

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

7/11 ~ 7/11 ~ 29

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 APPLICATION FOR REHEARING**

When a party applies for a rehearing on an order entered by the Oil Conservation Commission ( Commission ) the process afford[s] the Commission an opportunity to reconsider and correct an erroneous decision Pubco Petroleum Corp v Oil Conservation Comm n 1965 NMSC 023 ¶ 7 75 NM 36 So it can be said in this case Viewing itself as adversely affected by the order that the Commission entered granting CK Disposal LLC ( CK ) a permit to construct and operate a commercial surface waste management facility ( Order of the Commission ( Order ) (filed April 4 2017) and otherwise meeting the requirements for applying for a rehearing see NMSA 1978 § 70 2 25(A) (1999) 19 15 4 25 NMAC Louisiana Energy Services LLC d/b/a URENCO USA ( LES ) proceeded to file this application As LES explains the Commission committed errors which warrant a rehearing

**Argument**

**I THE COMMISSION ERRED BY CHANGING THE LAW**

19 15 36 12(A)(1) NMAC (2015) sets forth the findings that the Commission was required to make in order to grant the surface waste management facility permit in this case (Tr (2/8/17) at 30 Order, Finding of Fact 20 ) In pertinent part the regulation states

The division may issue a permit for a new surface waste management facility upon finding 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

As Conclusion of Law 6 in the Order shows the Commission changed the language of the regulation The conclusion states

The proposed facility can be constructed and operated in compliance with the applicable statutes and rules which are the Oil and Gas Act and its implementing rules including 19 15 36 NMAC, without endangering fresh water public health safety or the environment with conditions provided in the Division's October 13 2016 tentative decision and the Commission's additional conditions

(Order Conclusion of Law 6 (emphasis added)) As the emphasized language shows the Commission changed the language of the compliance requirement – i.e. to limit its scope to the Oil and Gas Act and its implementing rules

But clearly that is not what the regulation – which the Commission had to follow – actually states Atlixco Coalition v. Maggiore 1998 NMCA 134 ¶ 15 125 N.M. 786 ( The Department is required to act in accordance with its own regulations ) see also Albuquerque Commons P. Ship v. City Council 2006 NMCA 143 ¶ 64 140 N.M. 751 ( We give words their ordinary meanings without adding terms that the enacting body did not include unless a different intent is indicated ) rev'd on other grounds 2008 NMSC 025 144 N.M. 99 accord Rodarte v. Presbyterian Ins. Co. 2016 NMCA 051 ¶ 21, 371 P.3d 1067 ( When [a regulation's] language is clear and unambiguous this Court must give effect to that language[ ] ) (internal quotation marks & citation omitted) cert. denied 2016 NMCERT 005 \_\_\_\_ P.3d \_\_\_\_

And it is not how similar law has been read Cf. e.g. Greater Yellowstone Coalition v. Tidwell 572 F.3d 1115 1127 (10<sup>th</sup> Cir. 2009) (appellate court interpreted statutory phrase [s]ubject to the provisions of applicable law to denote other statutes including the National

Environmental Protection Act the Endangered Species Act and the Federal Land Policy and Management Act) (internal quotation marks & citation omitted)

It also is not what LES expected heading into the technical hearing (Order Finding of Fact ¶ 19) where the Commission first made the change. Based on a prior ruling by the Commission, LES understood that it would be allowed to present testimony and evidence showing that, in addition to CK not meeting the requirements for a permit under the Oil and Gas Act and its regulations, CK lacked other agencies' determinations that it needed to show that its proposed facility could be constructed and operated in compliance with other applicable statutes and rules. (Tr (2/8/17) at 47-50.) After an executive session, the Commission disagreed. (Id. at 51.) "[W]e made a determination as to how we are going to interpret [Rule 19.15.36.12(A)(1)] for purposes of this hearing, and we decided that, in practice, permits from OCD or OCC are conditioned on subsequent approvals from other agencies. [T]he OCC is not in a position to determine the permitting requirements and it is also beyond our jurisdiction to do so. (Id. at 52; see also id. at 48-49.) We also avoid the issue of jurisdictional overlap[.] (Id. at 55; see also id. at 31-32.)

The Commission's interpretation of 19.15.36.12(A)(1) to allow it, in practice, to grant a permit conditioned upon the applicant's subsequent compliance with other applicable statutes and rules is incorrect. The regulation was not written to give the Commission that option. The regulation was written to allow the Commission to issue a permit if the Commission makes certain findings, one of which is that the facility "can be constructed and operated in compliance with applicable statutes and rules." 19.15.36.12(A)(1). For the finding to be made, there must be a factual predicate or basis upon which the Commission can do so. Ferguson Steere Motor Co. v. State Corporation Commission, 1957 NMSC 050, ¶ 14, 63 N.M. 137 (A finding without

some evidence of probative value would be arbitrary and baseless ) Or considered in context the requirement means that the Commission must have other regulatory agencies' determinations in hand when it determines whether or not the requirement is met <sup>1</sup> There is no other way for the Commission to properly find that the compliance requirement is met

There is another reason to read the regulation that way It helps to give meaning to the remaining language in 19 15 36 12(A)(1) That language requires the Commission to find "that the facility can be constructed and operated without endangering fresh water public health safety or the environment " Id Waiting until it has the other agencies' determinations in hand enables the Commission to make a better assessment of whether or not other agencies in fact have taken steps to address fresh water health safety or environmental issues regarding a proposed facility that the Commission must address If not the Commission may respond by imposing clear and specific conditions see 19 15 36 12(C) NMAC (2015) that provide a basis in conjunction with the evidence for finding that the endangerment requirement is met

Correctly read then 19 15 36 12 A(1) makes sense as it was written The Commission erred by changing the compliance requirement as it did Cf. Lion s Gate Water v. D Antonio 2009 NMSC 057 ¶ 23 147 N M 523 ( Each section or part [of a regulation] should be construed in connection with every other part or section giving effect to each and reconcil[ing them] in a manner that is sensible so as to produce a harmonious whole ) (internal quotation marks & citation omitted) accord Morningstar Water Users Ass'n, Inc. v. Farmington Mun. Sch. Dist. No. 5, 1995 NMSC 052 ¶ 50 120 N M 307 (language used should

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<sup>1</sup> There are alternative ways that can be accomplished The applicant can obtain any necessary permits or authorizations from other agencies in advance and present them to the Commission Or, if the applicant lacks them the Commission can postpone making its finding that the compliance requirement is met until the applicant presents the other agencies' determinations

be read to accord with common sense and reason ) (internal quotation marks & citation omitted)) see also Kinder Morgan CO2 Co., L.P. v. State Taxation & Revenue Dep't 2009 NMCA 019 ¶25 145 N.M. 579 ( We will not read into a regulation language that is not there particularly if it makes sense as written ' )

In this case CK did not obtain the other agencies' determinations in advance. Faced with that situation, the Commission should have postponed making its compliance and endangerment findings until CK returned with any necessary permits and approvals. That is especially so in this case where it was not entirely clear that all of the concerns that the Commission thought other agencies would address would in fact do so. The Commission, for example, seemed to think that the New Mexico Environment Department ( NMED ) will address certain emissions issues. (See Tr. (2/10/17) at 585-88.) However, having not initiated the NMED regulatory process, CK was unable to provide a definitive answer on the issue. (See, e.g., Tr. (2/9/17) at 336-340, 41-370, 371-72. (In responding to a question from the Commission about whether CK needs to get an additional permit from the NMED, Mark Turnbough, CK's permitting consultant testified that he thought that there would be a couple of evaluations required to make the determination whether or not additional permitting was required. And some of that, just depends on their assessment of, for example, the emissions of VOCs and whether or not it reaches a threshold that requires a permit and then a management plan[ ] )

The permit conditions that the Commission imposed that require CK to obtain any necessary permits and approvals from other regulatory agencies and to provide backup documentation before starting operations (Order Condition 1 d and Condition 1 e) do not fix the problem. Three considerations explain why. First, the Commission's failure to follow its own regulation is enough to invalidate its permitting decision. Atlixco Coalition, 1998 NMCA 134,

¶ 15 see, e.g. Planning & Design Solutions v City of Santa Fe 1994 NMSC 112 ¶ 17 118 N M 707 (contract award reversed where city changed the rules in the middle of the game ) see also State Racing Commission v Yoakum 1991 NMCA 153 ¶ 17 113 N M 561 (collecting cases which show that an agency's failure to follow its own regulations can be fatal to the agency's action separate and apart from the invalidity that may arise from consequent due process violations) Second the Commission relied on the compliance requirement change in excluding evidence that LES sought to present during the evidentiary hearing Infra Point II Third the change denied LES due process of law Infra Point III

## **II THE COMMISSION ERRED BY EXCLUDING EVIDENCE**

The Order is silent regarding the testimony and exhibits that LES sought to present which the Commission excluded The Commission did so based upon narrow readings of its regulations By excluding the evidence the Commission erred in following respects

### **A The Commission Erred By Reading Its Regulations Too Narrowly**

#### **1 The Commission Improperly Excluded Evidence Regarding The Legal Access Issues**

During the technical hearing in reading its regulations narrowly, the Commission excluded evidence regarding legal access issues that dovetail The issues stem from a permit application requirement and extend to the compliance requirement

19 15 36 8(C)(2) NMAC requires a surface waste management facility applicant to submit a plat or topographic map showing highways or roads giving access to the surface waste management facility site CK submitted a map showing access to the facility (Tr (2/8/17) at 55 58 CK Application Vol I Site Development Plan Fig A 7) During the technical hearing LES argued that the regulatory requirement meant that CK had to show that it

had a right of legal access to use the route mapped in its application to access its proposed facility (Tr (2/8/17) at 59 60 ( You shouldn t be granting a permit unless at a minimum the Applicant can show you that it has legal access to the property it wants to build a facility on ' ) )

In connection with that argument LES sought to present evidence showing that CK lacked such access The Commission did not allow LES to proceed with presenting evidence that spoke to the issue (See id at 55 62 ) Had it been admitted the evidence would have shown that CK lacks the easement that it needs from the State Land Office ( SLO ) to avoid trespassing on land that the SLO already has leased to LES The evidence would have further shown that CK also needs a state highway access permit from the Department of Transportation ( DOT ) which CK cannot obtain without proof that it has a legal right of access across the mapped route To avoid unduly lengthening this application LES incorporates by reference its more detailed discussion of the issues in its post hearing brief (See [LES s] Final Argument Br Opp n Application CK Disposal LLC for [SWMF] Lea County New Mexico and Tentative Decision to Issue Permit ( LES Final Argument Br ) at 16 27 )

In excluding the evidence on the issues the Commission relied on two rationales It read the regulation as requiring nothing more than the submission of a mapped access route not only disregarding the term giving in 19 15 36 8(C)(2) NMAC (2015) which implicitly requires that the applicant must possess the right of access at the time of its application but also how the regulation must be read simply as a matter of common sense (See id at 61 63 ) The Commission also relied on its change to the compliance requirement supra Point I which it treated as a basis to exclude any and all evidence that it decided related to an issue that fell within the regulatory jurisdiction of another agency (See (Tr 2/8/17) at 52 (“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 ) see also id at 59-62 ) LES already has explained why the change was incorrect Supra Point I It follows that excluding evidence based on the change was incorrect as well

Now there is even more reason to believe that the Commission erred in excluding the evidence In its response to LES's motion for a stay of the Order ([LES's] Mot Stay) the Oil Conservation Division ( OCD ) states

In granting the permit the Commission concluded that CK's 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[ ] [emphasis added]

([OCD's] Resp Opp'n [LES's] Mot Stay at [1] (quoting Order at 7 ¶ 6) ) First and foremost the quoted language does not include the Commission's change to the compliance requirement (Cf. Order Conclusion of Law 3 Conclusion of Law 6 ) And a subsequent statement that the OCD makes in relation to CK's draft permit suggests that the OCD agrees that CK cannot begin construction if doing so would result in a trespass<sup>2</sup> Specifically the OCD states ' Any permit issued pursuant to the Order must contain [the] provision and will not authorize Applicant to turn one shovel of dirt if to do so violates any applicable law or rule[ ] (OCD Resp [LES's] Mot Stay at [2] )

Those developments support LES's reading of the law both as it relates to the permit application requirement and the compliance requirement Even if the Commission follows OCD's permitting advice by incorporating the language which prohibits the violation of any

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<sup>2</sup> The provision appears in NM161 Draft Surface Waste Management Permit ( Draft Permit ) which is included in CK Ex W The provision 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 invasion of other private rights or any infringement of state federal or local laws rules or regulations (Draft Permit ¶ 1 B )



applicable law or rule as it should taking that step will not remedy the problems which resulted from the Commission's exclusion of other evidence based upon its compliance requirement ruling which it appears to some extent influenced the Commission's consideration of evidence that it admitted in relation to the endangerment prong

## **2 The Commission Improperly Excluded Other Evidence**

The Commission also relied on its change to the compliance requirement in excluding testimony and other evidence. During the technical hearing the Commission excluded testimony and exhibits that LES sought to present to show that the compliance requirement was not met. Some of the evidence related to air quality permitting issues (See Tr (2/8/17) at 47-49 LES Ex P Tr (2/10/17) at 552-55 (testimony of Elizabeth Bisbey Kuehn and Clayton Orwig) Tr (2/10/17) at 607-09 LES Ex R (Orwig report)). Other evidence related to traffic safety issues (Tr (2/9/17) at 513-521 557-58 (testimony of Ronald Bohannon regarding DOT permitting and traffic safety issues) LES Ex X (Bohannon report)). To be clear in seeking to present the testimony and other evidence LES was not seeking to have the Commission decide matters that fall within the subject matter expertise of other regulatory agencies. Instead LES was trying to make the point that CK had not sought regulatory approvals and determinations from other agencies without which the Commission could not make an informed finding on whether the compliance requirement was met (See Tr (2/8/17) at 53-54 Tr (2/10/17) at 597-99)).

## **3 The Commission Excluded Evidence Too Broadly**

It is clear that in relying upon its compliance requirement ruling the Commission went too far in excluding evidence from one of LES's experts. That expert was Ronald Bohannon P E whom LES called to provide opinions on both traffic safety issues and storm water drainage

issues regarding CK's proposed facility (Tr (2/10/17) at 505-513). In applying its ruling, the Commission did not allow LES to present Mr. Bohannon's opinions on DOT permitting issues (Id. at 505-07). LES therefore sought to present his opinions on traffic safety issues in relation to the endangerment requirement (See id.). In preparing to do so, LES's counsel moved to admit Mr. Bohannon's report into evidence, at which point CK's counsel objected (Id. at 513-14). The Commission excluded the report and did not allow LES to present his opinions on traffic safety issues at all (Id. at 513-21).

**B The Commission Erred By Taking Inconsistent Positions  
When LES Sought To Make A Record Of The Excluded  
Evidence To Facilitate Judicial Review**

The Commission took inconsistent positions when LES sought to make a record of the evidence that the Commission excluded. At first, while not allowing questioning on them, the Commission agreed to allow some of the exhibits relating to the access and trespass issues to be considered part of the record (Tr (2/8/17) at 55-66 (LES Exs. K1-9, L1-2, M1-5, N1-4 & O)). Later on, in addition to not allowing LES's experts to testify on matters that it deemed to fall within the jurisdiction of other regulatory agencies, the Commission excluded some of the experts' reports (Tr (2/9/17) at 505-07, 513-21 (LES Ex. X (Bohannon report)), Tr (2/10/17) at 552-54, 559-565, 607 (LES Ex. R (Orwig report))).

The Commission did let LES make a verbal offer of proof regarding one of the reports (Tr (2/9/17) 557-58 (Bohannon report)). But clearly that is no substitute for having the actual exhibits made a part of the record, that is what most facilitates meaningful judicial review. See, e.g., ERICA, Inc. v. State Regulation & Licensing Dep't, 2008 NMCA 065, ¶ 36, 144 N.M. 132. (It does not appear to us that the hearing officer expressed any valid basis for striking the memorandum from the record. That the memorandum had no relevance was not a sufficient

basis. It is black letter law that generally where a party's proffered evidence is denied on the ground of relevance the party has a right to make an offer of proof in order to show on appeal what the content of the evidence was that would bear on relevance. That principle applies no less in an administrative agency setting. Id.

**C The Remedy Would Be To Grant The Application For Rehearing and, In Doing So, To Reopen The Proceedings**

In its Order, the Commission retained jurisdiction "for the entry of such further orders as the Commission may deem necessary" (See Order at [7], ¶ 3). If the Commission grants LES's application for rehearing, as it should the Commission can exercise its retained jurisdiction to reopen the technical hearing to allow LES to present and make part of the record all of the relevant evidence that the Commission erroneously excluded.

**III THE COMMISSION ERRED BY DENYING LES DUE PROCESS**

Looked at in another way it also can be said that the Commission's failure to follow its procedural framework for permitting denied LES due process of law. Implicit in the framework is the requirement that a surface waste management permit applicant must be able to show that it can meet its burden of proof by the time that the hearing process ends. See 19 5 36 8 19 15 36 9 19 15 36 10 NMAC (2015). That design ensures that those who receive notice of and participate in the hearing process are given an opportunity to ask questions and to raise concerns about the proposed facility before the Commission makes its final decision on the application. 19 15 36 12 NMAC. The permitting process thereby affords interested parties 'notice and an opportunity to be heard at a meaningful time and in a meaningful manner as due process requires. TW Telecom of N M, LLC v State Pub Regulation Comm'n, 2011 NMSC 029, ¶ 17, 150 N M 12 (internal quotation marks citations & emphasis omitted). But, if an applicant is not prepared to make the showing by the time the hearing ends the Commission

has to adjust its approach to afford the process due to the interested parties That is because due process calls for such procedural protections as [a] particular situation demands See id (internal quotation marks & citation omitted) In this case the concerns that LES raised demanded more process than it was afforded

**A The Commission's Exclusion Of Evidence Denied LES Due Process**

During the technical hearing the Commission should have allowed LES to present all of the evidence that it sought to present Had that occurred and had the Commission postponed making a finding on the compliance requirement until it had the other agencies' determinations in hand it would have known whether CK could construct and operate its surface waste management facility in compliance with other applicable laws Just as importantly, the Commission would have known what other agencies were going to address Duly informed the Commission could have analyzed any concerns in relation to the endangerment requirement and exercised its concomitant authority to impose clear and specific conditions that addressed them before finding that the requirement was met

But that is not how the process worked LES s efforts to present evidence showing that the requirements for granting CK s permit application were not met were cut short Supra Point I & II And it is questionable whether the evidence that the Commission did let LES present regarding the endangerment requirement received the consideration that it was due Infra CK is now claiming that 'URENCO failed to prove any harm to public health or the environment (Applicant's Resp Protestant URENCO s Mot Stay at 4 ) While LES disagrees if it did fail to prove that CK's planned surface waste management facility would cause any harm to public health and the environment the process that it was denied is in part to blame

**B The Commission's Use Of Permit Conditions Denied LES Due Process**

**1 During The Technical Hearing, The Commission's Decision To Allow CK To Conditionally Comply With The Compliance Requirement Denied LES Due Process**

The Commission's use of permit conditions also shows that the Commission deprived LES of due process. During the technical hearing based on the Commission's remarks (e.g. Tr (2/8/17) at 50-52-53) LES recognized that the Commission intended to allow CK to show that the compliance requirement was met after the Commission granted CK's permit application (Tr 2/10/17) at 597). LES alerted the Commission that its approach had due process ramifications (Tr (2/9/17) at 597-99).

LES gave the Commission an example. LES explained the highway access permitting process does not provide for a public hearing and that by granting a conditional permit approval the Commission would deprive LES of the opportunity to provide input on the issue (Id. at 599). The Commission did not respond by allowing LES to make the evidence part of the record. Instead, in effect, the Commission disregarded the concern by proceeding to issue a conditional permit.

LES was correct in its explanation of the law. The applicant for a highway access permit is not required to identify or notify other property owners to provide public notice 18-31-6-14(D) NMAC. The administrative review process for the permit also does not provide for notice or a hearing that would allow public comments or participation 18-31-6-14(G) NMAC. By not allowing LES to present evidence regarding the highway access permit issue, the Commission deprived LES of the opportunity to provide input on the issue.<sup>3</sup> Moreover

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<sup>3</sup> LES's due process concern is not limited to the highway access permit issue. Using another example from the hearing, LES will not have the opportunity to provide input during the

unlike what CK asserts without participants like LES in the process it cannot be with certainty that the permitting authorities and procedures of other agencies [will] act to ensure that public health and/or the environment are protected[ ] (Applicant s Resp Protestant URENCO s Mot Stay at 4 ) To the contrary in its post hearing brief LES provided examples of when that may not occur with regard to air quality issues surrounding CK s planned facility (Cf LES Final Argument Br at 31 32 33 )

## **2 In The Order, The Conditions Deprive The Public And LES Of Due Process**

After the technical hearing had ended the Commission entered its Order granting CK a conditional permit In prefacing the conditions the Commission stated that, [t]he public and LES had raised valid concerns regarding hydrogen gas emissions truck traffic and the tracking of liquids from the facility onto public roadways[ ] (Order Conclusion of Law 5 ) The Commission also stated that it was imposing the additional conditions as a consequence (Id.) The conditions require CK to take additional steps to address the concerns But through the

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storm water permitting process that one of CK s witnesses mentioned during his testimony The witness testified that CK will need to get storm water permits from the federal Environmental Protection Agency ( EPA ) to construct and operate the facility (Tr (2/10/17) at 768 ) Presumably the witness was referring to storm water general permit coverage That process entails submitting a Notice of Intent ( NOI ) The regulatory framework does not provide for public notice and a hearing regarding the NOI See EPA National Pollutant Discharge Elimination System ( NPDES ) General Permit for Discharge from Construction Activities (February 16 2017) §1 4 3 & Table 1 (authorized to discharge 14 calendar days after EPA notification that NOI is complete ) <http://epa.gov/npdes/epas2017constructiongeneralpermitcgpandrelateddocuments> Additionally CK stated in its application that it would seek coverage under the EPA NPDES Multi Sector General Permit for Stormwater Discharges Associated with Industrial Activity ( MSGP ) [http://www3.epa.gov/npdes/pubs/msgp2008\\_finalpermit.pdf](http://www3.epa.gov/npdes/pubs/msgp2008_finalpermit.pdf) (CK Permit Application Section NMAC 19 15 36 13 § 1 13 ( If required after consultation with New Mexico Environment Department (NMED) C K Disposal LLC will obtain a permit under the Multi Sector General Permit [MSGP] for Stormwater Discharges (promulgated September 29 2008) ) If the MSGP applies that process also does not provide for public notice and input See MSGP (June 4, 2015) § 1 2 1 3 & Table 1 2 (authorized to discharge 30 days after EPA notification that NOI is complete) <http://www.epa.gov/npdes/final2015msgpdocuments.pdf>

conditions the Commission effectively cut the public and LES out of the process. The timing of the conditions – ie after the hearing process had ended – was one way that occurred. The wording of the conditions – which do not provide for notice and an opportunity to be heard on CK's response to the conditions – was another way that occurred. (See Order Conclusion of Law 6 (incorporating by reference Draft Permit conditions) id Conditions 1 a 1 b 1 c). The Commission thereby denied the public and LES the opportunity to substantively address CK's showings. See TW Telecom of NM, LLC 2011 NMSC 029 ¶ 21. Considering what the conditions relate to, that is no small matter.

**a In Granting CK's Permit Application, The Commission Conditionally Approved CK's Liquid Processing Facility Despite The Absence Of Information Essential For Its Review And Without Provision For Public Review And Comment Following Submission Of The Information**

In its Order, the Commission refers to conditions provided in the Division's October 13, 2016 tentative decision[ ] (Conclusion of Law 6). Review of the conditions shows that one of them relates to the liquid processing facility which CK included in its permit application (Draft Permit Condition 6 E). In granting the application, the Commission also granted approval of the facility. (See Order.) Clint Richardson, Ph.D., the engineering expert hired by the OCD's Environmental Bureau to review CK's application, testified about his review of the part of it relating to the facility. (Tr. (2/9/17) at 408-10.) He testified that CK had addressed the facility in a cursory [narrative] manner which lacked essential design and specification information without which he could not complete his review. (Tr. (2/9/17) at 397, 409, 411, 422-24; CK Ex H (Letter from C. Richardson to J. Griswold dated March 25, 2016[6]); see also CK Ex P (Letter from C. Richardson to J. Griswold dated May 13, 2016) (reiterating need for information and raising possibility facility's stripping tower might require NMED review).) When he testified in

February of 2017 Dr Richardson had yet to receive the additional information (Tr (2/9/17) at 424 )

Enough is known about the liquid processing facility to raise significant health and safety and environmental concerns Nicholas Ybarra who oversaw CK s permit application testified about the facility during the technical hearing (Tr (2/8/17) at 122 124 ) Mr Ybarra – who had yet to come up with a ratio of how much liquid versus solid waste CK s planned surface waste management facility would receive – provided a narrative description of the liquid waste processing system (Id at 191 )<sup>4</sup> The liquid – which in addition to oil wastewater may include frac and fluid – will be processed to remove recyclable water and oil and sediment to the extent possible after which point any remaining liquid will go into evaporation ponds (Id at 190 99 )<sup>5</sup> Remaining oil will be skimmed off the top of the evaporation ponds (Id at 193 ) The remaining liquid will contain metals VOCs including BTEX and depending upon its constituents possibly chlorides (Id at 193 95 ) Having not investigated the issues Mr Ybarra did not know what kind of BTEX and chloride concentrations could be present the content of which would be released into the air through evaporation or aerator pumps (Id at 195 96 201 07 )

When asked about the issue Dr Richardson testified that if CK's permit application was granted and CK did not provide essential design and specification information until after that

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<sup>4</sup> Joe Carrillo the on site manager of Sundance Services a nearby surface waste management facility testified that out of the oilfield waste that Sundance receives around 80 percent of it is liquid (Tr (2/9/17) at 466 468 69 493 94 )

<sup>5</sup> The steps involved in separating out the recyclable water include use of the stripping tower mentioned by Dr Richardson in his May 13 letter Supra p 15 The stripping tower involves a pressurization process which according to Mr Ybarra results in Volatile Organic Compounds ( VOCs' ) being gassed off into the ambient atmosphere (Tr (2/8/17) at 198 201 )



point then the proceedings should be reopened to allow public input on the liquid waste facility (Id. at 427-28). Or, as he put it, "I think that the public should be involved" — that is just common sense. "[T]he permit would have to be written such that you would have that review process, approval process, the comment process on that part of the operation" (Id. at 428).

Instead of following that suggestion, the Commission left the original condition in place. Similarly to Dr. Richardson's observation about missing information supra p. 15, the condition itself states that CK's application did not include "detailed calculations or design information" (CK Ex. W (Draft Permit Condition 6 E)). But, as written, the condition only requires CK to "provide design documentation for [the] liquid processing operations to the OCD for approval" before the operations come on line (Id.). The condition therefore does not provide an opportunity for LES and the public to review and address the design documentation, and if the Commission requires CK to provide it, the specification information that Dr. Richardson also sought supra p. 15, or the detailed calculations that the Commission itself recognized were missing. And yet that would appear to be critical information that LES and the public should be allowed to review and address given Dr. Richardson's depiction of the missing information.

**b Hydrogen Sulfide Emissions ("H<sub>2</sub>S") Remain Of Considerable Concern**

Another condition relates to H<sub>2</sub>S monitoring. During the technical hearing, LES exposed serious flaws in CK's numeric modeling of H<sub>2</sub>S emissions from its planned facility and CK's H<sub>2</sub>S monitoring plan. Infra. Presumably the flaws prompted the condition.

But, as written, the condition is not responsive to the concerns in two respects. First, the condition requires CK to submit a more comprehensive H<sub>2</sub>S monitoring plan that includes monitoring at each of the facility's property boundaries. (Order Condition 1 a.) No specific

details are given as to what the plan must entail. Second, the condition requires CK to submit the plan to the Division prior to commencement of operations[ ] (Id.) As written, the Condition clearly does not allow LES and the public to review and comment on CK's revised H2S monitoring plan. The Condition may not even allow the Commission to weigh in.

Indeed, the OCD appears to recognize that the condition, as written, is problematic. In its response to LES's motion for a stay, after acknowledging the vagueness or uncertainty in the condition, the OCD invites LES to address the issue in seeking a rehearing. (See [OCD's Opposition [LES's] Motion Stay at [4] ( If Respondent believes that more detailed provisions regarding the contents or approval of the H2S plan are needed, it can address those issues in a Motion of Rehearing. )) LES did not receive OCD's response until Friday, April 21, 2017, when LES's application for rehearing was due on Monday, April 24, 2017. LES therefore has not had sufficient time within which to fully formulate a response.

From the record that exists, however, this much is clear. Additional modeling of the potential H2S emissions from CK's planned facility needs to occur using more sophisticated modeling techniques. That step must be taken in order for an informed decision to be made on how the existing H2S plan must be enhanced or improved to protect against the potential adverse effects of H2S emissions upon LES. (Tr. (2/9/17) at 310-327, 28 (purpose of the modeling was to determine impacts of H2S emissions on LES)) During the technical hearing, both during the testimony of Todd Stiggins, who performed the modeling (Tr. (2/9/17) at 276-278, 80-320; CK Ex. S; CK Ex. U) and Clayton Orwig, LES's expert on air emissions (Tr. (2/10/17) at 559-565), serious flaws were exposed in the modeling. Those flaws are set forth in detail in Point IV A. They include:

- use of a non-sophisticated H2S screening model

- the non-inclusion in the modeling of H2S emission sources that already exist

the non inclusion of additional H<sub>2</sub>S sources that would be created by CK's planned facility

the non calculation of the concentration of H<sub>2</sub>S emissions using the half hour average which is the basis for the acute exposure limit for the general public set forth in the 0.1 ppm New Mexico Ambient Air Quality Standard for the area

the non consideration of prevailing wind direction to the north and

the use of a fence line that underestimates the potential concentration of H<sub>2</sub>S emissions from CK's planned facility

Other more sophisticated modeling tools are available which would provide a more realistic assessment of the potential H<sub>2</sub>S emissions from CK's planned facility (Tr (3/10/17) at 566-68, see also id. at 633-34 (Screen 3 and AERSCREEN are gatekeeper tools to assess whether further analysis is required) ) It should be performed by CK

After CK performs the modeling CK should submit the modeling along with a more comprehensive H<sub>2</sub>S monitoring plan to the OCD. After the submissions the public and LES who both stand to be affected by H<sub>2</sub>S emissions from CK's facility should be given notice and the opportunity to comment on the submissions. The notice hearing(s) and approval of the plan by the OCC all should occur before CK begins operations. (See LES Mot Stay at 3-4 )

**c Road Contaminants Are A Concern**

During the technical hearing it became apparent that CK had not worked out a plan to prevent trucks leaving its facility from contaminating public roadways. Unlike Sundance (Tr (2/9/17) at 470-72) CK had no plan in place for a truck wash facility and the road surfaces that would be used within its facility site were not clearly explained during the hearing. (Id. at 269-70 )

The issue was of sufficient concern to the Commission that it included a condition addressing it. The condition states: Applicant shall manage the facility in such a manner that all

solid and liquid waste is confined to the site and not allowed to contaminate any public roadway by vehicles leaving the facility (Order Condition 1 c )

Well intentioned as the condition may be it again lacks details It too does not provide for review and comment by the public and LES Nor is the OCD or the Commission included The condition should be rewritten to allow the public and LES to review the waste containment road management plan that CK develops and to comment on the plan Additionally CK should be required to submit the plan to the OCD or the Commission for approval

### **3 The Commission's Handling Of The Proceedings Denied LES Due Process**

There is another due process dimension to the proceedings in this case Ignoring material issues raised by a party can render the party's right to be heard illusory Atlixco Coalition 1998 NMCA 134 ¶ 24 And that is what appears to have happened in this case from LES's vantage point As discussed in more than one respect the Commission did not follow its own regulations on key issues in not allowing LES to present evidence Supra Points I II The end result of the process was an order granting CK a permit that makes this case look like it involved an unremarkable surface waste management facility permitting process when it did not For the reasons discussed to the extent that they address LES's concerns the conditions as currently written do not ameliorate the situation

### **IV THE COMMISSION ERRED IN ITS FINDINGS OF FACT**

The following principles help to explain why the Commission erred by taking the approach that it did regarding findings of fact in the Order When regulations implementing a statute do not limit the [agency's] review to technical regulations but clearly extend to the impact on public health [or safety or the environment] resulting from the proposed permit the agency must make findings accordingly See Colonias Dev Council v Rhino Envtl Servs , Inc

(In re Application of Rhino Env'tl Servs.) 2005 NMSC 024 ¶ 31 138 N M 133 accord  
19 15 36 12(A)(1) NMAC (2015) Furthermore whether making a finding regarding a technical  
requirement or another aspect of regulations an agency may not disregard those facts or issues  
that prove difficult or inconvenient or refuse to come to grips with a result to which those facts  
lead nor may the [agency] select and discuss only that evidence which favors [its] ultimate  
conclusion or fail to consider an entire line of evidence to the contrary' Atlixco Coalition  
1998 NMCA 134 ¶ 24 Instead an agency deciding the matters must make sufficient findings  
of fact to disclose the reasoning upon which its order is based Fasken v Oil Conservation  
Comm'n 1975 NMSC 009 87 N M 292 Here that did not occur

**A The Commission Treated 19 15 11 NMAC As The  
Determinative And Sole Rule Governing H2S Emissions**

The Commission made findings of fact on H2S (See Order Finding of Fact 33 see also  
id. Finding of Fact 32 e) In Finding of Fact 33 the Commission invokes 19 15 11 NMAC  
which it states provides that if the hydrogen sulfide concentration in a facility is less than 100  
parts per million the operator is not required to take further actions pursuant to 19 15 11 NMAC  
Applicant's H2S plan provides for notification of the [OCD] at 10 parts per million (Order)  
The Commission erred in making and relying on that finding

**1 19 15 11 NMAC Is Not The Determinative And Sole  
Standard Governing H2S emissions**

A review of 19 15 11 on its face clearly demonstrates that the 100 ppm threshold set  
forth in the rule is intended as a type of screening mechanism to determine whether additional  
Rule 11 requirements must be complied with No place in Part 11 says that it provides the  
definitive health or environmental standard The OCD's counsel appears to read Rule 11  
similarly During the technical hearing he stated that the Rule 11 regulations are not regulations

as to how much emission can occur they are regulations as to what you have to do to protect the public if more than a certain amounts exists in your facility (Tr (2/10/17) at 653 ) And the Commission heard testimony which makes it clear that Rule 11 does not provide the ultimate safe threshold for H2S exposure to the public That testimony came from one of LES s witnesses Jay Peters who is a human health risk assessor (Id at 645 47 ) As he pointed out the Occupational Safety and Health Administration ( OSHA ) defines 100 ppm [as] the level that is immediately dangerous to life[ ] (Id at 653 ) As that testimony indicates 100 ppm is not even an acceptable occupational worker level under OSHA (See also id at 660 ) And a more technically up to date standard for the public is a value of 006 [ppm] (Id at 659 )

Part 11 solves its own dilemma As Rule 11 explains it does not exempt or otherwise excuse surface waste management facilities the division permits pursuant to 19 15 36 NMAC from more stringent conditions on the handling of hydrogen sulfide required by 19 15 36 NMAC[ ] 19 15 11 2 NMAC Rule 36 includes the endangerment finding requirement – i.e. there must be a basis for the Commission to find that the facility can be constructed and operated without endangering fresh water public health safety or the environment 19 15 36 12(A)(1)

## **2 The Commission Did Not Address The Disputed Evidence Under 19 15 36 NMAC**

During the technical hearing the Commission allowed CK and LES to present evidence regarding H2S issues in relation to the endangerment requirement in 19 15 36 12(A)(1) But the Commission made no findings of fact that mention Rule 36 By not doing so the Commission did not address the evidence in the record which shows that CK s facility potentially poses H2S risks to human safety

Witnesses for CK and LES agreed that H2S is a poisonous and highly dangerous gas (Tr (2/8/17) at 208 (Mr Ybarra) Tr (2/10/17) at 652 54 (Mr Peters) ) They also agreed that

exposure to H2S can result in death (see id.) and that in even in nonlethal doses H2S can seriously injure people (See id.)

Community members, aware of the dangers contacted OCD to express concern about potential H2S emissions from CK s planned surface waste management facility (CK Ex S Tr (2/9/17) at 327 28 Tr (2/9/17) at 402 03 ) LES which is the most likely place where H2S emissions would blow was one of them (Tr (2/8/17) at 212 Tr (2/9/17) at 327 28 ) OCD responded by making arrangements for the potential emissions to be numerically modeled (CK Ex S Tr (2/9/17) at 278 79 ) The modeling occurred (Tr (2/9/17) at 276 280 320, CK Ex U )

But as the Commission itself heard the modeling was seriously flawed The Screen 3 screening model that was used is no longer the EPA's preferred model (Tr (2/9/17) at 309 Tr (2/10/17) at 566 67 ) The Screen 3 model does not account for terrain and meteorological conditions as well as a more recent model (Tr (2/10/17) at 587 ) It only accounts for one potential source of emissions when there may be ' multiple sources of H2S at a facility as is the case with CK s facility (Tr (2/9/17) at 308 09 Tr (2/10/17) at 568 see also Tr (2/10/17) at 568 71) (multiple additional sources) )

The emissions source used was the planned load out point – ie where trucks under CK s plan will unload the exploration and production liquids (Tr (2/9/17) at 283 Tr (2/10/17) at 567 68 ) The worst case scenario that was run involved eight trucks simultaneously unloading liquids containing no more than 10 ppm of H2S (Tr (2/9/17) at 283 86 ) Mr Orwig ran the same model using the same inputs which he ran to the closest fence line (Tr (2/10/17) at 573, 639 40 ) The fence line is the south fence line which is the closest to potential H2S emissions (Tr (2/9/17) at 311, 323 ) Mr Orwig s modeling generated higher H2S levels – to which CK

stipulated (Id at 573 582 ) Mr Orwig testified that the levels between 5 and 6 ppm exceed the 1 ppm New Mexico Ambient Air Standard for the area (Id at 573 575 76 ) That is the standard that applies outside CK s fence lines (Id at 573 ) Mr Orwig also explained that CK s numeric modeling by using a one hour modeling average instead of the half hour modeling average that applies under the New Mexico Ambient Air Quality Standard for the area underestimated the concentration of H<sub>2</sub>S (Id at 575 76 583 ) Additionally CK s H<sub>2</sub>S modeling did not factor in wind direction (Tr (2/9/17) at 293 309 312 )<sup>6</sup>

Jay Peters also opined that CK s proposed H<sub>2</sub>S management plan which proposed a hydrogen sulfide management level of 10 ppm as a fence line monitoring trigger threshold is not protective of human health and would in fact endanger human health (Id at 651 see also id at 656 57 see also LES Ex T ) Mr Peters explained that different H<sub>2</sub>S threshold values are set for non occupational (i.e. general public) exposure and that non occupational threshold values would apply outside of CK s fence line (Tr (2/10/17) at 654 55 661 LES Ex T ) Mr Peters explained that above 6 ppb is where the adverse health risks begin under the non occupational values – which is considerably lower than the 10 ppm trigger threshold under CK s proposed H<sub>2</sub>S management plan (Tr (2/10/17) at 663 64 )

Stephen Cowne who heads LES s compliance operations including those relating to health and safety, testified that in the event of an emergency based on a H<sub>2</sub>S plume traveling north from the planned CK facility LES employees evacuating its facility would have to travel in the direction of the H<sub>2</sub>S plume to get to their cars (Tr (2/9/17) at 433 34 464 ) He also testified that in the event of such an emergency LES security and emergency staff would not be allowed to evacuate the facility due to federal law and national security restrictions (id at 438

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<sup>6</sup> Mr Orwig also testified that had he modeled the multiple H<sub>2</sub>S sources on site and off site the model results would have been higher (Tr (2/10/17) at 640 41 )



39) which Mr Ybarra was unaware of when he put together CK s H2S management plan (Tr (2/8/17) at 208 212 )

**B      The Commission Erred By Not Making Findings Of  
Fact On Environmental Impacts**

**1      The Commission Made No Findings of Fact On VOCs**

The Commission let LES present expert testimony and other evidence regarding VOCs in relation to the endangerment requirement under Rule 19 15 36 12(A)(1) (Tr (2/10/17) at 586 601 ) But the Commission made no finding(s) of fact regarding the evidence (See Order )

Mr Orwig testified on the issue After noting that CK s application did not contain many details on VOCs he explained that he used CK s projection that it would process 12 000 barrels waste a day (Id at 583 ) Based on prior testimony which indicated that a large percentage of the waste would be produced water Mr Orwig did not try to calculate VOC emissions from other sources (Id at 584 627 ) Mr Orwig reviewed literature which provided examples of VOC concentrations in produced water from the area (Id at 583 84 601 LES Ex BB )

Using the 12 000 barrel projection and the median value of the examples Mr Orwig calculated VOC figures which indicated that the facility could produce around 100 tons per year ( tpy ) of VOCs including 9 tpy of benzene and 20 tpy of ethylbenzene which he regarded as substantial (Tr (2/10/17) at 601 02 LES Ex BB ) To check his calculations he compared them with emissions from another surface waste management facility which indicated that the potential VOC emissions would cause those already substantial quantities to multiply especially if CK processed oilfield waste from 200 or more trucks per day (Tr (2/10/17) at 602 07 ) Mr Orwig testified that if only 25 percent of the waste processed was produced water he would still end up with a quantity of VOCs that was significant (Id at 641 42 ) Without explanation the Commission made no findings of fact on the issue (Order )

**2      The Commission Made No Findings of Fact Regarding  
LES's Storm Water Detention Pond**

The Commission heard testimony and admitted expert reports from Matthew McGovern Ph.D. the Chemistry Services Manager for URENCO USA as well as Nadia Glucksberg an environmental engineer about the adverse impact that wind transport of chlorides and other constituents from CK's evaporation ponds could have upon LES's storm water detention pond (Tr. (2/10/17) at 685-86, 691-92; LES Ex. Z; Tr. (2/10/17) at 738-742, 745-46, 750; LES Ex. VI). They explained that carried north by the prevailing wind to the pond, the chlorides and other constituents could cause LES to exceed the contaminant levels allowed under LES's NMED permit for the pond (Tr. (2/10/17) at 702-11; id. at 748-50). Without explanation, the Commission made no findings of fact on the issue. (Order.)

**C      The Commission Erred By Making Findings Of Fact On  
Disputed Issues Without Disclosing Its Reasoning**

**1      Finding of Fact 29**

In pertinent part, Finding of Fact 29 states:

29      The evaporation pond design complies with 19-15-36 NMAC

- b      The application contains design standards that will protect fresh water, public health, and the environment
- c      The application contains operating standards that will protect fresh water, public health, and the environment

(Order.) Ostensibly, the findings were drafted to correspond to the endangerment prong in 19-15-36-12(A)(1) cf. 19-15-36-17 (specific evaporation pond requirements).

As written, the findings suggest that the evidence in the record supports finding that the evaporation ponds will be protective of fresh water, public health, and the environment. No mention is made of the contrary testimony and evidence in the record.

Mr Ybarra testified that he did not know what concentrations of VOCs and chloride concentrates may be present in the liquid placed in the evaporation ponds which will be released into the air (Tr (2/8/17) at 195 96 ) Nor when asked did he know which procedures would be used to clean VOCs off the sides of the ponds to prevent them being carried into the air and dispersed (Id at 207 08 )

Additionally Mr Orwig s testimony indicated that significant amounts of VOCs would be present in the processed water that CK processes Supra p 25 Mr Orwig acknowledged that the water will be treated before it is placed in the evaporation ponds (Tr (3/10/17) at 619 ) He added that that the level of treatment was unclear to him based on the application (Id) He also testified that it was his understanding based on Mr Ybarra s testimony that other constituents in the water beyond crude oil would remain the water going into the evaporation ponds (Id at 625 26 )

There also was the expert testimony of Dr McGovern and Ms Glucksberg to consider Both testified about the potential adverse consequences of wind transport of chlorides and other constituents from the evaporation ponds to LES s storm water detention pond Supra p 26

## **2      Finding of Fact 34**

Finding of Fact 34 states Applicant will treat wastewater received at the site to remove the oil from water prior to placement into the evaporation ponds (Order) The finding is incorrect insofar as it suggests that CK s proposed treatment of the liquid oilfield waste will result in removal of 100% of any oil present before the liquid is placed in the evaporation ponds Mr Ybarra acknowledged that the treatment would result in removal of only 99% of the oil and that the remainder of the oil would be skimmed off the surface ponds as Finding of Fact 35 indicates (Tr (2/8/17) at 192 93 Order )

### 3 Finding of Fact 36

Finding of Fact 36 states

The Commission finds that Applicant provided an adequate alternate plan to monitor migratory bird protection and consequently qualifies for an exception from netting the ponds as provided in 19 15 36 13(I) NMAC

(Order ) In the finding the Commission does not explain the basis for its finding that CK s application contains an adequate alternate plan to protect migratory birds Both Dr Richardson and Ms Glucksberg testified that CK's application did not contain such a plan (Tr (2/9/17) at 424 26 see also CK Ex P Tr (2/10/17) at 746 see also LES Ex V2 ) Additionally Ms Glucksberg testified about the adverse longevity and reproductive impacts exposure to the ponds may have upon migratory birds (Tr (2/10/17) at 747 48 )

#### **V THE COMMISSION ERRED BY MAKING CONCLUSIONS OF LAW THAT ARE NOT SUPPORTED BY THE FINDINGS OF FACT**

Conclusions of law follow the findings of fact, i.e. the findings support the conclusions not vice versa Smith v Maldonado 1985 NMSC 115 ¶ 7 103 N M 570 [C]onclusions of law [therefore] must be founded on and supported by the findings of fact Farmers, Inc v Dal Mach & Fabricating, Inc 1990 NMSC 100 ¶ 6 111 N M 6 In this case three of the six Conclusions of Law are not supported by the Findings of Fact Those conclusions are Conclusions of Law 3, 4 and 6

#### **A Conclusion of Law 4**

Conclusion of Law 4 states

CK Disposal LLC s application meets the requirements of 19 15 36 NMAC and therefore should be approved

(Order ) Given the reference to CK s application LES reads the reference to 19 15 36 NMAC to refer to 19 15 36 8(C) NMAC (2015) which sets forth the application requirements for a permit

for a new surface waste management facility. As previously discussed, CK's application does not meet the requirements of the regulation in the following respects: (i) under 19 15 36 8(C)(2) NMAC (2015), CK lacks a right of legal access to its planned surface waste management facility, supra pp. 6-8; under 19 15 36 8(C)(4) & (C)(5) NMAC (2015), CK has yet to supply the detailed design information and detailed calculations required for its liquid waste processing facility, supra pp. 15-16; and under 19 15 36 8(C)(6) NMAC (2015), CK has not provided a plan for management of approved wastes that complies with the applicable requirements in 19 15 36 13(I) NMAC (2015) regarding a migratory bird plan, supra p. 28.

The conclusion also is incorrect insofar as it suggests that when an applicant for a permit for a new surface waste management facility files an application that meets the requirements of 19 15 36 8(C), such a showing suffices to establish that the permit should be approved. As Finding of Fact 20 shows, the Commission must make the findings set forth in 19 15 36 12(A)(1) NMAC (2015), which require more than the filing of an application that meets the requirements of 19 15 36 8(C) NMAC (2015). (Order.)

## **B      Conclusion of Law 3 and 6**

Conclusion of Law 3 and Conclusion of Law 6 share some overlapping elements. Conclusion of Law 3 states:

The Applicant has demonstrated that the proposed facility can be constructed and operated without endangering fresh water, public health, safety, or the environment and in compliance with the applicable statutes and rules, which are the Oil & Gas Act and its implementing rules, including 19 15 36 NMAC and 19 15 11 NMAC.

Conclusion of Law 6 states:

The proposed facility can be constructed and operated in compliance with the applicable statutes and rules, which are the Oil & Gas Act and its implementing rules, including 19 15 36 NMAC, without endangering fresh water, public health, safety, or the environment with conditions provided

in the Division's October 13, 2016 tentative decision and the Commission's additional conditions

(Order)

Logically, it makes sense to begin by addressing Conclusion of Law 6. As previously discussed, and as Finding of Fact 20 shows, the language of the compliance prong is incorrect because the language departs from the language as it appears in 19 15 36 12(A)(1) NMAC (2015). Supra pp. [1] 5. In further addressing the prong, LES uses the promulgated language – i.e. that in order to issue a permit for a new surface waste management facility, the Commission must find that the facility can be constructed and operated in compliance with applicable statutes and rules, 19 15 36 12(A)(1). As Conditions 1 d and 1 e in the Order and statements made by those appearing on behalf of CK at the hearings show, there is no factual basis upon which the Commission can find that the facility can be constructed and operated in compliance with the applicable rules. CK has yet to initiate the permitting processes referenced in Condition 1 b and Condition 1 d. (See Order e.g. Tr. (2/8/17) at 14-15; Tr. (2/8/17) at 186-87; Tr. (2/9/17) at 263; Tr. (2/10/17) at 274.) Correspondingly, the Commission made no Findings of Fact showing that CK has complied with the regulatory processes contemplated by the conditions. (See Order.)

Conclusion of Law 6 is also incorrect insofar as it states that CK's surface waste management facility can be constructed and operated without endangering fresh water, public health, safety, or the environment. Here, as well, conditions belie the conclusion. CK has yet to comply with Condition 1 a, which requires a more comprehensive H<sub>2</sub>S plan, and with Condition 1 c, which requires that CK formulate plans for managing the facility in a manner that ensures that all solid and liquid waste is confined to the site and is not allowed to contaminate any public

roadway by vehicles leaving the facility. Additionally, the Commission did not make findings on other issues under the endangerment requirement. Supra

From the preceding considerations it follows that Conclusion of Law 3, in addition to departing from the language of the compliance prong as it appears in 19 15 36 12(A)(1) NMAC (2015), is incorrect in stating that the Applicant – i.e. CK – has demonstrated that the compliance and endangerment prongs are met.

### **Conclusion**

For the reasons stated supra, the Commission should grant LES's application for rehearing.

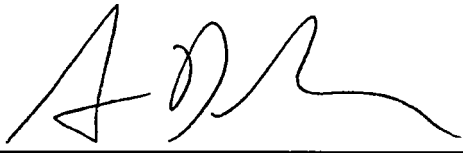
After doing so, the Commission should take the following steps. It should vacate the Order. It should require CK to submit all of the information that Dr. Richardson requested regarding the liquid processing facility, a more comprehensive H<sub>2</sub>S monitoring system, and a road contaminant plan. It should reopen the hearing process on CK's application and could structure the hearings as it did previously, providing for a public hearing to address the submissions and a technical hearing for CK and LES to address the submissions and to allow LES to present all the evidence that the Commission excluded. It otherwise should stay the proceedings until CK provides the permits and any other legal permissions that it needs to construct and operate the facility in compliance with all other applicable statutes and rules. Once a complete record is assembled, the Commission should reconsider whether or not CK should be granted a permit to construct and build the facility.

In the alternative, the Commission should amend the Order in the following respects. The Commission should stay the Order to prevent CK from starting construction unless and until it obtains legal access to its planned facility site. It should rewrite the conditions regarding the

liquid processing facility the H2S monitoring plan and the road contaminant management plan to provide for notice and a hearing for LES and the public to comment on the submissions as previously described The Commission should also reconsider its decision to grant the permit

Respectfully submitted

RODEY DICKASON SLOAN AKIN & ROBB P A

By \_\_\_\_\_

Scott D Gordon

Cynthia A Loehr

Post Office Box 1888

Albuquerque New Mexico 87103 1888

Telephone (505) 765 5900

[sgordon@rodey.com](mailto:sgordon@rodey.com)

[CLoehr@rodey.com](mailto:CLoehr@rodey.com)

*Attorneys for Louisiana Energy Services LLC d/b/a*

*URENCO USA*

and

URENCO USA

By *Approved Via E mail April 24, 2017*\_\_\_\_\_

Perry D Robinson

External General Counsel URENCO USA

13 Hunting Court

Bluffton SC 29910

Telephone (575) 691 9662

*Attorney for Louisiana Energy Services LLC*

*d/b/a URENCO USA*



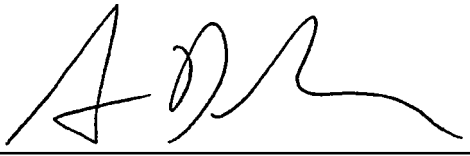
**CERTIFICATE OF SERVICE**

We hereby certify that a copy of the foregoing pleading was e mailed on April 24, 2017, to the following

Michael L Woodward  
Wes McGuffey  
Hance Scarborough LLP  
400 W 5<sup>th</sup> Street, Suite 950  
Austin Texas 78701  
Telephone (512) 479 8888  
mwoodward@hslawmail.com  
wmcguffey@hslawmail.com  
*Attorneys for CK Disposal LLC*

David K Brooks  
Oil Conservation Division  
1220 South St Francis Dr  
Santa Fe NM 87505  
Telephone (505)476 3440  
DavidK.Brooks@state.nm.us  
*Attorney for Oil Conservation Division*

RODEY DICKASON, SLOAN AKIN & ROBB P A

By   
\_\_\_\_\_  
Scott D Gordon