

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

2017 11 20 P. 11
CASE NO 15617

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

OIL CONSERVATION DIVISION'S OPPOSITION TO
LOUISIANA ENERGY SERVICES, LLC'S MOTION TO STAY

The motion filed by Louisiana Energy Services, LLC ("Respondent") to stay the Commission's final order (Order R14254-B, hereinafter called "the Order") should be denied.

The applicable standard for staying a Commission order is provided in Rule 19.15.4.23 B NMAC. A stay should be granted only when necessary to [1] prevent waste, protect correlative rights, protect public health or the environment or [2] prevent gross negative consequences to an affected party. Neither of these criteria applies here. There is no issue of waste or correlative

rights in this case, so this Response will address only public health and environmental concerns and "gross negative consequences."

1 Public Health and the Environment

The Commission found that

The proposed facility can be *constructed* and operated without endangering public health, safety, or the environment with the conditions provided in the Division's October 13, 2016 tentative decision and the Commission's additional conditions [emphasis added] Order P6, at 7

Since the Commission's conditions apply only to operation, the Commission obviously concluded that satisfaction of the conditions prior to commencement of construction is not

necessary to protect public health and the environment Respondent does not suggest any irreparable or even adverse, environmental consequences that will follow from construction if the facility is not operated Rather Respondent urges that certain permits from other agencies necessary for operation, are required by those agencies' rules, prior to commencement of construction The Division takes no position on the correctness of those arguments, and neither should the Commission The Commission has no jurisdiction to interpret laws or rules governing permits required by other agencies If Applicant violates rules of another agency, it will have to answer to that agency

Furthermore, the Order does not purport to authorize any violation of any law or rule, or any trespass Rather the Commission directs that

The Division shall issue a final permit that *incorporates the conditions in its October 13 2016 tentative approval* and the conditions contained in Ordering Paragraph 1 above Ordering paragraph 2, at 8 (emphasis added)

The referenced tentative approval is CK Disposal Exhibit W in the hearing record It states

This permit *does not convey any property rights of any sort* or any exclusive privilege to the owner/operator and does not authorize any injury to property or persons, any invasion of other private rights, *or any infringement of state federal or local laws or regulations*

Any permit issued pursuant to the Order must contain this provision and will not authorize Applicant to turn one shovel of dirt (Motion at 2) if to do so violates any applicable law or rule, excepting only the requirement for an OCD permit

The opportunity for public participation is also not impaired by the Order The public has been accorded every opportunity for participation, and has participated, in the process leading to the Order through submission of written comments, participation in the public hearing in Eunice, and the opportunity taken advantage of by several members of the New Mexico Legislature, to address the Commission at the evidentiary hearing in Santa Fe To the extent that rules of other

agencies provide for public comment, the right of the public to participate in the processes of those agencies is in no way impaired by the Order

2-9 Hydrogen Sulfide Contingency Plan

The foregoing considerations fully rebut all of Respondent's environmental arguments for a stay, except those related to the Hydrogen Sulfide ("H2S") contingency plan. Any vagueness or uncertainty in the Commission's requirement for a more detailed H2S plan is not a reason why the Order should be stayed. The H2S issues presented to the Commission entirely relate to the operation of the project, and not to its construction. There is no evidence suggesting that any danger to the environment will result from alleged uncertainties in the H2S plan not being resolved prior to commencement of construction. If Respondent believes more detailed provisions regarding the contents or approval of the H2S plan are needed, it can address those issues in a Motion of Rehearing.

3 Gross Negative Consequences

The late Leon Green, professor of law at the University of Texas, suggested that the word "gross" as used in law is a vituperative epithet.¹ Whatever "gross negative consequences" means in Rule 19.15.4.23 B NMAC, however, it is difficult to see how it could apply to this case. Respondent seeks a stay to prevent Applicant from commencing construction of its proposed facility prior to conclusion of any motion for rehearing and possibly lengthy appeals from the Order, and prior to satisfaction of all permit conditions for operation which may entail lengthy proceedings before other agencies. If Applicant constructs its facility and is not allowed to operate, there will be negative consequences for Applicant that could possibly be described as "gross." However, Applicant is not required to take that risk.

¹ Remark by Dean Green in lecture heard by the author of this Response at University of Texas School of Law circa 1970

Respondent has not asserted, much less pointed to any evidence indicating, that Respondent will suffer from construction of Applicant's facility, as distinguished from its operation. It has only argued that Applicant will need to cross real estate in which Respondent has a leasehold interest in order to construct its facility. Any trespass that Applicant might commit would *not* result from the Order, however, because the Order directs the issuance of a permit that does not confer any property rights or authorize any invasion of private rights. The only negative consequence of the order in this respect, if it can be so characterized, is that if Applicant does not have and does not obtain, the necessary property rights Respondent will have to seek the assistance of the State Land Commissioner or the courts, agencies that have jurisdiction over such matters, rather than the Oil Conservation Commission, which does not. The Commission has expressly determined in prior cases that it has no jurisdiction to determine title to any interest in real property or to construe contracts concerning the same, and that it does not undertake to rule on such matters in approving a permit. *Application of TMBR/Sharp Drilling Inc*, Order No. R 11700 B, issued in Case No. 12731 on March 26, 2002, ¶27 at 5. There is no basis to conclude that Respondent will suffer *any* negative consequence if the Order is not stayed, much less a gross one.

4 Conclusion

For the foregoing reasons the Commission should deny the Motion to Stay

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~~ ^{April 20} 23, 2017

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