



MODRALL SPERLING

L A W Y E R S

October 17, 2014

Earl E. DeBrine, Jr.
505.848.1800
Fax: 505.848.1891
edebrine@modrall.com

Via E-mail & U.S. Mail

Ms. Jami Bailey, Director
Oil Conservation Division
New Mexico Department of Energy,
Minerals and Natural Resources
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505

Re: *In the Matter of the Application of DNCS Properties, LLC
Permit for Surface Waste Management Facility in South/2
Section 31, Township 17 South, Range 33 East, and North /2
Section 6, Township 18 South, Range 33 East, NMPM, Lea
County, New Mexico*

Dear Ms. Bailey:

The Harvey E. Yates Company ("HEYCO") by and through its counsel, hereby submits the following comments concerning the above-referenced Application for a Surface Waste Management Facility. HEYCO received notice of the Division's tentative approval of the Application on September 23, 2014 and therefore its comments are timely submitted under NMAC 19.15.36.10.

1. HEYCO owns and operates oil and gas leases covering the E/2 Section 6, T18 South, R33 East directly below a portion of the proposed facility which includes formations that are productive for oil and gas. There is a producing well on the lease (API 3002529103) and HEYCO intends to drill up to 5 additional wells. HEYCO's rights under its lease include a right to reasonable use of the surface. The granting of the permit will prevent HEYCO from exploring, developing and operating its oil and gas lease, impair HEYCO's correlative rights and cause the waste of oil and gas resources in contravention of the Division's obligations under the Oil and Gas Act. Accordingly, the granting of the permit will result in a regulatory taking. *See Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 2895, 120 L. Ed. 2d 798 (1992).

Modrall Sperling
Roehl Harris & Sisk P.A.

Bank of America Centre
500 Fourth Street NW
Suite 1000
Albuquerque,
New Mexico 87102

PO Box 2168
Albuquerque,
New Mexico 87103-2168

Tel: 505.848.1800
www.modrall.com

2. The Application has been filed by an Arizona limited liability company that is not registered to do business in New Mexico. The Application does not provide any evidence of the Applicant's experience in oil and gas production or oilfield waste management. Additionally, the Application does not identify the officers and owners of the company who own more than a 25% interest in the applicant, contrary to NMAC 19.15.36.8(C)(1).

3. The Application seeks inappropriate exceptions to the NMAC 19.15.36.15's requirements for migratory birds. The proposed facility is located on property that has previously been enrolled by HEYCO in a Candidate Conservation Agreement with Assurances as part of a conservation plan for the lesser prairie chicken developed in cooperation with the New Mexico Game & Fish Department, the New Mexico State Land Office the U.S. Bureau of Land Management and U.S. Fish and Wildlife Service. The Application fails to consider the effect of that enrollment and is inconsistent with the State of New Mexico's obligations under its CCAAs.

4. The granting of the Application without appropriate conditions to accommodate oil and gas development is contrary to the public interest and if the Division issues the permit, the Secretary of the Department of Energy, Minerals and Natural Resources should exercise his discretion and deny the Application.

HEYCO respectfully requests that appropriate conditions be imposed in the permit to reasonably accommodate planned oil and gas development or that the Application be denied. Alternatively, HEYCO requests that the Application be set for hearing in accordance with NMAC 19.15.36.10 and, after appropriate notice and hearing, be modified with conditions to accommodate oil and gas development or be denied.

Please contact me if you have any questions.

Sincerely,



Earl E. DeBrine, Jr.

EED/kta/Y:\dox\client\82021\0114\CORRES\W2292595.DOCX
cc: Florene Davidson (florene.davidson@state.nm.us)
Joel Carson, III (joel@carsonryan.com)
Jim Griswold (jim.griswold@state.nm.us)