016, the Applicant requested formal review of its Application.⁴ The Application was declared administratively complete on May 4, 2016.⁵ The OCD's rigorous review of the Application was performed by qualified experts, Mr. Jim Griswold (the OCD's Environmental Bureau Chief), and Dr. Clinton Richardson (a contracted expert on landfill permitting and design).⁶ The OCD's expert review determined that the Application was satisfactory, and met or exceeded the Part 36 requirements.⁷ Mr. Griswold testified that the Application satisfies the requirements of Part 36 of the OCD regulations.⁸ On October 13, 2016, OCD issued its tentative decision and draft permit indicating that after review of the Application the OCD has tentatively decided on permit approval with conditions, and OCD issued the draft permit with general and specific conditions.⁹ The tentative decision is an indication that OCD would have already approved the subject application absent URENCO's hearing request.

³ Applicant's Exhibit G (OCD timeline).

⁴ Applicant's Exhibits G (OCD timeline) and J (Mr. Karger's certification).

⁵ Applicant's Exhibit K.

⁶ Tr. Vol. II, 384:21-385:8 (a rigorous review was conducted); Applicant's Exhibit E (resume of Dr. Clinton Richardson).

⁷ Tr. Vol. II, 384:6-9; Applicant's Exhibit W (tentative decision); Applicant's Exhibit P (discussion of Application review by Dr. Clinton Richardson).

⁸ Tr. Vol. II, 384:6-9.

⁹ Applicant's Exhibit W (tentative decision).

At the hearing, Applicant demonstrated the three central pillars of its proposed facility and acceptable Application: (a) superior geologic location; (b) state-of-the-art environmentally protective design; and (c) responsible operations using best management practices.

a. *The proposed location has superior geologic characteristics and meets the stringent Part 36 siting criteria.*

The proposed location of the facility is geologically ideal. It meets and exceeds the stringent geologic siting requirements of Part 36. Importantly, there is no groundwater within 100 feet below the lowest elevation where oil field waste will be placed.¹⁰ Additionally, in accordance with the other siting criteria of Part 36, the proposed facility is not located: (1) within 200 feet of a watercourse, lakebed, sinkhole or playa lake; (2) within an existing wellhead protection area or 100-year floodplain; (3) within, or within 500 feet of, a wetland; (4) within the area overlying a subsurface mine; (5) within 500 feet from the nearest permanent residence, school, hospital, institution or church in existence at the time of initial application; (6) within an unstable area; and (7) the proposed facility does not exceed 500 acres.¹¹ Not only are the siting criteria and strict depth to groundwater requirements met, Applicant's geologist observed that *this is geologically the best site he has encountered for a waste disposal site in his 30 years in the industry.*¹² He further explained that his opinion that this is the best site he has encountered for land disposal is based on the geology, the Chinle formation, its characteristics of being a low permeability type of a sediment and a barrier to downward migration to the groundwater flow, its thickness (reported as thick as 1,270 feet thick), and that the proposed location is uniquely

¹⁰ Tr. Vol. I at 74:1-24.

¹¹ Applicant's Exhibit AA, Permit Application Vol. II at Attachment G (hydrogeology report); Applicant's Exhibit AA, Permit Application Vol. I at NMAC Introduction Section, pp. 15-16.

¹² Tr. Vol. I at 98:1-6 ("Well, in my opinion, my 30 years, I have worked on well over 100 various landfills, including hazardous waste facilities under Subtitle C of the EPA and, numerous states, and my opinion is this is the best site I have ever seen for a waste disposal site.")

situated so the Rattlesnake Ridge (in New Mexico) or the Dockum Red Bed Ridge (in Texas) allows the Ogallala Formation, which overlies the Chinle, to be structurally high so the Ogallala Formation is not saturated.¹³

Because there is not a zone of saturation for a considerable depth beneath the proposed location, it is more protective to utilize vadose zone monitoring for the proposed facility.¹⁴ Therefore, Applicant proposed a more protective vadose zone monitoring plan, and the vadose monitoring plan and sampling analysis plans were approved by OCD.¹⁵ The vadose monitoring plan is sufficient to protect the deep underlying freshwater formations, and is also sufficient to protect the freshwater in the Ogallala aquifer, located roughly a mile away from the proposed location.¹⁶ The geologic characteristics and the proposed vadose monitoring and sampling plans are protective of freshwater resources.

b. *State-of-the-art environmentally protective design.*

The landfill design is state-of-the-art and protective of the environment. The design meets and exceeds the stringent requirements of Part 36.¹⁷ In Applicant's Exhibit P, Mr. Richardson stated that "[b]ased on a review of the plans and specifications provided, it is my professional opinion that the design represents a state-of-the-art consensus practice for landfill engineering."¹⁸ Important design aspects and evidence proving the protective nature of the

¹³ Tr. Vol. I at 98:23-101:9.

¹⁴ Tr. Vol. I at 90:5-95:8; Applicant's Exhibit AA, Permit Application Vol. II at Attachment H (vadose zone monitoring plan); Applicant's Exhibit W (tentative decision); Applicant's Exhibit P (discussion of Application review by Dr. Clinton Richardson).

¹⁵ Applicant's Exhibit AA, Permit Application Vol. II at Attachment H (vadose zone monitoring plan) and Attachment I (sampling analysis plan); [APPROVAL OF VADOSE PLAN AND SAMPLING ANALYSIS PLAN].

¹⁶ Tr. Vol. I at 115:22-116:7.

¹⁷ Tr. Vol. I at 170:12-20; Tr. Vol. II at 260:12-20.

¹⁸ Applicant's Exhibit P at 2.

design include: (1) the liner system; (2) the proposed use of daily cover; (3) the final cover design; (4) the additional calculations requested that confirm the robustness of the design; (5) the run on and run off controls; and (6) the closure and post closure plan.

The liner design exceeds the performance of the prescriptive requirements of Part 36, and is therefore even more protective than the prescriptive design requirements of Part 36.¹⁹ The liner design is a dual liner system with leak detection and leachate collection consisting of six inches of recompacted soil to provide a stable base for the liner system, a geosynthetic clay liner, a 60-mil HDPE liner, a geonet on the floor and a geocomposite on the sideslopes to act as a leak detection layer, and an additional 60-mil HDPE liner.²⁰

As an additional protection that is not required by Part 36, Applicant proposes to utilize daily cover on the working face of the landfill.²¹ This will provide odor control and will reduce the potential for moisture or other non-waste to come into contact with the disposed waste. Similar to the liner design, the final cover design exceeds the prescriptive requirements of Part 36.²² The final cover design includes the six-inch daily and six-inch intermediate cover placed on top of the waste, which is overlaid with a 60-mil HDPE liner, then a 200-mil geocomposite, and then three feet of soil on top to act as a protective infiltration and vegetation layer for the

¹⁹ Tr. Vol. II at 258:8-11.

²⁰ Tr. Vol. I at 139:20-140:20; Applicant's Exhibit AA, Permit Application Vol. II at Attachment B, C-104 (design drawings).

²¹ Tr. Vol. I at 233:10-24.

²² Tr. Vol. II at 258:8-11.

cap.²³ Applicant's engineer, Mr. Ybarra, described the functionality of each designed aspect of the final cover, demonstrating its protectiveness.²⁴

To further demonstrate the protectiveness of the landfill design, the OCD requested calculations that were not specifically called out by Part 36.²⁵ Applicant willingly performed the calculations and submitted them to the OCD reviewer.²⁶ Applicant also formally submitted these calculations as a section of the Application.²⁷ The additional calculations related generally to volumetric calculations, soil erosion estimates, anchor trench capacity, foundation settlement related to leachate collection, waste settlement relating to the top slope and surface drainage features, leachate pipe performance, liner stability and tensile stress, and waste stability.²⁸ The results confirmed the robustness of the design, and nothing was changed as a result of the calculations.²⁹

Another aspect of the Application design that exceeds the requirements of Part 36 relates to the run on and run off controls at the proposed facility.³⁰ Although the OCD rules require analysis of the 25-year storm event and prevention of run-on and run-off from the active portion of the waste management facility, the Applicant exceeded the requirements and provided a full drainage study containing pre-development and post-development analysis of potential

²³ Tr. Vol. I at 159:2-11; Applicant's Exhibit AA, Permit Application Vol. I at Attachment B (design drawings).

²⁴ Tr. Vol. I at 159:12-161:4.

²⁵ Tr. Vol. II at 249:1 - 250:22.

²⁶ Tr. Vol. 251:23-252:12; Applicant's Exhibit I.

²⁷ Applicant's Exhibit AA, Permit Application Vol. II at Attachment M.

²⁸ Applicant's Exhibit I; Applicant's Exhibit AA, Permit Application Vol. II at Attachment M.

²⁹ Tr. Vol. II at 253:20-254:11.

³⁰ Tr. Vol. III at 765:2-7; *see also* 19.15.36.13.M(1)-(2).

stormwater impacts.³¹ The drainage design satisfies the requirements of Part 36, as it will control run-on from the 25-year storm event, will prevent run-on to and run-off from the active portion of the landfill, and will prevent any discharge of contaminated water.³²

The Applicant's closure and post closure plan complies with Part 36 requirements.³³ The closure and post closure plan provides for closure activities for the liquid processing areas and the landfill facility, in an effort to return the site as close as possible to existing conditions.³⁴ It includes financial assurance estimates, discussed below, and the closure and post closure plan was reviewed by OCD and determined to be in compliance with Part 36.³⁵

c. Operator commitment to responsible operations.

The operator and Applicant, CK Disposal, LLC, has demonstrated its commitment to ensure responsible facility operations, as evidenced by its Application and hearing testimony. The Applicant committed to construct, operate, and close the facility in compliance with all local, state, and federal requirements.³⁶ The Applicant's engineer described the extensive inspection and reporting requirements that the facility will implement that include daily physical inspections of various facility components and automated monitoring.³⁷

Within the Application, the Site Operating Plan ("SOP") provides site management and

³¹ 19:15:36.13.M(1)-(2); Applicant's Exhibit AA, Permit Application Vol. II at Attachment J.

³² Tr. Vol. I at 156:21-157:11; Applicant's Exhibit P (see Mr. Richardson's discussion of drainage design).

³³ Applicant's Exhibit AA, Permit Application Vol. II at Attachment L; Tr. Vol. I at 170:12-15.

³⁴ Tr. Vol. I at 168:13-22; Applicant's Exhibit AA, Permit Application Vol. II at Attachment L.

³⁵ Applicant's Exhibit P; Applicant's Exhibit W.

³⁶ Tr. Vol. I at 43:2-6.

³⁷ Tr. Vol. I at 165:3-166:9.

site operation procedures that satisfy Part 36.³⁸ Information provided in the SOP includes information about hours of operation, personnel, training, equipment, site access, noise control, odor control, landfill waste characteristics, waste acceptance criteria and procedures, liquid processing, as well as an H₂S Management Plan, and a Contingency Plan.³⁹

Relating to H₂S, the Applicant met and exceeded the requirements of Part 36 in submittal of its H₂S Management Plan and modeling related to H₂S. Applicant will monitor incoming waste for H₂S at the scale and gate houses, and will address any loads that exceed 10 parts per million by treating the load until it reaches 1 part per million or less, or will reject the load. H₂S monitors will also be placed throughout the facility. Automatic alerts will occur if H₂S concentrations reach designated levels, and the Applicant has provided detailed descriptions of corrective and emergency actions in its H₂S Management Plan.⁴⁰

Additionally, due to concerns raised by Protestant URENCO relating to H₂S, modeling was performed to determine the maximum potential concentrations of H₂S at the facility and at Protestant URENCO's facility. The modeling utilized highly conservative assumptions, even though they were unlikely or unrealistic, such as assuming that all unloading trucks would be at the maximum H₂S concentration, assuming that all H₂S (even in aqueous form) from the unloading trucks escapes into the atmosphere in a six minute unloading period, and that all eight available load out points at the facility were being used simultaneously.⁴¹ These assumptions are unrealistic because it is unlikely that all trucks would be at the limit and it is unrealistic that all

³⁸ Applicant's Exhibit AA, Permit Application Vol. II at Attachment K; Tr. Vol. I at 163:23-165:5.

³⁹ Tr. Vol. I at 162:23-163:5.

⁴⁰ Applicant's Exhibit AA, Permit Application Vol. II at Attachment K, Appendix A (H₂S Management Plan).

⁴¹ Tr. Vol. II at 282:23-286:25.

aqueous H₂S would escape during unloading.⁴² Even using these unrealistic conservative assumptions, the maximum concentration modeled at Protestant URENCO's building is 5.5 parts per billion, or .0055 parts per million. This is an extremely low level of H₂S, as can be discerned when comparing it to the Part 11 OCD threshold standard of 100ppm, and the proposed facility will not exceed OCD requirements for H₂S concentrations.⁴³

3. Notice requirements have been met.

At the hearing, the Applicant and OCD demonstrated through testimony, exhibits, and stipulations that the notice requirements outlined in 19.15.36.9 NMAC have been met. OCD demonstrated by stipulation that it timely distributed notice of its determination of administrative completeness to all interested persons in compliance with 19.15.36.9.B NMAC,⁴⁴ that OCD mailed notice of the tentative decision and posted the same on its website in compliance with 19.15.36.9.D NMAC,⁴⁵ and also that public notice of the meeting of the Commission and this hearing on February 8–10, 2017, was in compliance with statutory and regulatory requirements.⁴⁶

Applicant demonstrated through testimony and exhibits that the notice requirements applicable to Applicant had been met. Applicant's witness, Nicholas Ybarra, testified that notice of administrative completeness was properly mailed, as evidenced by the OCD's letter notifying of administrative completeness, Applicant's mailed notice, and the certified return receipts for

⁴² *Id.*

⁴³ Tr. Vol. II at 287:14–288:4

⁴⁴ OCD Exhibit No. 5 at stipulations 6–10.

⁴⁵ OCD Exhibit No. 5 at stipulation 12.

⁴⁶ OCD Exhibit No. 5 at stipulation 19.

the mailers.⁴⁷ Mr. Ybarra further demonstrated that published notice of the tentative decision properly occurred in the Albuquerque Journal and Hobbs News-Sun newspapers in English and Spanish,⁴⁸ and that mailed notice of the tentative decision properly occurred.⁴⁹

4. Financial assurance requirements have been and will be met.

19.15.36.11 NMAC, relating to financial assurance requirements, requires an applicant to submit acceptable financial assurance in the amount of the commercial facility's estimated closure and post closure cost, or \$25,000, whichever is greater. Applicant's engineer, Mr. Ybarra, testified to the closure and post closure care cost estimates, calculated to be \$1,149,142 and \$1,162,770, respectively.⁵⁰ Applicant's representative, Bryce Karger, testified that Applicant will have the financial wherewithal, and is committed to ensure that the proper financial assurances are posted to guarantee closure and post closure care of the proposed facility.⁵¹ Mr. Karger further testified that Applicant will operate in compliance with all OCD regulations.⁵²

5. The facility can be constructed and operated in compliance with applicable statutes and rules without endangering fresh water, public health safety or the environment.

Applicant has filed an acceptable application that meets Part 36 requirements, as discussed above. Applicant has also demonstrated that the facility can be constructed and operated in compliance with applicable statutes and rules without endangering fresh water,

⁴⁷ Tr. 130:4-131:16; Applicant's Exhibits K, L, and M.

⁴⁸ Tr. 131:18-132:2; Applicant's Exhibits W, X, and Y.

⁴⁹ Tr. 133:3-134:2; Applicant's Exhibit Z.

⁵⁰ Tr. Vol I at 170:12-20; Applicant's Exhibit AA, Vol. II at Attachment L.

⁵¹ Tr. Vol I at 42:13-43:6.

⁵² Tr. Vol I at 42:9-12.

public health safety or the environment. OCD Environmental Bureau Chief, Jim Griswold, testified that the Application meets the requirements of Part 36, and that the design, construction, and operation of the proposed facility in accordance with draft permit conditions would be protective of freshwater, human health and safety.⁵³ Applicant's engineer, Mr. Ybarra, also testified that the Application satisfies Part 36 requirements, and that design and operations will be protective of human health, freshwater, and the environment.⁵⁴ Applicant confirmed in the hearing that it will operate in strict compliance with the draft permit conditions and OCD regulatory requirements.⁵⁵ Satisfying the OCD's Part 36 requirements—the regulations adopted by OCD to protect fresh water, public health and the environment—is sufficient to demonstrate this requirement for permit issuance, but in order to assuage concerns raised by Protestant URENCO, Applicant provided additional evidence of its commitment to comply with additional permitting requirements at other agencies.

Applicant presented testimony that it will gain all required authorizations prior to construction and operation of the proposed facility.⁵⁶ Applicant additionally committed to construct, operate, and close in compliance with all local, state and federal requirements.⁵⁷ These required authorizations are subject to requirements and reviews of other regulatory agencies, which Applicant anticipates will include working through any driveway permitting and traffic safety issues with the New Mexico Department of Transportation, working through any required air permitting proceedings at New Mexico Environment Department, and working

⁵³ Tr. Vol. II at 384:6-20.

⁵⁴ Tr. Vol. I at 170:12-20.

⁵⁵ Tr. Vol. I at 41:19-42:12.

⁵⁶ Tr. Vol. I at 41:9-18.

⁵⁷ Tr. Vol. I at 43:2-6.

through any required proceedings related to storm water permitting. All legal and regulatory requirements (local, state, and federal) applicable to the proposed facility will be met prior to construction and operation.⁵⁸ Thus, Applicant has sufficiently demonstrated that its facility can be constructed and operated without endangering fresh water, public health safety or the environment, and in compliance with all applicable statutes and rules.

6. Issuance of the Part 36 permit to CK Disposal is warranted.

This facility will provide much needed modern disposal operations to oil and gas operators in the region, laying a bridge from the present day to the future of New Mexico's oil and gas industry. As discussed above, every requirement for granting a permit under Part 36 has been met by Applicant. The geology is ideal. The design is state-of-the-art and highly protective. The operator is committed to responsible operations. Notice requirements have been met. Financial assurance requirements have been met. The proposed facility can be constructed and operated in accordance with applicable statutes and rules without endangering fresh water, public health or the environment. Therefore, granting a permit for the proposed facility is both warranted and appropriate.

B. Protestant URENCO did not demonstrate failure to meet Part 36 requirements.

Protestant URENCO did not effectively demonstrate any failure to meet Part 36 permitting requirements. No evidence presented by Protestant URENCO demonstrates that the Application is not acceptable. No evidence presented by Protestant URENCO demonstrates that notice requirements were not met. No evidence presented by Protestant URENCO demonstrates that financial assurance requirements have not been and will not be met. No evidence presented by Protestant URENCO demonstrates that the facility cannot be constructed and operated in

⁵⁸Tr. Vol. I at 43:2-6.

compliance with applicable statutes and rules without endangering fresh water, public health or the environment. Rather, as discussed above, each of these requirements for a Part 36 permit has been satisfied.

Although Protestant URENCO did not present evidence that substantially related to the key issues above, URENCO did present some evidence and testimony. However, the evidence and testimony that Protestant URENCO presented was technically flawed, unsupported, and unreasonable. These defects become evident when examining the factual premises, the analysis, and the conclusions of URENCO's experts. The defective analyses presented by Protestant URENCO related to: (1) H₂S emissions; (2) stormwater modeling; (3) migratory bird protection; and (4) windblown chlorides. Each of these areas of argument presented by Protestant URENCO were fatally flawed by faulty premises that ignore basic facts presented in the Application and fail to demonstrate any deficiencies relevant to Part 36 permitting.

First, Protestant URENCO presented evidence relating to H₂S emissions, arguing that H₂S emissions could potentially cause issues to machinery and employees at URENCO's facility. Protestant URENCO failed to show any actual threat or harm to human health safety or the environment due to potential H₂S emissions from the proposed facility. Protestant URENCO's alleged harm to its machinery already occurred, apparently beginning in February of 2011.⁵⁹ It was not Applicant that caused any of the alleged issues with Protestant URENCO's machinery. If the issues were caused by H₂S, the possible cause would be either the adjoining Sundance Services oil and gas waste facility (that does not appear to do any treatment to reduce H₂S levels),⁶⁰ or the oil and gas industry activities that are prevalent in the general area. Also

⁵⁹ Protestant URENCO's Exhibit F.

⁶⁰ Tr. Vol. I at 230:14-21.

importantly, Protestant URENCO's allegations about H₂S emissions ignore provisions in the H₂S Management Plan that call for monitoring and treatment of H₂S in trucks and maintaining appropriate ph levels in the evaporation ponds. Worthy of note, this is an oil and gas producing area, and has been since long before URENCO's arrival. URENCO moved in directly next door to a legacy oil and gas waste facility and accepted the risk of the H₂S concentrations inherent in the area.⁶¹

Protestant URENCO's allegations are not relevant to the Part 36 permitting standards. Applicant meets the Part 36 requirements, and this was not challenged by Protestant URENCO. Additionally, the evidence shows that there will not be any off-site impacts from even the maximum concentrations conceivable (although not realistic) of H₂S emissions. The maximum concentration conceivable (although not realistic) that could reach Protestant URENCO's building is 5.5 parts per billion, or .0055 parts per million. Protestant URENCO failed to present evidence that this extremely small but still unrealistically high maximum concentration would cause any harm to human health safety or the environment in general, and did not even attempt to show failure to comply with Part 36 requirements or OCD regulations relating to H₂S.

Second, Protestant URENCO attempted to criticize the stormwater modeling that Applicant provided in the Application. Again, Protestant URENCO did not allege that Applicant failed to meet Part 36 requirements (and Applicant did meet Part 36 requirements, as discussed above). Protestant URENCO's report that purported to review and comment on Applicant's drainage study was conducted by Ronald R. Bohannon, a professional engineer.⁶² Mr. Bohannon's report also addressed traffic issues that were not subject of this hearing, and was

⁶¹ Tr. Vol. II at 352:2-11.

⁶² See Protestant URENCO's Exhibit W.

excluded from admission as evidence. Notably, the report was not sealed even though Mr. Bohannon is a professional engineer. Mr. Bohannon was encouraged by the Commission to proceed with testimony about the contents of his report related to the drainage study.⁶³

Mr. Bohannon's testimony alleged that Applicant utilized an incorrect rainfall input number for the drainage model. Here again, Protestant URENCO did not allege failure to meet any Part 36 permitting requirements (which Applicant met as discussed above). In reality, Mr. Bohannon's rainfall input number was incorrect and less accurate than the Applicant's rainfall input number. Mr. Bohannon utilized a rainfall number from 20 miles away from the proposed facility location, at Hobbs, New Mexico.⁶⁴ Good engineering practice is to utilize the isopluvial maps to obtain a rainfall number for the actual proposed location, and Mr. Bohannon failed to do so.⁶⁵ Because his premise is incorrect, his analysis is fundamentally flawed.

Third, Protestant URENCO also presented unsupported and erroneous expert testimony that the facility would pose a threat to migratory birds. This testimony and analysis was provided by Nadia Glucksberg, a hydrogeologist without any training or education as a biologist.⁶⁶ Protestant URENCO alleged that birds would be harmed because of the oil and gas waste that URENCO incorrectly assumed would be in the evaporation ponds. Protestant URENCO's analysis is fatally flawed because it completely ignores the information presented in the Application regarding the treated water in the evaporation ponds and the regular inspection and maintenance activities that will occur at the proposed facility.⁶⁷ Contrary to Protestant

⁶³ Tr. Vol. II at 521:6-18.

⁶⁴ Tr. Vol. III at 765:19-766:6.

⁶⁵ *Id.*

⁶⁶ Tr. Vol. III at 751:13-14.

⁶⁷ Tr. Vol. I at 167:13-25.

URENCO's incorrect assumptions, the water in the evaporation ponds will have 99% of the oil and gas removed during treatment (this is 99.8% free of oil and gas waste assuming a beginning oil and gas content of 20%), and all water placed into the evaporation ponds is treated.⁶⁸ The ponds will be inspected daily,⁶⁹ and in the event there is any remaining oil, it will be removed by skimming the ponds.⁷⁰ Because Protestant URENCO's analysis ignores the reality of Applicant's proposed activities, it is fundamentally flawed and incorrect.

Fourth, Protestant URENCO, through Ms. Glucksberg, alleged that the evaporation ponds could result in a risk of aeolian windblown contaminants or chlorides that would migrate to URENCO. The analysis incorrectly assumes that materials will dry and accumulate in the evaporation ponds, leaving materials that could be blown by the wind.⁷¹ Again, this analysis is fundamentally flawed because it completely ignores the information presented in the Application regarding the treated water in the evaporation ponds and the regular inspection and maintenance of the ponds. The water placed into the evaporation ponds will only be treated water, and the evaporation ponds will be inspected and maintained daily.⁷² There will not be any buildup of dried chlorides or contaminants in any evaporation ponds, as Protestant URENCO alleged.

C. Protestant URENCO inappropriately urges OCD to consider issues beyond the regulatory requirements of Part 36 and within the purview of other agencies and courts.

A key aspect of Protestant URENCO's case centered on an incorrect argument that the permitting standards of other agencies should be examined, considered and applied to the subject

⁶⁸ Tr. Vol. I at 166:13-167:18.

⁶⁹ Tr. Vol. I at 207:23-208:2.

⁷⁰ Tr. Vol. I at 193:12-19.

⁷¹ Tr. Vol. III at 755:19-757:8.

⁷² Tr. Vol. I at 167:13-25.

Part 36 Application. This argument is both odd and erroneous, but Protestant URENCO claims it is based on the general regulatory standard for granting a Part 36 Permit, because the regulatory language requires 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 or the environment.”⁷³

Entrenched in its position at the hearing, Protestant URENCO ignored the inherent weaknesses of its untenable argument: (1) a more reasonable interpretation of the OCD’s regulatory language would be that it is referencing applicable statutes and rules *of the OCD*, and regardless, it is only required that a facility can be constructed and operated in compliance with applicable statutes and rules; (2) the common statutory construction tenet that specific provisions control over similar general provisions further supports the interpretation that “applicable statutes and rules” and protection of “fresh water, public health safety or the environment” are specifically defined by the individual provisions of Part 36; (3) the Commission was correct and well-reasoned in its decision and explanations during the hearing; (4) there is adequate legal support for the Commission’s decision not to examine, consider and apply the permitting standards of other agencies; and (5) Applicants and the oil and gas industry in general rely on certainty in the Part 36 permitting requirements. Each of these items is discussed below.

First, a more reasonable interpretation of the OCD’s regulatory language would be that it is referencing applicable statutes and regulations *of the OCD*. Protestant URENCO’s argument that OCD should apply permitting standards of other agencies is based on its incorrect interpretation that the permitting standard requires compliance with *all potentially* applicable

⁷³ 19.15.36.12.A(1) NMAC (stating in full: “A. Granting of permit. (1) 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 or the environment.”).

statutes and rules *of any agency*. Rather, the general permitting standard requires only that the facility “can be constructed and operated in compliance with applicable statutes and rules and without endangering fresh water, public health safety or the environment.” URENCO’s argument ignores two aspects of the regulatory language: 1) This is an OCD rule, and the reference to “applicable statutes and rules” does not indicate on its face that it seeks to exceed the OCD rules or their enabling statutes, and 2) Even if the language were interpreted to extend to the rules and statutes governing other agencies, the applicable standard would be that the facility can be constructed and operated in compliance with those requirements. Here, it was demonstrated not only that the facility can be constructed and operated in compliance with other agencies’ requirements, but that it will be so.

Second, the common statutory construction rule that specific provisions control over similar general provisions further supports the position that “applicable statutes and rules” and protection of “fresh water, public health safety or the environment” are specifically defined by the individual provisions of Part 36. Agency rules are construed in the same manner as statutes.⁷⁴ Under the rules of statutory construction, general language is limited by specific language of the same regulation.⁷⁵ Here, the general Part 36 permitting requirement of 19.15.36.12.A(1) NMAC is that the facility “can be constructed and operated in compliance with applicable statutes and rules[.]” This general requirement is limited by the specific requirements also located in Part 36 that are applicable to this Application.

Third, the Commission was correct and well-reasoned in its decision and explanations

⁷⁴ *Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad Inc.*, 148 N.M. 516, 522, (N.M. Ct. App. 2010) (citing *Amend Ground Water Quality Stds. Contained in 20.6.2 NMAC* N.M. Mining Ass’n v. N.M. Water Quality Control Comm’n, 141 N.M. 41, 46 (N.M. Ct. App. 2006)).

⁷⁵ *Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 146 N.M. 24, 30 (N.M. 2009) (citing *Lubbock Steel & Supply, Inc. v. Gómez*, 105 N.M. 516, 518, 734 P.2d 756, 758 (1987)).

during the hearing. At the hearing, Commissioner Padilla explained:

Right. So we made a determination as to how we are going to interpret that particular rule for the purposes of this hearing, and we decided that in practice permits from OCD or OCC are conditioned on subsequent approvals from other agencies, but that the OCC is not in a position to determine the permitting requirements of those agencies and it is also beyond our jurisdiction to do so. For the purposes of this hearing, we will still hear testimony that relates to fresh water, public health safety, and the environment, but we won't consider those as they relate to the permitting requirements of other agencies.⁷⁶

Further explanation was also provided by the Commissioners indicating that this reasoning was at least in part based on the Commission not having expertise to deal with the permitting issues of other agencies (such as the New Mexico Department of Transportation),⁷⁷ that the Commission does not agree that any other permits must be issued prior to an OCD permit,⁷⁸ and that the Commission is interested in avoiding the issue of jurisdictional overlap that could cause problems between respective agency roles.⁷⁹

Fourth, there is adequate legal support for the Commission's decision not to examine, consider and apply the permitting standards of other agencies. The Oil & Gas Act contemplates that Commissioners have the power to limit hearings to particular issues and that examiners presiding over a hearing have the power to promote an efficient and orderly hearing.⁸⁰

⁷⁶ Tr. Vol. I at 52:1-14.

⁷⁷ Tr. Vol. I at 53:8-17.

⁷⁸ Tr. Vol. I at 54:13-55:2.

⁷⁹ Tr. Vol. I at 55:3-6.

⁸⁰ 70-2-13 NMSA ("...Any member of the commission or the director of the division or his authorized representative may serve as an examiner as provided herein. The division shall promulgate rules and regulations with regard to hearings to be conducted before examiners, and the powers and duties of the examiners in any particular case may be limited by order of the division to particular issues or to the performance of particular acts. In the absence of any limiting order, an examiner appointed to hear any particular case shall have the power to regulate all proceedings before him and to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing, including the swearing of witnesses, receiving of testimony and exhibits offered in evidence subject to such objections as may be imposed...") (emphasis added).

Additionally, the OCD rules contemplate the Commission's power to limit issues in prehearing conferences.⁸¹ The OCD rules further state that even though parties should have a full opportunity to be heard (subject to any prescribed limitation of issues), immaterial evidence should be excluded even it is relevant.⁸² Therefore, the Commission has ample support for its well-reasoned and correct decision to exclude issues relating to regulatory permitting proceedings that are contemplated to occur at other agencies prior to construction or operation of the proposed facility.

Worthy of note, this case is not like the case that has been cited by Protestant URENCO, *In re Rhino Environmental Services*, 2005-MCSC-024, 138 N.M. 133. Aside from the obvious distinction that this case is governed by the Oil & Gas Act and before the OCD, rather than the NMED, there is an even more important distinguishing factor. In this case, Protestant URENCO was allowed to and encouraged by the Commissioners to present evidence relating to fresh water, public health safety, and the environment. The Commission will consider that evidence. The only limitation in the Commission's decision is that it declined to relate that evidence to the permitting requirements of other agencies (over which the Commission has no expertise or jurisdiction). That evidence can be presented to the other agencies during their respective regulatory reviews and permitting proceedings, which will occur in the event the OCD issues a Part 36 permit to Applicant.

⁸¹ 19.15.4.16.B NMAC ("The pre-hearing conference's purpose shall be to narrow issues, eliminate or resolve other preliminary matters and encourage settlement.") (emphasis added).

⁸² 19.15.4.17.A NMAC ("Presentation of evidence. Subject to other provisions of 19.15.4.16 NMAC [this includes subpoenas, prehearing conferences, and hearings on motions], the commission or division examiner shall afford full opportunity to the parties at an adjudicatory hearing before the commission or division examiner to present evidence and to cross-examine witnesses. The rules of evidence applicable in a trial before a court without a jury shall not control, but division examiners and the commission may use such rules as guidance in conducting adjudicatory hearings. The commission or division examiner may admit relevant evidence, unless it is immaterial, repetitious or otherwise unreliable. The commission or division examiner may take administrative notice of the authenticity of documents copied from the division's files.") (emphasis added).

Finally, both Applicants and the industry need to have certainty in the permitting requirements. It is important to know what the requirements are to gain a Part 36 permit. Those requirements are specifically enumerated in Part 36. Without this certainty, gaining OCD permits for much-needed state-of-the-art surface waste disposal facilities under Part 36 would be a nebulous moving target. Gaining Part 36 authorizations would be onerous at best and potentially impossible. This cannot be the state of the law. To recover oil and gas resources, the industry needs disposal in sufficient quantities that is environmentally protective; it needs state-of-the-art facilities. Therefore, promoting certainty in the Part 36 permitting requirements is necessary to allow economic production of oil and gas, and a necessary step for the future of the oil and gas industry in New Mexico.

IV. CONCLUSION

Based on the Application and the evidence presented at hearing, the Applicant has demonstrated compliance with all Part 36 requirements. In fact, Applicant has demonstrated that the proposed facility exceeds those requirements. Protestant URENCO did not prove otherwise, and failed to present any evidence that Part 36 requirements were not met. It was just a lot of noise. It is time to move the oil and gas waste disposal industry forward in accordance with the intent of Part 36 regulations. An exceptional Application has been submitted and supported at hearing. It meets or exceeds all permitting requirements. A permit should be issued, and Applicant respectfully requests that it be so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above pleading was served on the following parties by electronic mail on February 23, 2017.

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Attachment A:

Applicant's Proposed Findings of Fact and Conclusions of Law

Applicant, CK Disposal, LLC, presents the following proposed findings of fact and conclusions of law for the Commissioners' consideration:

Findings of Fact:

1. On November 6, 2015, CK Disposal, LLC ("Applicant") submitted a draft application (the "Application") to the New Mexico Oil Conservation Division ("OCD") for a permit to construct and operate a surface waste management facility consisting of a landfill and liquid processing area pursuant to NMAC 10.15.36.
2. The proposed facility is located 0.05-miles south of State Highway 234, approximately 4.16 miles southeast of Eunice, New Mexico, in Lea County.
3. The proposed facility will consist of a 141.5-acre landfill area, and a 51.75-acre liquid processing area.
4. On May 1, 2016, the Applicant requested OCD initiate formal review of the Application.
5. The OCD declared the Application administratively complete on May 4, 2016.
6. The OCD expert reviewers examined the Application and determined that the Application was satisfactory, and met or exceeded the Part 36 requirements.
7. On October 13, 2016, OCD issued its tentative decision and draft permit indicating that after review of the Application the OCD has tentatively decided on permit approval with conditions, and OCD issued the draft permit with general and specific conditions.
8. The Application meets or exceeds the geologic and siting requirements of Part 36.
 - a. There is no groundwater within 100 feet below the lowest elevation where oil field waste will be placed.
 - b. The proposed facility is not located: (1) within 200 feet of a watercourse, lakebed, sinkhole or playa lake; (2) within an existing wellhead protection area or 100-year floodplain; (3) within, or within 500 feet of, a wetland; (4) within the area overlying a subsurface mine; (5) within 500 feet from the nearest permanent residence, school, hospital, institution or church in existence at the time of initial application; (6) within an unstable area; and (7) the proposed facility does not exceed 500 acres.

9. Because there is not a zone of saturation for a considerable depth beneath the proposed location, it is more protective to utilize vadose zone monitoring for the proposed facility. Therefore, Applicant proposed a more protective vadose zone monitoring plan, and the vadose zone monitoring plan and sampling analysis plans were approved by OCD.
10. The vadose monitoring plan is sufficient to protect all freshwater formations.
11. The geologic characteristics of the proposed location and the proposed vadose monitoring and sampling plans are protective of freshwater resources.
12. The state-of-the-art landfill design meets and exceeds the requirements of Part 36:
 - a. The state-of-the-art liner design consists of a dual liner system with leak detection and leachate collection consisting of six inches of recompacted soil to provide a stable base for the liner system, a geosynthetic clay liner, a 60-mil HDPE liner, a geonet on the floor and a geocomposite on the sideslopes to act as a leak detection layer, and an additional 60-mil HDPE liner.
 - b. The final cover design meets or exceeds the requirements of Part 36, and includes the six-inch daily and six-inch intermediate cover placed on top of the waste, which is overlaid with a 60-mil HDPE liner, then a 200-mil geocomposite, and then three feet of soil on top to act as a protective infiltration and vegetation layer for the cap.
 - c. The drainage design satisfies the requirements of Part 36, as it will control run-on from the 25-year storm event, will prevent run-off from the active portion of the landfill, and will prevent any discharge of contaminated water.
13. The state-of-the-art evaporation pond design with spray systems meets or exceeds the requirements of Part 36.
 - a. Applicant demonstrated an acceptable detailed engineering design plan, including operating and maintenance procedures, a closure plan, and a hydrologic report sufficient for the division to evaluate the actual and potential effects on soil, surface water and groundwater.
 - b. The Application contains design standards meeting specifications that will protect fresh water, public health and the environment.
 - c. The Application contains operating standards meeting specifications that will protect fresh water, public health and the environment.
14. The Applicant's closure and post closure plan complies with Part 36 requirements.
15. Site Operating Plan ("SOP") provides site management and site operation procedures that satisfy Part 36, including information about hours of operation, personnel, training,

equipment, site access, noise control, odor control, landfill waste characteristics, waste acceptance criteria and procedures, liquid processing, as well as an H₂S Management Plan, and a Contingency Plan.

- a. Applicant will require a form C-133, authorization to move liquid waste, prior to receipt of oil field wastes from a transporter.
 - b. Applicant will utilize the paint filter test to ensure that oil field waste containing free liquids will not be placed in the landfill.
 - c. Applicant will accept only exempt or non-hazardous waste.
 - d. Applicant will require a form C-138 to confirm that the oil field wastes accepted are generated from oil and gas exploration and production operations, are exempt waste and are not mixed with non-exempt waste or is non-hazardous.
 - e. Applicant will test incoming trucks for H₂S concentrations. If H₂S concentrations exceed 10 parts per million, Applicant will treat the waste until the H₂S concentration is 1 part per million or less.
16. Wastewater received at the site will be treated to remove the oil from the water prior to placement into the evaporation ponds.
 17. Applicant will conduct daily inspections of the ponds for the presence of either oil or birds. Any oil found on the ponds will be removed immediately.
 18. OCD in its review of the Application found the Applicant qualifies for an exception to the 19.15.36.13.I NMAC with respect to the protection of migratory birds.
 19. Based upon the nature of the waste material and the lack of internal moisture, the production of landfill gas should be negligible. Thus, no a landfill gas control system should be required.
 20. OCD timely distributed notice of its determination of administrative completeness to all interested persons.
 21. OCD timely mailed notice of the tentative decision and posted the same on its website.
 22. Public notice of the meeting of the Commission and the hearing on February 8-10, 2017, was in compliance with statutory and regulatory requirements.
 23. Applicant's notice of administrative completeness was properly mailed to required persons, including surface owners of record within one-half mile of the surface waste management facility, the county commission of Lea County, and affected federal, tribal or public governmental agencies.

24. Published notice of the tentative decision properly occurred in the Albuquerque Journal and Hobbs News-Sun newspapers in English and Spanish.
25. The Applicant properly mailed notice of the tentative decision to required persons within 30 days after receipt of the tentative decision.
26. Testimony demonstrates that Applicant will have the financial wherewithal, and is committed to ensure that the proper financial assurances are posted to guarantee closure and post closure care of the proposed facility.
27. The design, construction, and operation of the proposed facility in accordance with draft permit conditions will be protective of freshwater, human health and safety.
28. The Applicant has committed to gain all required authorizations prior to construction and operation of the proposed facility.
29. The Applicant has committed to construct, operate, and close the facility in compliance with all local, state, and federal requirements.
30. The Applicant has sufficiently demonstrated that the proposed facility can be constructed and operated without endangering fresh water, public health safety or the environment, and in compliance with all applicable statutes and rules.

Conclusions of Law:

1. The Oil Conservation Division has jurisdiction over this matter pursuant to NMSA §§ 70-2-6 and 70-2-12.
2. A satisfactory Application has been filed, in accordance with New Mexico Administrative Code 19.15.36.12.A(1).
3. The requirements of New Mexico Administrative Code 19.15.36.9 (entitled Notice Requirements for New Surface Waste Management Facilities, Major Modifications or Renewals and Issuance of a Tentative Decision) have been met, in satisfaction of New Mexico Administrative Code 19.15.36.12.A(1).
4. The requirements of New Mexico Administrative Code 19.15.36.11 (entitled Financial Assurance Requirements) have been met, in satisfaction of New Mexico Administrative Code 19.15.36.12.A(1).
5. The proposed facility can be constructed and operated in compliance with applicable statutes and rules without endangering fresh water, public health safety or the environment, in satisfaction of New Mexico Administrative Code 19.15.36.12.A(1).