NM1-61

Hearing

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November 22, 2016

RECEIVED OCD
2016 NOV 22 A 10:51

VIA HAND-DELIVERY
David Catanach
Division Director
Oil Conservation Division
N.M. Energy, Minerals and Natural Resources Department
1220 South St. Francis Dr.
Santa Fe, NM 87505

Re: October 13, 2016 Tentative Decision regarding Commercial Surface Waste Management Facility Permit NM1-61, To Be Issued to C.K. Disposal, LLC

Dear Mr. Catanach:

This firm represents Louisiana Energy Services, LLC, d/b/a URENCO USA ("LES"), which operates a uranium enrichment facility, licensed by the United States Nuclear Regulatory Commission, located immediately to the north of the land on which C.K. Disposal, LLC ("C.K."), proposes to build and operate the oil and gas waste disposal facility that is the subject of your agency's October 13, 2016 tentative decision. Pursuant to 19.15.36.10(A) NMAC and your August 26, 2016 to State Senator Stuart Ingle and other legislators, LES respectfully requests that the Oil Conservation Commission schedule an evidentiary hearing on C.K.'s application.

First, LES' hearing request is timely, in that it is submitted to you less than thirty days following the October 25, 2016 publication of C.K.'s notice of the tentative decision.

Second, Energy, Minerals and Natural Resources Department General Counsel Bill Brancard previously has advised that the internal reference to 19.15.36.9 NMAC in

19.15.36.10(A) NMAC is concerned with the standing of a person who requests a hearing. As an owner and lessee of adjacent and nearby land,[1] LES clearly has standing to seek a hearing.

Third, the legislators' August 26, 2016 letter to you, as well as the other comments that have been submitted to your office since publication of C.K.'s application this spring, demonstrate that there is significant public interest in the application. (This interest has been further demonstrated by requests for hearing filed by various legislators on October 25, 2016 and by the City of Eunice on November 3, 2016.)

Fourth, LES' June 2 and 22, 2016 comments submitted to you, copies of which are attached hereto and incorporated by reference herewith, raise objections that have probable technical merit, as discussed in more detail below.

Fifth, LES opposes C.K.'s application because of the serious problems the proposed facility would create for the operation of LES' uranium enrichment facility. LES requests a hearing on the application for the following reasons, among others:

Pursuant to the version of 19.15.36.12(A)(1) NMAC in effect as of November 6, 2016, when C.K. filed its application and which is therefore applicable to it, the Oil Conservation Division ("OCD") may grant C.K's application and grant the permit only if C.K. demonstrates in its application and the agency finds that the proposed facility can be constructed and operated "in compliance with applicable statutes and regulations" and (that is, regardless of such compliance) the facility will not endanger "fresh water, public health, safety or the environment."[2] Contrary to state law, see, e.g., Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶ 17, 125 N.M. 786 (agency decision must "adequately reflect the basis for [its] determination and the reasoning used in arriving at such determination" (internal quotation marks and citation omitted)), neither the October 13, 2016 tentative decision nor the agency's internal record explains how the OCD has

[1] LES leases from the New Mexico State Land Office ("SLO") the triangular-shaped parcel of land that is located south of State Road 176 and immediately to the north of the land on which the proposed C.K. facility would be built, and owns in fee the trapezoidal-shaped parcel of land located immediately to the north thereof, across the highway. As has been communicated to the SLO previously, LES continues to be interested in development of a solar power installation on the leased parcel lying between the C.K. property and the highway.

[2] This "endangerment" standard appears to be derived from solid waste disposal laws and regulations. See generally 42 U.S.C. § 6972(a)(1)(B) (RCRA); 42 U.S.C. § 6973(a) (CERCLA); In re Rhino Envtl. Servs., 2005-NMSC-024, ¶ 24, 138 N.M. 133 (New Mexico Solid Waste Act). Courts interpret "endangerment" to mean threatened or potential harm, not actual harm, Burlington Northern & Santa Fe Ry. v. Grant, 505 F.3d 1013, 1020 (10th Cir. 2007), and will err in favor of protecting public health and the environment. Id. Accord In re Rhino Envtl. Servs., 2005-NMSC-024, ¶ 34 (agency must interpret regulations liberally to realize purposes of governing act).

concluded that C.K.'s application meets either of these requirements. In particular, the agency has not addressed the numerous concerns raised and discussed in LES' June 22, 2016 comments.

Further, C.K.'s application[3] does not demonstrate that it can meet these requirements. For example, the application does not address at all compliance with federal and state air quality statutes and regulations that would govern emissions of hydrogen sulfide, volatile organic compounds, and particulates (including salt water and crude oil). Indeed, to our knowledge neither C.K. nor the OCD has contacted other agencies to determine whether the proposed oil and gas waste disposal facility, as described in the application, would comply with the statutes and regulations that those other agencies enforce. Rather, the application (as well as OCD's review) appears to focus only on compliance with the engineering specifications and other requirements of 19.15.36 NMAC. The application also fails to demonstrate that construction and operation of the facility will meet 19.15.36 NMAC's ultimate requirement, i.e., that it will not endanger public health, safety and the environment in the surrounding area, including but not limited to LES' uranium enrichment plant.

LES' June 2 and 22, 2016 comments, incorporated herein, articulate specific concerns that will be addressed at the public hearing about how the proposed C.K. facility would endanger fresh water, public health, safety and the environment. However, and without limiting the scope of the evidence it would present, LES seeks a hearing to address the following general and/or additional concerns:

1. Hydrogen sulfide. First, C.K.'s application assumes that at times its facility may have emissions that will trigger evacuation of surrounding areas. As a matter of federal law, and because it is handling nuclear material, LES cannot shut down its operations and evacuate all of its employees. Second, C.K's application generally establishes a hydrogen sulfide standard of no more than 10 or 20 ppm, but in fact the gas is dangerous at much lower concentrations. Third, C.K.'s September 9, 2016 hydrogen sulfide modeling (which constitutes an improper supplementation of its application, see footnote 3 below) makes unrealistic assumptions that minimize projected concentrations, and also calculates concentrations other than at the closest fence line. Fourth, contrary to 19.15.36.17(A) NMAC, C.K.'s application does not demonstrate that it will prevent the emission of nuisance (i.e., concentrations less than hazardous) as well as hazardous hydrogen sulfide and other odors. Generally, C.K.'s business plan appears to be premised on accepting crude oil and associated waste containing high concentrations of

[3] C.K. filed its application on November 6, 2015. From our review of your agency's record, it appears that since that date C.K. has been permitted to modify and supplement its application. While modification and supplementation may be permitted under the revised version of 19.15.36 NMAC that took effect on June 30, 2016, it does not appear to be permitted under the version of the regulation that is applicable to C.K.'s application. LES objects to any agency consideration of any such modifications and supplementation.

hydrogen sulfide that producers do not want and then evaporating the gas into the atmosphere adjacent to LES' plant. This method of disposing of hydrogen sulfide is unacceptable to LES.

2. Other air contaminants. C.K.'s application contemplates and will result in the release of VOCs, particulates and other contaminants into the atmosphere. However, neither C.K. nor the OCD has quantified those releases or otherwise demonstrated that C.K. will not be required to obtain (or alternatively that it will obtain) the necessary permit(s) from the New Mexico Environment Department.

3. Traffic safety. C.K's application does not demonstrate that its facility would not create serious traffic safety hazards on State Road 176, which would be the access route to the facility. The facility would not have sufficient space to accommodate trucks containing oil and gas waste that are waiting to offload, and as a result those trucks on occasion would be backed up into and block (opposite the entrance to LES' plant) both lanes of traffic on the highway. The trucks would deposit mud and oil on the state highway, further exacerbating safety conditions. C.K. also cannot establish legal access from the highway to its land.

4. Ground water. Contrary to 19.15.36.8(C)(15) NMAC, C.K.'s application does not provide data from the shallowest aquifer below the proposed site. Its geological data and description is inadequate, because its test borings are too shallow.

For these reasons, LES respectfully requests a public hearing on C.K.'s application. As the aforementioned state legislators have requested in their October 25, 2016 letter to you, LES asks that the hearing take place in Eunice. LES also requests, as a preliminary matter, that you schedule a pre-hearing conference in the near future at which the parties who wish to participate in the hearing can discuss hearing dates (we anticipate the hearing will last multiple days) and other preparations for the hearing.

Very truly yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: _____ for
Henry M. Bohnhoff

HMB:jcm
Attachments (as indicated)

cc: Bill Brancard (via e-mail - bill.brancard@state.nm.us)
David Sexton (via e-mail - Dave.Sexton@urenco.com)
Perry Robinson (via e-mail - Perry.Robinson@urenco.com)
Brandt Graham (via e-mail - Brandt.Graham@urenco.com)

Via personal delivery and via email to jim.griswold@state.nm.us

June 2, 2016

Mr. Jim Griswold
Bureau Chief, New Mexico Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87505

Mr. David Catanach
Division Director, New Mexico Energy, Minerals, and Natural Resources Division
1220 South St. Francis Drive
Santa Fe, NM 87505

Subject: Initial Response to; Written Request for Extension of Time to Further Respond to; Request for Copy of Application; Request for OCD and Commission Hearing Dockets and Notification of Activity; and, Notice of Possible Future Request for Hearing regarding C.K. Disposal's May 6, 2016 Notice of Application, C.K. Disposal – Surface Waste Management Facility.

Dear Messrs. Griswold and Catanach,

First, to Mr. Griswold, thank you for taking time with me earlier this week to personally explain the New Mexico Oil Conservation Division ("OCD") permit application process.

Louisiana Energy Services ("LES")[1] wishes to comment on C.K. Disposal's May 6, 2016 Notice of Application, C.K. Disposal – Surface Waste Management Facility (attached). The purpose of this response is fivefold: 1.) to provide an initial response within 30 days of Notice per 19.15.36.9.C NMAC, which LES requests the New Mexico Oil Conservation Division ("OCD") take into account prior to issuing a tentative decision regarding C.K. Disposal's application; 2.) to request a 60-day extension of time pursuant to 19.15.36.9.C NMAC, in order to further supplement LES' response with more thorough analysis upon LES receiving a complete copy of C.K. Disposal's Application, which LES understands to contain around 1100 pages; 3.) to request a copy of C.K. Disposal's application for its proposed surface waste facility; 4.) to request that LES be notified of all activity regarding this permit application per 19.15.36.E.2 and 19.15.4.9 NMAC; and 5.) to request that, unless C.K. Disposal's application is denied without further steps taking place, a hearing be held to address LES' concerns regarding public health

[1] LES is an enriched uranium manufacturer licensed by the Nuclear Regulatory Commission ("NRC"), and located in southeastern New Mexico, within ½ mile of the proposed C.K. Disposal facility.

and safety, and the environment including groundwater concerns (LES will additionally and separately file a request with the OCD Clerk at the proper time per 19.15.36.10.A NMAC).

LES supports the need for disposal facilities in support of the oil industry, and LES recognizes the oil industry's contributions to New Mexico. However for the reasons listed below, LES believes that even a tentative approval of C.K. Disposal's application at the proposed location would be unwarranted in terms of producing new and unnecessary risk to the detriment of public health, safety, and the environment, including to the LES site and its employees, land, buildings, and equipment.

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C.K. Disposal currently seeks a tentative decision regarding a permit to construct and operate a surface waste management facility in Lots 1 through 4 and the south half of the north half of Section 5, Township 22 south, Range 38 east, N.M.P.M., Lea County, New Mexico.

Another Entity Is Already Doing What C.K. Disposal Seeks To Do, And Does So Without Producing New Unnecessary Risk To The Detriment Of LES Employees' and Visitors' Health Or Safety

There is an existing waste disposal site located to LES' north which does not pose new unnecessary risk to the health safety of LES' employees or visitors. Reasons that the existing facility just north of the LES site does not pose the same concerns include: 1.) the existing site is not operated to the same extent as the proposed C.K. Disposal site, hence the magnitude of atmospheric discharge is less with the existing site than what C.K. Disposal proposes to do; 2.) the existing site is physically located significantly further from LES enrichment plant operations and, accordingly, the existing site is much further from the locations where the majority of LES' staff are located – LES' operations and its approximately 290 employees and 200 contractors are predominantly located on the south side (not the north side) of LES' property; 3.) the existing disposal site is significantly further from a main highway thoroughfare and therefore does not introduce a traffic safety concern to LES or its employees or to our federally mandated Emergency Response obligations; and 4.) the prevailing wind conditions based on LES' meteorological measurements are such that the wind predominantly blows from the south to the north, meaning that atmospheric discharge from the existing site is predominantly blown in the opposite direction from the LES site and its employees. Significant meteorological data from the surrounding area was gathered and analyzed for both primary wind direction and wind speeds during the licensing of our facility with the Nuclear Regulatory Commission (NRC). As noted in our Safety Analysis Report (Section 1.3.3.1), docketed with the NRC, the prevailing wind direction is from the south.

For Public Health, Safety, Emergency Response, And Environmental Reasons, It Would Be Unwarranted To Place A Site Such As C.K. Disposal Proposes Adjacent To And Directly Upwind Of LES' Site And Its Employees & Visitors

LES' concerns reside with the lack of justification regarding the risk of placing such an operation as C.K. Disposal proposes *directly adjacent to a strategic national nuclear asset that is continuously manned 24 hours a day, 7 days a week.* According to our meteorological measurements, the prevailing winds from the south will blow atmospheric discharge directly onto LES' site, employees, equipment, and buildings, the consequence of which is the risk of new and unwarranted health and safety risks to LES site personnel and visitors, as well as unknown environmental risks to the land upon which LES is located, and new and unwarranted risk of damage to LES' sensitive equipment.[2]

Relative to employee safety and emergency response responsibilities, additional concerns are as follows: 1.) LES has received no data regarding the nature and type(s) of chemical material and quantities that would be discharged in to the environment, nor has LES received information regarding even more detrimental possible combinations 2.) further, a correlation of this data to allowable federal exposure limits, for example federal ppm standards, has not been provided; 3.) both construction and especially operation of the facility C.K. Disposal proposes would increase heavy truck traffic entering/exiting the highway, but LES has not received any analysis of this type of traffic safety implications; and 4.) as a federally licensed facility, we are obligated to produce and implement procedures, emergency drills and training for postulated accidents on our site as well as response to accidents on adjacent properties – LES has not been presented with sufficient data to understand the impact to our emergency response requirements, memorandums of understanding with medical and emergency response organizations and the highway patrol.

Relative to environmental compliance, LES is licensed to operate under a number of federal requirements imposed through the Nuclear Regulatory Commission, Department of Energy and other federal facilities. Additionally, we are regulated by the State of New Mexico CID and NMED divisions. In the case of NMED we are required to submit environmental discharge reports for our facility on a routine basis that include air discharge, ground water and other measurements. Without further details on the proposed facility, it is unclear how our reporting and monitoring obligations and associated cost may be impacted in order to demonstrate releases from an adjacent operation are not the result of our site performance.

[2] LES has demonstrated through equipment operation and testing that hydrogen sulfide causes damage to electrical equipment and connections. LES uses highly sophisticated and precise electronics to operate centrifuge technology. Increased air contaminates of this and similar types will require a significant unplanned capital investment to resolve.

Additionally, Another Entity Has Already Applied To Do What C.K. Disposal Seeks To Do Now, But The Other Entity Applied To Use A Location Where We Know Of No New And Unnecessary Risks To The Detriment Of Public Health And Safety

In fact, it has been brought to LES' attention that an application very similar to C.K. Disposal's application has already been filed with OCD for a facility of this type, but which proposes to be located further from the LES site and downwind from the LES site, which would significantly lessen the risk to LES employees' and visitors' health and safety compared to what C.K. Disposal proposes to do and the existing disposal facility north of our site.

To place all this in appropriate context I would like to offer a brief summary of our operation and the value asset we provide to the local community, State of New Mexico and the US Federal Government. For these reasons, we are concerned and intend to fully engage in this process.

In 2006, LES received is Construct and Operate License from the NRC to build the first nuclear project in the United States in almost thirty years. At project completion, LES will have an investment of nearly $5 Billion and will provide enriched uranium for nuclear power generation resulting in 10% of the electricity required for the United States. As the only uranium enrichment plant in North America, LES uses world-leading centrifuge technology to produce this important domestic source of enrichment. LES provides 290 direct, full-time, high paying, safe jobs as well as 200 contracted jobs and is held in high regard by the community as a good corporate citizen. LES and our employees provide the largest donation to the United Way of Lea County each year and our contributions have exceeded $1 Million in the past ten years. We invest an additional $500,000 in the local community in the form of scholarships, sponsorships, and organized community service projects each year. Also, LES utilizes over 150 of its employees to visit 20 schools annually to teach over 2,100 students about science though our Richie Enrichment Science Workshops. LES also provides support to our federal government on matters dealing with international nuclear nonproliferation. As you can see from this brief overview, LES is not only a strategic asset to provide energy resources and security for America, but is also a key employer and community partner for New Mexico.

Finally, please be advised that we intend to broaden the range of chemical constituents we routinely test for at our site boundaries to includes those types of chemicals that could be expected to result from an operation similar to the one proposed. We intend to establish this as a baseline. Should the application process for C.K. Disposal's proposed facility move forward, we will employ this monitoring on a routine basis to confirm applicable federal and state emission standards are continuously met.

Conclusion

As explained above, LES generally supports the need for this type of facility. However, LES, its employees and its visitors should not be subjected to new and unnecessary health and safety risks which C.K. Disposal's plans would expose them to by locating such a site adjacent to and directly upwind of LES, when: 1.) there's already a site doing this very nearby which does not

present new and unnecessary risks to our employees' and visitors' health or safety; and 2.) there's another application for a very similar disposal site which is further away from and downwind from the existing disposal site and our facility and hence would not subject LES' employees and visitors to new and unnecessary risks to their health and safety.

LES hereby respectfully requests that a complete copy of C.K. Disposal's application be sent to LES at the address below.

LES hereby respectfully requests an additional 60-day extension of time pursuant to 19.15.36.9.C NMAC, in order to further supplement this LES response with more thorough analysis upon LES receiving a complete copy of C.K. Disposal's Application.

LES hereby respectfully requests that LES be notified of OCD and commission hearing dockets going forward, all administrative activity regarding C.K. Disposal's application, and to be notified of OCD applications generally going forward.

Should the OCD tentatively grant a permit for the facility C.K. Disposal proposes, LES will respectfully file a hearing request with the OCD Clerk pursuant to regulation.

Again, LES appreciates the opportunity to comment on this important application, and **LES respectfully requests that the OCD deny C.K. Disposal's application for its proposed Surface Waste Management Facility.**

Sincerely,

David E. Sexton
President and Chief Executive Officer
URENCO USA
P.O. Box 1789
Eunice, NM 88231

Tel: +1 575 394 5215
Email: dave.sexton@urenco.com
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NOTICE OF APPLICATION
C.K. DISPOSAL – SURFACE WASTE MANAGEMENT FACILITY

Pursuant to 19.15.36, Oil Conservation Division Surface Waste Management Facilities regulations, C.K. Disposal is providing notice that the Oil Conservation Division (OCD) has deemed administratively complete an Application for Permit for a new Surface Waste Management Facility (C.K. Disposal). The Application for Permit was originally submitted to OCD by C.K. Disposal on 11/06/2015. Comments regarding the Application may be submitted to OCD within 30 days of Notice.

1. **Applicant's name and address:** C.K. Disposal, LLC, 5909 86th Street, Lubbock, Texas 79424
2. **Facility location and address:** C.K. Disposal E & P Landfill and Processing Facility is located in Lots 1 through 4 and the south half of the north half of Section 5, Township 22 south, Range 38 east, N.M.P.M., Lea County New Mexico. The site is 0.05-miles south of State Highway 234, approximately 4.16-miles southeast of Eunice, New Mexico.
3. **Brief description of surface waste management facility:** The facility will encompass a total of 316.97-acres with a landfill footprint of 141.50-acres, a liquid processing unit of 57.75-acres, and a saltwater disposal unit of 5.10-acres. At full build-out, the Processing Area will include an oil treatment facility consisting of an estimated 9 produced water load-out points, 12 produced water receiving tanks, 48 produced water settling tanks, 12 evaporation ponds, 5 crude oil recovery tanks, and 5 oil sales tanks; as well as 1 stabilization and solidification area. The landfill consists of six (6) cell that will have a combined disposal capacity of approximately 24,585,056-cubic yards. The landfill method will be below grade fill with 4H:1V side slopes and aerial fill with 5H:1V final cover side slopes, with a maximum 3.5% final cover top slope. The site estimated incoming waste for the life of the facility will vary from 500-cubic yards to 1,500-cubic yards of waste per day. In addition, various support facilities, including: a Processing Area Gatehouse, Landfill Scalehouse, waste acceptance/security features, roads, emergency shower and eyewash station, and stormwater detention basins are proposed for the new Facility. The C.K. Disposal surface waste management facility has been designed and permitted in accordance with NMAC 19.15.36.8 through 19.15.36.20.
4. **Depth and quality of shallowest aquifer:** Based upon information projected from nearby wells, the shallowest potential water-bearing zone in the vicinity is Chinle Formation, which is approximately 225-feet (ft) below ground surface (bgs) at the C.K. Disposal site. In addition, the C.K. Disposal site characterization boring investigation results demonstrate that no shallow groundwater is present above a depth of 150-feet bgs at any of the boring locations. Based on nearby wells, groundwater depth is approximately 225-feet below the site with a maximum TDS concentration of approximately 11,600-mg/L.

Interested parties may contact Jim Griswold, Bureau Chief, Oil Conservation Division at (505) 476-3465 for further information.

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4222 85th Street Lubboc

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urenco

Via personal delivery and via email to jim.griswold@state.nm.us

June 22, 2016

LES-16-00116-OCD

Mr. Jim Griswold
Bureau Chief, New Mexico Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, NM 87505

Mr. David Catanach
Division Director, New Mexico Oil Conservation Division
1220 South St. Francis Drive
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Subject: LES' Supplemental Comments to Proposed C.K. Disposal Surface Waste Management Facility

References:
1. Notice of Application C.K. Disposal –Surface Waste Management Facility
2. Letter from D. Sexton to J. Griswold and D. Catanach providing LES' initial response to Reference 1, dated 6/2/16.

Dear Messrs. Griswold and Catanach,

Louisiana Energy Services LLC ("LES"), dba URENCO USA ("UUSA") appreciates the opportunity to provide supplemental comments to Reference 2 regarding the proposed disposal facility South of LES' UUSA facility near Eunice New Mexico and the access you provided to the complete application. This access has allowed us to analyze the content of the application and provide more informed comments as noted herein.

As outlined in Reference 2, LES' UUSA facility is an internationally recognized facility that provides uranium enrichment services to customers worldwide. The safety and well-being of our employees and the local community is paramount to us. Additional information about UUSA is contained in Enclosure 2.

We acknowledge that the Permian Basin oil reserves provide enormous economic benefit to the Eunice area and to the state of New Mexico. For this reason, we fully support the oil industry. We're not against the permitting of a facility of the type proposed, within Lea County, however, we do have concerns with siting such a facility directly upwind of our site, which is manned 24 hours a day, 7 days a week and has 490 employees and contractors.

We want to ensure that the health of our employees and visitors is not affected by air concentrations of hydrogen sulfide and other airborne hazardous chemicals. Based on the permit application, the C.K. facility is expected to release levels of hydrogen

sulfide and other hazardous chemicals at levels that will be harmful to employees and visitors at the UUSA facility. Because our facility is manned continuously and will operate for at least the next 40 to 50 years, we have a large number of employees who could be exposed to the airborne discharge of such a facility for a very long period of time.

We want to ensure that our employees and visitors are not placed in an unsafe condition by increased road traffic and road conditions on NM HWY 176. This road is already heavily trafficked by trucks and daily vehicle traffic.

The UUSA process contains support systems that are essential to the operation of billions of dollars' worth of assets. These critical systems consist of several uninterruptable power supplies and over a hundred chiller units. Due to the current levels of sulfur compounds in the air, we have seen some degradation of electronic circuit boards that control these systems. The C.K. Disposal plant emissions will increase the hydrogen sulfide emissions and result in escalating repair costs and an amplified risk of loss to our process systems.

UUSA believes in the mission of the Lea County Energy Plex and is supportive of the oil and gas community, but the proposed location and health and safety concerns around it lead us to believe that such a project is better suited to a more remote area of the county that is not adjacent to a continuously occupied facility of strategic national interest.

UUSA's detailed comments are included as Enclosure 1. As you will see, review identified that C.K. Disposal's application is simply insufficient to conclude that it is an acceptable application or that C.K. Disposal's proposed facility can be constructed and operated in compliance with applicable statutes and rules and without endangering fresh water, public health, safety or the environment, and is therefore unacceptable per 19.15.36.12.A. NMAC. Instead, it is only possible to conclude C.K. Disposal's proposed facility presents detriment to fresh water, public health, safety and the environment per 19.15.36.12.B. NMAC.

Again, UUSA appreciates the opportunity to supplement its previous June 2, 2016 comments regarding this important application. Pursuant to 19.15.36.12.A. NMAC, UUSA requests that the OCD not issue a permit for C.K. Disposal's proposed facility. Similarly, and pursuant to 19.15.36.12.B. NMAC, UUSA further requests that the OCD deny the permit for C.K. Disposal's proposed facility.

Respectfully,

David E. Sexton
President and Chief Executive Officer
URENCO USA
P.O. Box 1789
Eunice, NM 88231

Enclosures:

1. URENCO USA Comments on the C.K. Disposal Facility Permit Application
2. About URENCO USA

CC:

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ENCLOSURE 1

URENCO USA Comments on the C.K. Facility Permit Application

I. C.K. Disposal's Proposed Waste Management Facility May be Detrimental to Fresh Water, Public Health, Safety, and the Environment and Should be Denied.

A. Detriment to Public Health and Safety

1. Increased public safety concerns arise due to the increase in congestion and other traffic related accidents and issues.

As Item 24 of the NMAC permit application indicates, the division may require additional information to demonstrate that the surface waste management facility will not adversely impact public safety. There is no assessment of traffic impacts due to waste delivery to the proposed facility contained in the permit application; therefore, the potential impact to public safety due to increased traffic has not been adequately addressed. Further, since both the proposed facility and the existing URENCO USA facility utilize the State Highway (NM 234, also known as NM 176 and Andrews Highway) as access points for their respective entrance gates and employees, the cumulative impacts of the facilities should be evaluated.

Specific Comments:

1) C.K. Disposal's permit application does not specify the number of anticipated waste shipments to the facility but has indicated a landfill capacity ranging from 500 cubic yards to 1,500 cubic yards per day. If the typical truck shipment to the site were 20 cubic yards, the number of additional truck trips on the Highway would range from 25 to 75 more trucks per day. Depending on the typical approach to the site (from east of west) there may be impacts and safety concerns for the public due to congestion at the nearest intersection. This truck traffic would be in addition to the normal truck traffic utilizing the highway to reach other destinations and in addition to the routine truck traffic to and from the URENCO USA facility located almost directly across the Highway from the proposed waste facility location. The current URENCO USA truck deliveries and shipments are about 7-10 per day, including shipments of radiological materials.

2) The permit application does not include an evaluation of the proposed location for the entrance to the facility from NM Highway 234 in relation to the existing main gate entrance for the URENCO USA facility. This is an area of potential traffic congestion due to the placement of the new proposed entrance.

3) There has been no evaluation of the individual or cumulative traffic impacts from employee vehicle traffic from the proposed facility or in combination with the adjacent facility for the combined impacts that may be experienced at certain times of the day especially at shift changes.

2. **The hydrogen sulfide emissions threaten public health.**

In addition to air emissions, the actual impact to human health should be evaluated to assure that the levels in the facility's application are protective and that appropriate monitoring will be conducted. The current proposed waste acceptance level and fence line concentration limit for H2S of 10 ppm is not protective of the public and must be lowered.

19.15.36.12(A) NMAC stipulates that new permits must be constructed to ensure and operated in a such a manner that does not endanger public health:

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

19.15.36.12(C) NMAC further states that:

> "The division may impose conditions or requirements, in addition to the operational requirements set forth in 19.15.36 NMAC, that it determines are necessary and proper for the protection of fresh water, public health, safety or the environment."

Finally, 19.15.36.17(B) states that:

> "The operator shall ensure each pit, pond and below-grade tank is designed, constructed and operated so as to contain liquids and solids in a manner that will protect fresh water, public health, safety and the environment."

The Application presents proposed methods for ensuring protection of public health and control of H2S odors in Attachment K. The Application states that a trigger level of 10 ppm H2S will be applied at the downwind property boundary, and that if levels exceed 20 ppm H2S at the downwind property boundary, emergency response, including facility evacuation, will take place. Furthermore, and as noted in Section 1, the Application states that all oilfield waste loads will be monitored for H2S upon arriving at the site. If H2S levels exceed 10 ppm, then treatment will be performed to reduce H2S levels prior to unloading shipments.

Specific Comments:

1) Although the Application indicates that H2S will be monitored at potential sources such as the evaporation ponds and at the property boundary, the Application does not indicate if H2S will be released from truck shipments that are being treated to reduce H2S. Furthermore, if H2S is released from trucks that are treated, the application does not indicate how such levels will be monitored at the downwind property boundary, which presumably is directly adjacent to the incoming waste treatment area.

2) The Application does not provide any information concerning the nature of the response actions that will be instituted at neighboring properties if the monitoring If the H2S threshold is exceeded at the property boundary, or how the response actions will be coordinated (e.g., through MOUs, or access agreements.).

3) The Application does not provide any modeling estimates of H2S liberation or downwind migration. Consequently, the response and contingency plan cannot be placed into context with the likelihood of incurring the need for a response action.

4) The Application does not state whether emergency evacuation requirements are limited to the employees of the applicant or if mandated evacuation of adjacent businesses would be required. Federal regulations imposed on UUSA for the control of special nuclear material require 24 hours a day, 7 days a week continuous protection. Complete evacuation of our facility under any circumstances is not allowed. Further, the Application does not define any detection means, protective actions or emergency actions for an airborne release in excess of proposed limits during non-work hours when the facility is not open.

5) The 10 ppm threshold for H2S is not protective of public health for workers in neighboring properties. The odor threshold for H2S is 0.01 to 1.5 ppm; this is the range of concentrations where people can detect a rotten egg smell from H2S[1]. The odor becomes offensive in the 3 to 5 ppm range. Prolonged exposure to H2S concentrations in the 2 to 5 ppm range can cause nausea, tearing of the eyes, headaches, loss of sleep and airway problems (bronchial constriction) in some asthma patients[2]. Moreover, NIOSH stipulates a recommend exposure limit of 10 ppm for a 10 minute continuous exposure, after which exposure mitigation is recommended[3]. Similarly, the American Conference of Government Industrial Hygienists (ACGIH) stipulates a threshold limit value (TLV) of 5 ppm for a 15 minute continuous exposure, after which exposure mitigation is recommended.

These values, however, are intended to be applied to individuals who work with H2S as part of their employment, and who have been informed of H2S hazards as part of the workplace right to know regulations. For individuals that are not working with H2S as a component of their occupation, non-occupational standards apply. USEPA recommends a long-term time-weighted average (TWA) not to exceed value of 0.006 ppm[4] based on adverse effects to the nervous and respiratory systems[5]. USEPA also recommends a 24-hour TWA not to exceed 0.07 ppm based

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[1] OSHA Safety and Health Topics: Hydrogen Sulfide. www.osha.gov/SLTC/hydrogensulfide/hazards.html
[2] ibid
[3] Centers for Disease Control, National Institute for Occupational Safety and Health (NIOSH). http://www.cdc.gov/niosh/npg/npgd0337.html
[4] USEPA Regional Screening Levels. Composite Worker Air. https://www.epa.gov/risk/regional-screening-levels-rsls-generic-tables-may-2016
[5] Integrated Risk Information System. Hydrogen Sulfide. https://cfpub.epa.gov/ncea/iris2/chemicalLanding.cfm?substance_nmbr=61

on the threshold concentration that produces an allergic response in sensitive human populations[6].

To meet these requirements, the threshold levels at the property boundary must be lowered to be protective of public health. The design, operation and emergency response need to take the requirements into consideration.

B. Detriment to Air Quality, the Environment, and Fresh Water

1. **The air pollutant emissions, based on the type and amount of waste material planned for disposal, pose a threat to the air quality and need to be closely monitored.**

With respect to air emissions, the permit application does not quantify potential or expected actual emissions of regulated air pollutants. The construction and operation of an industrial facility in the State of New Mexico requires an evaluation of whether an air permit is applicable and required for the intended operation [New Mexico Administrative Code (NMAC) 20.2.72 addresses Statewide Air Quality Construction Permitting requirements and NMAC 20.2.73 addresses Notice of Intent and Emissions Inventory Requirements. Both regulations require the quantification of hourly and annual emissions of regulated air pollutants including Nitrogen Oxides (NOx) Carbon Monoxide (CO), Volatile Organic Compounds (VOCs), Sulfur Oxides (SOx), Total Particulate Matter (TSP), Particulate Matter less than 10 microns (PM10), Particulate Matter less than 2.5 microns (PM2.5), Hydrogen Sulfide (H2S), and Lead. However, the New Mexico air regulations 20.2.72.402(C)(5) specifically exempt Oil & Gas production facilities from being regulated under the state's "Toxic Air Pollutants' program. Oil & Gas production facility is defined under 202.72.401(F) as "facilities for the exploration, development, production, treatment, separation, storage, transport, and sale of unrefined hydrocarbons, natural gas liquids, and CO2 (e.g., major SIC group 13, oil and gas extraction, SIC industry group no. 4612, crude, petroleum, pipeline and SIC industry no. 4922, natural gas transmission)". Regardless of the exemption, a new facility would need to apply for an air construction and operating permit for all other regulated air pollutants, noted above. Please note that it does not appear to meet the definition of an Oil & Gas production facility as 'landfill and water treatment' are not listed and the Standard Industrial Classification (SIC) or North American Industry Classification System (NAICS) codes are not provided in the facility's application.

Specific Comments:

1) Fundamental to the permitting process is the calculation of potential emission rates of any regulated air contaminant emitted by the source. The permit application attempts to address odor issues for hydrogen sulfide (H2S), but does not quantify or address emissions of particulate matter, volatile organic compounds (VOCs), or hazardous air pollutants (HAPs). Quantifying the level of emissions from proposed evaporation ponds, air stripper, truck loading/unloading and tank venting should be addressed.

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[6] Agency for Toxic Substances and Disease Registry (ATSDR). Acute Minimum Risk Level for hydrogen sulfide. http://www.atsdr.cdc.gov/mrls/pdfs/atsdr_mrls.pdf

2) The stated purpose of the evaporation ponds and the water processing operation is to generate marketable water. The application notes that "volatiles and dissolved gasses can be problematic in other treatment activities as well as oil and gas use. The treatment goal of the stripping tower is to minimize these harmful constituents in effluent water" and "at this time, expected air would simply be off-gassed to the ambient atmosphere." This process includes a seven-foot diameter air stripper whose air emissions are not completely described and remains unquantified. The permit also states that iron compounds, manganese compounds and chlorides are anticipated corrosives in the waste stream. These would likely be emitted to the air in addition to any volatiles and should be addressed.

3) The application does not anticipate or address any air dispersion modeling. The state of New Mexico has recently published draft guidance for the oil and gas production industry to streamline the air permitting of compressor stations. The draft guidance specified that modeling is not required if the facility meets several requirements including that H2S emissions not exceed 0.01 pounds per hour (lbs/hr) and the facility not be located at least 2,634 feet (or 800 meters) from a source that emits over 25 tons per year of NOx. Although this is not a direct correlation, as the application for a disposal and processing facility is not the same as a compressor station; emission levels and air dispersion modeling should be addressed in the application to determine if the emission rate from the facility meets applicable standards.

4) The application proposed to monitor H2S in the headspace (presumably) of delivery containers. This screening method does not directly correlate to quantities processed by the facility or the emission rates anticipated from the operations at the proposed facility. A trigger level of 10 parts per million (ppm) and a treatment to 1 ppm in the headspace does not quantify the VOC and H2S concentrations in the material itself. The emissions generated by processing the material cannot be correlated to headspace concentrations at the time of delivery.

5) With respect to air emissions, if the water processing unit operates at the levels included in the application (12,000 barrels per day, 24 hours per day, seven days per week) and assuming a VOC concentration of 200 ppm, the annual potential emissions of a 90% efficient stripper exceed 130 tons per year. The potential emissions of VOCs are greater than the 100 tons per year major source limit and therefore would require a Title V air permit. This permit was not noted in the facility's application.

2. The evaporation ponds that collect contaminated discharge pose an ecological risk

The New Mexico environmental regulations state that "The application shall include.... other information that the division may require to demonstrate that the surface waste management facility's operation will not adversely impact fresh water, public health, safety or the environment...." (NMAC 19.15.36.8C (17)). The proposed development of this facility has not addressed potential impacts to the immediate environment caused by the construction of the 317-acre facility.

Areas subject to surface disturbance should be evaluated for the presence of sensitive habitat and/or Rare, Threatened, or Endangered species. This is usually accomplished through the completion of some type of biological inventory and clearance. An on-the-ground inspection by a qualified biologist should be required to quantify, using elementary survey sampling techniques, the types and numbers of plants, mammals, birds, reptiles and amphibians. In cases where sensitive species are affected, the preferred response would be to modify the proposed action to avoid the species or its habitat (avoidance). If avoidance of a threatened, endangered, or sensitive species or its habitat is not possible, consultation with USFWS would be required and a biological assessment would be prepared to recommend actions to protect the species or its habitat. A list of species that the biologist should be aware of can be obtained from the New Mexico Department of Fish and Game (e.g. "Threatened and Endangered Species of New Mexico").

In addition to the requirements above, ponds attract migratory birds. In Section 1.9 of the Permit application, C.K. Disposal, LLC states the following:

> "C.K. Disposal LLC herein requests an exception to 19.15.36.13.I NMAC. The Migratory Bird Protection Plan presented as describes an alternate methodology to the screening requirement of the storage ponds. This Plan describes visual inspections and migratory bird retrieval and clean up procedures should bird(s) require decontamination."

There was no indication in the Permit application that a detailed "Migratory Bird Protection Plan" was presented. The southeastern region of New Mexico is an important component of the "Central Flyway" and therefore, since significantly large ponds will be present, these waterbodies will undoubtedly attract migrating waterfowl that have been observed in southeastern New Mexico including ducks, geese, herons, pelicans and swans.

Specific Comments:

1) C.K. Disposal should institute and plan Best Management Practices for the protection of migratory birds. The application states that "Visual inspections" and "migratory bird retrieval and clean up procedures" will be conducted, however these will not protect migratory birds from the exposure to environmental contaminants. At a minimum, personnel trained in the capture, handling and/or cleaning of birds will be necessary within a reasonable time frame if a bird is in jeopardy.

2) Birds at the disposal facility may be exposed to environmental contaminants that could affect individuals by reducing reproduction or survival. The uptake of contaminants from ponded environments is of particular concern. Contaminants in soils may erode and become concentrated within ponds. These metallic and organic compounds accumulate in aquatic sediments and also may accumulate or biomagnify in the tissues of aquatic organisms. The facility should conduct routine and scheduled sampling of surface water and sediments and action should be taken if concentrations are above some predetermined regulatory benchmark. Best management practices for contaminants should include the ongoing evaluation of ecological risks and the communication of any risks to management. An ecological risk assessment should be included in the permit application to help prioritize future environmental remediation.

3) Mitigation measures for environmental contaminants may include identifying and reporting birds that are found with deformities or areas with high numbers of unexplained bird mortality. The proposed evaporation ponds that receive contaminated effluents should be evaluated for risk to bird species such as swallows which make heavy direct use of ponded waters and associated insects. If these ponds present an unacceptable risk, they should be covered so that they are unavailable to migrating species. Regular maintenance should be conducted to ensure covered ponds remain unavailable. Ecological risk assessments should consider impacts of contaminants to migratory birds most at risk. Information from these assessments should be used to prioritize mitigation of ecological risk. Finally, the use of integrated pest management techniques to minimize the use and exposure to pesticides should be considered.

3. Groundwater is threatened by inadequate testing and monitoring.

In general, the application (Attachment G – Hydrogeology Report) presents the geology and hydrogeology of the region with only limited site data. Five soil borings were completed, but no soil or groundwater samples were collected to support this evaluation.

Section 3.4 of Attachment G states that because the facility is "not permitted and thus has no existing groundwater wells, there is no existing analytical data". Groundwater wells should be installed in support of the permit process and to obtain site specific data. Instead of relying on published data from the region, quarterly groundwater samples should be analyzed for the constituents required by OCD and should be collected for a minimum of one year, to be able to evaluate seasonal fluctuations, and establish baseline conditions. Furthermore, the groundwater wells would also provide information on the physical properties of the aquifer below the facility.

Although no groundwater monitoring wells were installed, or are proposed to be installed, the facility has proposed a Vadose Monitoring Plan (Attachment H).

This plan is based on sentinel shallow vadose monitoring points to be installed around the facility. A simple vadose model (such as HYDRUS-1) should be employed to model potential releases and to evaluate if the plan is appropriate for the setting and amount and types of materials that could be released to the environment. Unfortunately, the soil properties needed for such a model (and required by OCD) were not collected and were not found in published literature for the shallow Ogallala Formation. As noted in Section 3, these data should be collected and then used to evaluate potential contaminant migration in the vadose zone before the Vadose Monitoring Plan (Attachment H) and Sampling Plans (Attachment I) are approved.

II. The Division Should Not Approve C.K. Disposal's Unacceptable Application, Because It Fails to Identify or Address the Information Necessary for a Proper Evaluation.

A. The geology and hydrogeology data provided in the application, is insufficient to establish base line data for the permit and fails to meet the application requirement—under Subsection C(15) of 19.15.36.8. NMAC.

Item 22 of the OCD Application for a Surface Waste Management Facility requires the following site-specific information be included in the application so that the base line data is understood. These requirements are provided below, including an evaluation to determine if each were met:

1) A map showing names and locations of streams, springs, or other watercourses, and water wells within one mile of the site.

   Although this is a desert setting and there are few, if any, surface water features, the scale of the map is difficult to read.

2) Laboratory analyses performed by an independent commercial laboratory, for major cations and anions, benzene, toluene, ethyl benzene, and xylenes (BTEX), RCRA metals, and total dissolved solids (TDS) of groundwater samples of the shallowest fresh water aquifer beneath the proposed site;

   No groundwater samples were collected from the site. A total of five (5) soil borings were completed to 175 feet below ground surface (bgs), knowing that groundwater was encountered at approximately 225 feet bgs. Site specific data should be collected for at least four (4) quarterly rounds to establish a baseline for groundwater quality of the shallowest freshwater aquifer. Samples should be submitted to an independent commercial laboratory for analysis of the parameters listed above.

3) Depth to, formation name, type and thickness of the shallowest fresh water aquifer;

   A detailed geologic description of the region is provided in the application; however, it is based on published literature and boring logs conducted by others. The site characterization effort did complete five borings on site to characterize soils, but each boring was terminated in the Ogallala formation, and was not completed to a sufficient depth to characterize the Chinle formation where the shallowest freshwater aquifer is encountered. Furthermore, as noted before, soil samples were not collected to meet the requirements of Item 7, below.

4) Soil types beneath the proposed surface waste management facility, including a lithologic description of soil and rock members from ground surface down to the top of the shallowest fresh water aquifer;

   As noted above, the application refers to published literature to describe the geology and lithology of the soil and rock members below the proposed facility. Borings completed were terminated in the Ogallala Formation and did not extend into the shallowest aquifer.

5) Geologic cross-sections

   Geologic cross sections were completed, however because the borings were not completed in the Chinle, they do not represent hydrogeologic conditions, but rather the

soils above the water table and therefore do not extend to the depths needed to adequately present site conditions.

6) Potentiometric maps for the shallowest fresh water aquifer

   Potentiometric maps for the site included previously published maps for the site of Eunice and do not extend to the proposed facility. Groundwater wells and contour maps should be developed for the site to establish groundwater flow direction and support a baseline evaluation to characterize groundwater. This is specifically important as the facility plans groundwater injection as part of its process, making the baseline data critical in the evaluation of potential environmental impacts.

7) Porosity, permeability, conductivity, compaction rations and swelling characteristics for the sediments on which the contaminated soils will be placed.

   No soils data were analyzed from the borings and instead, previously published values were used from regional borings. These are not site-specific, as local conditions may vary. Furthermore, the soil properties of porosity, specific capacity and storativity for the Ogallala formation (the shallow formation that will underlie the facility) were not listed. These are several of the parameters that are critical for vadose modeling.

In addition to not meeting the minimum requirements specified by the permit application, the facility is also planning for groundwater injection. However, there are no groundwater models to evaluate how this process could impact the current hydrogeology, nor is there mention for a permit for conducting such activities.

B. Financial assurances estimates in the application are unsatisfactory and fail to properly address the application requirements of a closure and post-closure plan—under Subsection C(9) of 16.15.36.8. NMAC.

As part of the permit application requirements, the facility must provide a cost estimate for closure activities. The permit application offers $2.3 million for closure activities with the financial assurance maintained by bond, letter of credit, trust, or other forms acceptable under NMAC 19.15.36.11.E). Although the application states that the specific method of financial assurance will be determined later, we believe that this cost is conservatively low and omits several significant items. Following are some examples potential under estimation of closure cost for the Oil Treating Plant, Landfill Cell, and Pond Closures. Please note that the specific comments are based on the costs provided in the application.

Oil Treating Plant Closure

1) The permit offers a cost of $25,000 for the removal of the tanks. Per the Site Operations Plan, the total tankage on the completely built out facility will include:
   - 16 produced water tanks (1,000 bbl each)
   - 48 settling tanks (1,000 bbl each)
   - 5 crude oil recovery tanks (1,000 bbl each); and

- 4 oil sales tanks (1,000 bbl each)

Per NMAC 19.15.36.18(D)(1)(a), this item must include that all tanks be emptied, cleaned and removed (disposed of, re-used or recycled). All wastes from the cleaning must be disposed of at an approved facility. The cleaning and disposal of 73 tanks (totaling over 3 million gallons of storage) will cost significantly more than $25,000. It is our opinion that $25,000 is closer to the cost for a single tank (including cleaning, dismantling, transportation & disposal of contents and cleaning solutions, and removal and transportation of the tank) and does not represent the projected costs of all tank closure.

2) The permit offers a cost of $25,000 for the closure and removal of Process Equipment. Per the Site Operations Plan, the total process equipment at the built-out facility may include:
   - One Boiler;
   - Four Mechanical oil-water separation units;
   - One Air Stripping Tower;
   - Four Greensand Filters;
   - One Reverse Osmosis unit; and
   - An unknown amount of process piping.

   Per NMAC 19.15.36.18(D)(1)(a), this item must include that all process equipment be emptied, cleaned and removed (disposed of, re-used or recycled). All wastes from the cleaning must be disposed of at an approved facility.

   The cleaning and disposal of 11 pieces of process equipment will cost significantly more than $25,000. It is our opinion that $25,000 is closer to the cost for a single piece of equipment (including cleaning, dismantling, transportation & disposal of contents and cleaning solutions, and removal and transportation of the equipment).

3) The permit estimates $10,000 for earthwork. The tasks included in earthwork are not clearly defined, however, it is assumed that the earthwork task may include the following items, which would appear to be required under NMAC:
   - Removal of receiving tank liner system;
   - Removal of tank and equipment foundations;

   There are likely additional earthwork tasks regarding the treatment area. However, even these small tasks would typically cost more than the $10,000 allocated.

4) There are no costs for the required soil sampling and analysis:
   Per (NMAC 19.15.36.18(D)(1)(b)):

   "the site is sampled, in accordance with the procedures specified in chapter nine of EPA publication SW-846, test methods for evaluating solid waste, physical/chemical methods, for TPH, BTEX, major cations and anions and RCRA

metals, in accordance with a gridded plat of the site containing at least four equal sections that the division has approved"

Based on the size and various operations at the site, it is also likely that substantially more than the minimum four sections will be required to meet the closure requirements.

Landfill Cell Closure

The Financial Assurance estimate only includes the closure of one 23.6 acre cell of the landfill. In order to meet the permit requirements, the costs to close the full facility (approximately 142 acres) must be included. This is relevant in the case of a closure initiated by the agency or abandonment.

Unit costs for many of the cap construction elements appear conservatively low. The estimate includes an area which is nearly exactly 23.6 acres and does not account for side slopes, which will increase the surface area over an aerial determination of 23.6 acres when shown in plan view. While we disagree with the assumption of only using 23.6 acres, the estimate accounts for an area that is 80% side slope and only 20% of the more costly "cap". This is a very specific situation which reduces closure costs substantially (4.66 acres of geomembrane and geocomposite in the 23.6 acre closure). Other specific comments pertaining to the cost estimated are provided below:

1) Infiltration layer (24")
   - Standard compaction of the sand layer is not included in the estimate. 7.5% additional sand is standard practice.
   - Costs for the sand layer are extremely low. Costs must include:
     - Purchase (borrow) and hauling of sand layer (For comparison RSMeans 310516100500 for load at pit, haul 2 mile round trip, spread with 200 HP dozer shows $30.56 per LCY for Roswell). It is anticipated that costs would be higher due to a longer haul
     - Compaction: Compaction costs are not included (RSMeans 312323240400 for sheepsfoot roller, 8" lifts, select fill shows $1.35 per ECY for Roswell).

2) Soil Erosion layer (12")
   - Soil must be imported in order to support vegetation.
   - Costs for the soil layer are extremely low. Costs must include:
     - Purchase (borrow) and hauling of the topsoil (Means 310513100800 for topsoil borrow, weed free, load at pit, haul 2 mile round trip spread with 200 HP dozer shows $35.59 per CY for Roswell).
     - Compaction Costs should be similar to those for the sand infiltration layer.

3) Missing costs. There are no costs presented for the following items:
   - Establishment of Vegetative Cover. Specific requirements are in place in NMAC 19.15.36.18(D)(2)(b), for vegetative cover, including type and coverage. (Means

329219131000 shows mechanical seeding for large areas including lime, fertilizer and seed at $0.68 per square yard for Roswell - $78k for one cell and $467k for entire landfill)
- With the potential for H2S gas in the landfill components, the lack of installation of a gas control layer is a concern.

Pond Closure

The Cost Estimate seems to underestimate many of the quantities and costs associated with the evaporation pond closures. According to the design drawings, each pond it approximately 400' by 200' (80,000 sf) at the surface. There are 12 ponds on the facility, for a total area of evaporation ponds of 960,000 square feet. The removal and disposal of liquids is estimated at 286 bbl (or 8,608 gallons, or 1,151 cubic feet). This would equate to approximately 0.01" (one one-hundredth of an inch) of water across the areas of the pond). It is more likely that the water that needs to be removed from the ponds after operations have ceased will be measured in feet and not hundredths of an inch. One foot of water across all ponds would equate to approximately 238,000 bbl of water.

1) The removal and disposal of sludge is estimated at 4,444 tons. Using an approximation of 1.5 tons per cubic yard, this is a total of approximately 3,000 cubic yards or 81,000 square feet. This would be approximately 1" of sludge across the area of the ponds. It is more likely that the amount of residual sludge in the ponds will be measured more in feet of sludge than inches.

2) The transport and disposal cost of $21.50 per ton appears low. Based on the required haul distance as well as the anticipated characteristics of the waste, the transportation and disposal costs are anticipated to be much higher.

3) The omission of backfill fill material (e.g., 0 cubic yards) that will be required for the pond backfill and contouring is of concern. It is not believed that suitable backfill material will be available on-site. The placement and compaction of only 11,853 yards (approximately 4" deep over the area of the 12 ponds) also seems to be an underestimation of what is required.

Post-Closure Cost Estimate

Per NMAC 19.15.36.18, the following elements must be included in the post-closure of a landfill for a period of 30 years:

- Maintenance of cover integrity;
- Maintenance and operation of a leak detection and leachate collection and removal system; and
- Operation of gas and groundwater monitoring systems.

Comments on estimate:

1) Engineering Estimate:
   - Vadose zone monitoring/lab/reporting costs are low. The task must include obtaining the sample, shipping the sample to the laboratory, analyzing the sample and provide an annual report of the results to the agency, comparing the results to standards. A cost of $400 per sample appears low for this.
   - Groundwater sampling/analysis/reporting is not included in this estimate. Identical types of costs as for the vadose monitoring must be included. As noted above, there are no existing groundwater monitoring wells on site, and no wells are proposed. Site specific groundwater data must be obtained so that closure activities may document changes to groundwater quality as a result of facility operations.

2) Construction and Maintenance Costs
   - Cap and Side slope repair costs seem low, as the proposed cost of $3,000 per year for 126 acres of cap. Assuming that one membrane repair or revegetation is required each year over the 30 years, it is unlikely that $3,000 would cover the cost of a cap repair. Revegetation of even 1% of the landfill (approximately 1 acre) per year would exceed the annual budget, outside of heavy equipment and earthwork required for cap or side slope repair.
   - Mowing costs of $25 per acre seem low. For comparison, RSMeans 320190191660 for Mowing brush, light density, tractor with mower, shows a cost of $48.84 per 1,000 sf.
   - No costs, as required, for the operation and maintenance of the leak detection system are included in the estimate.

3) Leachate Management

   - No costs are included for the operation or maintenance of a leachate recovery system.
   - The HELP model indicates significant volumes of leachate will be generated, as part of the permeable sideslopes proposed in the design. The $4,000 per year is not sufficient for the removal and disposal of tens of thousands of gallons of leachate that will be generated. Substantially more costs for operations and maintenance of a leachate removal system, and transportation and disposal of the collected leachate will be required.

Overall, the cost estimate for closure is likely substantially understated in the permit application, and therefore will require far less financial assurance putting NMED at risk. The estimate should be revised to include all required activities and to be inclusive of all structures that will be removed, or areas to be capped or backfilled. The estimate should also include realistic values for each proposed action.

III. Closing

The permit application submitted for C.K. Disposal lacks technical merit for several important categories and does not have a baseline dataset to be able to evaluate how the proposed operations may impact the environment.

Additionally, as UUSA has demonstrated, C.K. Disposal's application is simply insufficient to conclude that it is an acceptable application or that C.K. Disposal's proposed facility can be constructed and operated in compliance with applicable statutes and rules and without endangering fresh water, public health, safety or the environment, and is therefore unacceptable per 19.15.36.12.A. NMAC. Instead, it is only possible to conclude C.K. Disposal's proposed facility may be detrimental to fresh water, public health, safety and the environment per 19.15.36.12.B. NMAC.

Pursuant to 19.15.36.12.A. NMAC, UUSA requests that the OCD not issue a permit for C.K. Disposal's proposed facility. Similarly, and pursuant to 19.15.36.12.B. NMAC, UUSA further requests that the OCD deny the permit for C.K. Disposal's proposed facility.

ENCLOSURE 2

About URENCO USA

- UUSA represents a 5 billion dollar investment made by our parent company, URENCO LTD, based in Stoke Poges, England. The Eunice NM facility is one of 4 enrichments plants owned by URENCO Ltd. The other plants are located in the Netherlands, Germany and the United Kingdom.

- The plant is a strategic national asset for nuclear enrichment and currently provides for over 5% of total electricity use nationwide.

- UUSA actively participates with the federal government in projects to deter nuclear proliferation.

- UUSA routinely host visitors from the local community, all government agencies and positions, from across the US and other many other countries. Typically, UUSA hosts 1000 visitors annually.

- UUSA is an industry leader in employee benefits and compensation. UUSA provides life, health, vision, dental, disability and pet insurances. 401K, Roth and company pension retirement plans are also provided. Additionally, Employee Assistance and Legal Assistance programs are available. A gym and fitness center is located on site for employee use with focus on health and wellness.

- Currently the largest contributor to the Lea County United Way. Over $1,400,000 has been donated since 2008.

- Awards $150,000 in college scholarships annually and offers summer internships to approximately 20 students annually.

- Company employees annually present science workshops at surrounding schools. In 2015, 150 employees presented to 2100 students.

- Hosts a variety of community events. Some examples are the Women's Symposium, United Way Chili Cook-off, Robotics Expo and LEGO League.

- Each year, around September 11, employees volunteer to help local families with home maintenance and repair. All materials are provided by URENCO USA. Since 2008, employee volunteers have repaired 135 homes.

Griswold, Jim, EMNRD

From: Brancard, Bill, EMNRD
Sent: Wednesday, December 28, 2016 11:56 AM
To: Bada, Cheryl, EMNRD; Catanach, David, EMNRD
Cc: Sayer, Matthias, EMNRD
Subject: FW: Case No. 15617; Applicant's Response to Motion for Continuance
Attachments: Applicant's Response to Motion for Continuance.pdf

CK Disposal's response to motion for continuance.

From: Davidson, Florene, EMNRD
Sent: Wednesday, December 28, 2016 11:36 AM
To: Brancard, Bill, EMNRD <bill.brancard@state.nm.us>
Subject: FW: Case No. 15617; Applicant's Response to Motion for Continuance

Bill, here is a response to the motion for continuance.

From: Mike Woodward [mailto:mwoodward@hslawmail.com]
Sent: Wednesday, December 28, 2016 11:26 AM
To: Davidson, Florene, EMNRD <florene.davidson@state.nm.us>
Cc: Brooks, David K, EMNRD <DavidK.Brooks@state.nm.us>; hbohnhoff@rodey.com; CLoehr@rodey.com; Wes McGuffey <wmcguffey@hslawmail.com>
Subject: Case No. 15617; Applicant's Response to Motion for Continuance

Dear Ms. Davidson,

Attached to this communication is Applicant's Response to the Motion for Continuance in Case No. 15617, "In the Matter of the Application of C.K. Disposal, LLC for Permit to Construct and Operate a Commercial Surface Waste Management Facility, Permit No. NMI – 61".

Thank you.

Mike Woodward

Michael L. Woodward
Attorney

HANCE SCARBOROUGH, LLP
ATTORNEYS AND COUNSELORS AT LAW

Hance Scarborough, LLP
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512-479-8888 office
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mwoodward@hslawmail.com
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STATE OF NEW MEXICO
ENERGY MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

CASE NO. 15617

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

APPLICANT'S RESPONSE TO PROTESTANT URENCO'S MOTION FOR CONTINUANCE

COMES NOW, CK Disposal, LLC ("Applicant"), and files this Response to URENCO's ("URENCO" or "LES") Motion for Continuance of the hearing on the referenced Application of CK Disposal, LLC currently set for January 9–11, 2017.

I. INTRODUCTION AND SUMMARY

Applicant generally accepts URENCO's description of the background of this matter in the Motion for Continuance, but disputes the characterization that the matter has "progressed without any apparent or claimed urgency" thus no party will be prejudiced by the requested delay. Applicant has invested hundreds of thousands of dollars preparing the application that is the subject of this proceeding, and at substantial cost has worked through the administrative and technical review of the application in as diligent a manner as possible. Delay of the hearing on this matter would delay the ultimate decision on whether to approve the application and grant the permit, thus would further delay the prospect of obtaining any return on capital invested into the project. Simply put, time is money, and delay would cause prejudice to the Applicant by requiring Applicant to expend additional money than has already been expended on the project, while simultaneously delaying the Applicant's potential to obtain a return on its investment.

Applicant objects to any unnecessary delay in the evidentiary hearing and decision whether to approve the subject application. URENCO admits in its Motion for Continuance that it has been aware of this application since before June of 2016, when it filed extensive technical comments objecting to the proposed facility. URENCO also received notice of the Oil Conservation Division's ("OCD") tentative decision to approve the application in October, 2016, and subsequently filed a request for hearing. Thus, URENCO cannot claim surprise that an evidentiary hearing is now scheduled.

II. RESPONSE

Notice of hearing has been properly issued by the Oil Conservation Commission ("OCC"). Proper web posting, proper mailed notice, and proper newspaper published notice has occurred per 19.15.4.9(B) NMAC. URENCO admits in its Motion for Continuance that the hearing notice was published online on December 20, 2016, and that newspaper notice was published in a Hobbs newspaper on December 16, 2016. URENCO's argument that it did not *receive* the mailed notice by December 20, 2016 ignores the general "mailbox rule" that deposit of an item in the mail constitutes delivery completion, and also ignores the fact that URENCO received notices online and through the newspaper.

URENCO's additional claims that Applicant is required to mail or publish duplicative notices of hearing are also in error, because no further notice is required beyond the notice of application and notice of hearing discussed above. *See* 19.15.4.12(E) NMAC ("In the case of an administrative application where the required notice was sent and a timely protest was made, the division shall notify the applicant and the protesting party in writing that the case has been set for hearing and the hearing's date, time and place. No further notice is required.") This matter involves an administrative application in which the required notice was sent and a timely protest was made.

The division has notified the applicant and protestants in writing that a hearing has been set for a certain date, time and place. Therefore, no further notice is required under the express terms of 19.15.4.12(E) NMAC, and URENCO's claim that 19.15.4.12(B) NMAC requires additional notice is in error.

Accordingly, sufficient notice has been issued to convene the subject hearing on January 9, 2016 in Eunice. However, as suggested below, Applicant is agreeable to a one-month continuance in order to facilitate holding the hearing on the merits in Santa Fe, rather than Eunice.

III. SUGGESTED PATH FORWARD

Applicant is agreeable to a continuance of one month or less if the evidentiary hearing is moved to Santa Fe. Accordingly, Applicant respectfully suggests OCC issue new notice of public hearing and convene the public hearing in Santa Fe on or before February 6. A hearing in Santa Fe rather than in Eunice, will provide a more convenient forum for the parties involved in the evidentiary hearing, most notably for the members of the OCC and the staff of the OCD who have their principal offices in Santa Fe.

Applicant respectfully concurs with the URENCO's Motion for Continuance on the condition that the hearing be rescheduled to begin no later than February 6, 2016 in Santa Fe. Alternatively, should the OCC determine that it is not in favor of holding the hearing in Santa Fe prior to February 6, 2016, Applicant respectfully requests that Protestant URENCO's Motion for Continuance be denied outright.

IV. CONCLUSION

Sufficient notice has occurred to convene the public hearing on Case No. 15617, Application of CK Disposal, LLC for a Commercial Surface Waste Management Facility Permit in Lea County, New Mexico. In an effort to accommodate the parties, Applicant respectfully

agrees to a one-month continuance on the condition that the public hearing be convened in Santa Fe, New Mexico no later than February 6, 2016. Alternatively, Applicant would request that Protestant URENCO's Motion for Continuance be denied.

Respectfully submitted,

HANCE SCARBOROUGH, LLP

Michael L. Woodward
Wesley P. McGuffey
NM State Bar No. 148103
400 West 15th Street, Suite 950
Austin, Texas 78701
Tel: 512.479.8888
Fax: 512.482.6891

CERTIFICATE OF SERVICE

I hereby certify that the above pleading was served on the following parties by electronic mail on December 28, 2016.

David K. Brooks — *Attorney for Oil Conservation Division*
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 S. St. Francis Drive
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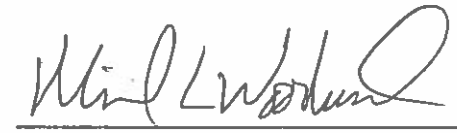
Email: cloehr@rodey.com

Attorneys for Louisiana Energy Services, LLC dba URENCO USA



Michael L. Woodward

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

FINAL AGENDA AND DOCKET
NEW MEXICO OIL CONSERVATION COMMISSION MEETING
February 8, 2017
9:00 A.M.
Wendell Chino Building
Porter Hall
1220 S. St. Francis Drive
Santa Fe, New Mexico 87505

The following items are for discussion and possible action:

1. Roll Call.

2. Approve the Agenda.

3. Approve minutes of January 9, 2017 meeting.

4. Final Action may be taken in:
***Case No. 15487*:** **Application of the New Mexico Oil Conservation Division through the supervisor of District II for adoption of special rules for drilling in certain areas, for the protection of fresh water, Chaves and Eddy Counties, New Mexico**
***Case No. 15437*:** **Application of Caza Petroleum, Inc. for a non-standard oil spacing and proration unit and compulsory pooling, Lea County, New Mexico**

5. ***Case No. 15617*:** *(Continued from the January 9, 2017 Commission Meeting.)*
Application of CK Disposal, LLC for a Commercial Surface Waste Management Facility Permit in Lea County, New Mexico. CK Disposal, LLC has applied with the Oil Conservation Division for a permit to operate a surface oil field waste management facility pursuant to 19.15.36 NMAC. The proposed facility will be located within the **North ½ of Section 5, Township 22 South, Range 38 East NMPM**. The waste management facility is intended for the permanent disposal of exempt and non-exempt/non-hazardous oil field waste and will include a liquid waste processing area on 51.75 acres, a possible deep well water injection unit on 5.1 acres, and a landfill on 141.5 acres. The remaining 118.62 acres incorporates buffer areas, site structures, and access roads. The landfill will have a waste capacity of approximately 24.6 million cubic yards. The Director of the Oil Conservation Division is scheduling a hearing on the application pursuant to 19.15.36.10(A) NMAC and before the Oil Conservation Commission pursuant to 19.15.4.20 NMAC. The hearing shall be conducted in accordance with 19.15.4 NMAC.

6. Status report by representatives of the Division and Geolex, Inc. on events concerning acid gas injection well replacements at Targa Midstream's Monument Gas Processing Facility, Lea County, NM [Informative presentation only].

7. Next meeting: February 28, 2017.

8. Adjournment.

If you are an individual with a disability who needs a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, contact Florene Davidson at least ten days prior to the meeting or as soon as possible at 505.476.3458 or florene.davidson@state.nm.us. Public documents can be provided in various accessible formats. Contact Florene Davidson if accessible format is needed.

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

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 PRE-HEARING STATEMENT

The Chief of the Environmental Bureau of Oil Conservation Division (OCD) hereby submits its Pre-Hearing Statement for the hearing scheduled on Wednesday, February 8, 2017.

PARTIES	ATTORNEYS
Applicant:	
CK Disposal, LLC	Michael L. Woodward Hance Scarborough, LLP 400 West 15th Street, Suite 950 Austin, TX 78701 mwoodward@hslawmail.com Phone (512)-479-8888 Fax (512)-482-6891
Other Parties:	
THE NEW MEXICO OIL CONSERVATION DIVISION THROUGH THE CHIEF OF THE ENVIRONMENTAL BUREAU	David K. Brooks Energy, Minerals and Natural Resources Department, State of New Mexico 1220 S. St. Francis Drive Santa Fe, NM 87505 Phone: (505)-476-3415 FAX (505)-476-3462 Davidk.Brooks@state.nm.us

Louisiana Energy Services, LLC
dba URENCO USA

Henry M. Bohnhoff
Rodey Law Firm
201 3rd Street NW, Suite 2200
Albuquerque, NM 87102
hbohnhoff@rodey.com
Phone (505)-768-7237
Fax (505)-768-7395

STATEMENT OF THE CASE

Applicant, CK Disposal, LLC, filed an application with the Environmental Bureau of OCD, pursuant to 19.15.36 NMAC for a permit to construct and operate a surface waste management facility at a site near the town of Eunice, in Lea County, New Mexico. OCD issued a tentative decision to grant the permit, pursuant to 19.15.36.9 NMAC. Louisiana Energy Services, LLC dba URENCO USA ("Protestant") requested a hearing pursuant to 19.15.36.10 NMAC. The OCD Director ordered that a hearing be scheduled before the Oil Conservation Commission, pursuant to Subsection B of 19.15.4.20 NMAC.

WINTESSES TO BE CALLED BY THE DIVISION

Name	Employer	Position	Field(s) of Expertise
Jim Griswold	NMEMNRD	Chief, Environmental Bureau	OCD permitting procedures

Testimony to be presented by Jim Griswold

Mr. Griswold will testify to the receipt of the Application, the Environmental Bureau's determination that the Application is administratively complete and the issuance of a tentative decision. He

will testify the Division complied with all of the procedures required by 19.15.36 NMAC for issuance of a permit pursuant to the application.

Time for Presentation: 20 minutes

Exhibits

1	Determination of Administrative Completeness dated May 4, 2016
2	Tentative Decision dated October 13, 2016
3	Email notification pursuant to 19.15.36.9.B, dated May 23, 2016

In addition, Mr. Griswold will identify the original application which Applicant if offered in evidence by Applicant.

PROCEDURAL MATTERS

The Applicant knows of no unresolved procedural matters.

Respectfully Submitted,

David K. Brooks

David K. Brooks
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 S. St. Francis Drive
Santa Fe, NM 87505
Attorney for Oil Conservation Division
Environmental Bureau Chief

Certificate of Service

I hereby certify that the above pleading was served on the following parties by electronic mail on February 2, 2017.

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Attorney for Louisiana Energy Services, LLC
dba URENCO USA

David K. Brooks

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

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

CASE NO. 15617
ORDER NO. R-14254-B

ORDER OF THE COMMISSION

BY THE COMMISSION:

This matter came on for hearing on January 9, 2017, in Eunice, New Mexico and on February 8, 9, and 10, 2017, in Santa Fe, New Mexico, before the Oil Conservation Commission (Commission).

NOW, on this 4th day of April, 2017, the Commission, having considered the public comments, testimony, and the record,

FINDS THAT:

1. On November 6, 2015, CK Disposal, LLC (Applicant) submitted a draft application to the Oil Conservation Division (Division) for a permit to construct and operate a commercial surface waste management facility in Lea County, New Mexico pursuant to 19.15.36 NMAC.

2. The proposed facility is located .05 miles south of State Highway 234, approximately 4.16 miles southeast of Eunice, New Mexico.

3. The proposed facility will consist of a 141.5-acre landfill area and a 51.7-acre liquid processing area.

4. On May 1, 2016, the Applicant formally submitted its application for review.

5. On May 4, 2016, the Division declared the application administratively complete.

6. On October 13, 2016, the Division issued its tentative decision to grant the permit with conditions pursuant to 19.15.36.9(D) NMAC.

7. On October 25, 2016, Applicant published notice of the Division's tentative decision pursuant to 19.15.36.9(E) NMAC, and on October 26, 2016, Applicant mailed notice by certified mail to the parties requesting notification of applications generally, or of the particular application including persons who had filed comments on the application during the initial public comment period, pursuant to 19.15.36.9(E)(2) NMAC.

8. On November 22, 2016, Louisiana Energy Services, LLC, d/b/a URENCO USA (LES), which operates a uranium enrichment facility to the north of Applicant's proposed commercial surface waste management facility, filed a request for hearing pursuant to 19.15.36.10(A) NMAC. In addition, several legislators requested that the Commission schedule a hearing.

9. Pursuant to 19.15.36.10(A)(2) NMAC, the Division Director may schedule a hearing if he determines that there is significant public interest in the application. The Division Director found that there is significant public interest in CK Disposal, LLC's application.

10. Pursuant to NMSA 1978, Section 70-2-6(B) and 19.15.4.20(B) NMAC, a hearing may be held before the Commission if the Division Director, in his discretion, determines that the Commission shall hear the matter. The Division Director determined that the Commission should hear this matter.

11. On December 13, 2016, the Division Director issued an order scheduling the hearing to be held in Eunice, New Mexico beginning on January 9, 2017.

12. On December 16, 2016, the Division published notice of the hearing in the Hobbs News-Sun. The Division also posted notice on its website.

13. On December 21, 2016, LES filed a motion requesting the hearing be continued.

14. On December 28, 2016, the Applicant filed a response to the motion for continuance.

15. On December 29, 2016, LES filed a reply in support of its motion for continuance.

16. On January 3, 2017, the Commission issued an order scheduling the hearing beginning on January 9, 2017 in Eunice, New Mexico to accept public comments and scheduling the technical testimony beginning on February 8, 2017 in Santa Fe, New Mexico.

17. On January 9, 2017, in Eunice, New Mexico, the Commission accepted public comments regarding CK Disposal, LLC's application.

18. The public has voiced concerns regarding hydrogen sulfide gas emissions, impacts to economic development, truck traffic, and the tracking of liquid and solid waste from the facility onto public roadways.

19. On February 8, 9, and 10, 2017, in Santa Fe, the Applicant presented technical evidence and testimony in support of the application, and LES presented technical testimony and evidence in opposition to the application. The Commission also accepted statements at the hearing from Senator Carroll H. Leavell, Senator Gay G. Kernan, and Representative David M. Gallegos, all who expressed opposition to the application.

20. 19.15.36.12(A)(1) provides that:

> The division may issue an permit for a 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.

21. The application meets or exceeds the geologic and siting requirements in 19.15.36 NMAC.

a. There is no ground water 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.

22. The proposed facility is located above the Chinle formation, which is a low permeability type of sediment and a barrier to downward migration to ground water.

23. The proposed location is uniquely situated so the Rattlesnake Ridge, a sub-surface geologic feature, allows the Ogallala Formation, which overlies the Chinle Formation, to be structurally high so the Ogallala Formation is not saturated.

24. Because there is not a zone of saturation for a considerable depth beneath the proposed location, Applicant proposed to use vadose zone monitoring for the

proposed facility. Such monitoring is more protective than direct ground water monitoring.

25. The vadose zone monitoring plan is sufficient to protect all fresh water formations including the deep underlying fresh water formations and the fresh water in the Ogallala aquifer, which is located approximately one-half mile west of the facility's proposed location.

26. The geologic characteristics of the proposed location and the proposed vadose zone monitoring and sampling plan are protective of fresh water resources.

27. The landfill design meets or exceeds the requirements in 19.15.36 NMAC.

a. The 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 side slopes to act as a leak detection layer, and an additional 60-mil HDPE liner.

b. The final cover design meets the requirements of 19.15.36 NMAC, and includes a 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 meets the requirements of 19.15.36 NMAC, as it will control run-on from a 25-year storm event, will prevent run-off from the active portion of the landfill, and will prevent any discharge of contaminated water.

28. Applicant proposed utilizing a daily cover, which will provide odor control and reduce the potential for moisture or other non-waste to contact the disposed waste.

29. The evaporation pond design complies with 19.15.36 NMAC.

a. Applicant demonstrated an acceptable engineering design plan, including operating and maintenance procedures, a closure plan, and a hydrologic report sufficient to evaluate the actual and potential effects on soil, surface water, and ground water.

b. The application contains designs 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.

30. The landfill engineering design is state-of-the art.

31. The closure and post-closure plan complies with 19.15.36 NMAC.

32. The Site Operating Plan provides site management and site operation procedures that comply with 19.15.36 NMAC, 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 H_2S Management Plan, and a Contingency Plan.

a. Applicant will require a form C-133, authorization to move liquid waste, prior to receiving oil field waste from a transporter.

b. Applicant will use the paint filter test to ensure oil field waste containing free liquids are not 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 production operations, are exempt waste, and are not mixed with non-exempt waste or is non-hazardous.

e. Applicant will test incoming trucks for H_2S concentrations. If H_2S concentrations exceed 10 parts per million, Applicant will treat the waste until the H_2S concentration is one part per million or less.

33. 19.15.11 NMAC 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 H_2S plan provides for notification of the Division at 10 parts per million.

34. Applicant will treat wastewater received at the site to remove the oil from the water prior to placement into the evaporation ponds.

35. Applicant will conduct daily inspections of the ponds for the presence of either oil or birds. Applicant will immediately remove any oil found on the ponds.

36. The Commission finds that Applicant provided an adequate alternate plan to monitor migratory bird protection, and consequently, qualifies for exception from netting the ponds as provided in 19.15.36.13(I) NMAC.

37. Based upon the nature of the waste material and the lack of internal moisture, the production of landfill gas should be negligible. Thus, no landfill gas control system is required.

38. Applicant stated that it will post the proper financial assurance to guarantee closure and post closure care of the proposed facility.

39. Applicant's engineer, Mr. Ybarra, testified to the closure and post closure care cost estimates calculated at $1,149,142 and $1,162,770.

40. The proposed facility will provide needed modern disposal operations for oil and gas waste.

The Commission concludes as follows:

1. The Commission has jurisdiction over this matter pursuant to NMSA 1978, Section 70-2-6 and 70-2-12.

2. Notice required by 19.15.36 NMAC and 19.15.4 NMAC was provided.

3. 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 and Gas Act and its implementing rules including 19.15.36 NMAC and 19.15.11 NMAC.

4. CK Disposal, LLC's application meets the requirements of 19.15.36 NMAC and 19.15.11 NMAC and should therefore be approved.

5. The public and LES have raised valid concerns regarding hydrogen sulfide gas emissions, truck traffic, and the tracking of liquid and solid waste from the facility onto public roadways. Consequently, the following additional conditions should be required.

a. Applicant shall provide a more comprehensive H_2S monitoring plan that includes monitoring at each of the facility's property boundaries. A plan detailing this monitoring plan shall be submitted to the Division prior to commencement of operations. Also, Applicant will be required to submit the monitoring results to the Division monthly for the first two years of operation, and quarterly thereafter.

b. Applicant shall manage the facility in such a manner that all truck traffic disposing waste at the facility is accommodated on-site, and off-site traffic entering the facility complies with New Mexico Department of Transportation requirements.

c. 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.

d. Applicant shall not operate the facility until all required local, state and federal permits are obtained, including any permits that the New Mexico Environment Department, United States Environmental Protection Agency, or New Mexico Department of Transportation may require.

e. Applicant shall, prior to commencing operations, summarize to the Division its efforts to obtain additional local, state, or federal permits that may be required. This shall include copies of permits obtained, correspondence with these agencies, and any other information that will demonstrate that Applicant has obtained necessary permits from other jurisdictional agencies.

6. 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.

IT IS THEREFORE ORDERED THAT:

1. CK Disposal, LLC's application for a permit to operate a commercial surface waste management facility is granted with conditions as provided in the Division's October 13, 2016 tentative decision along with the following additional conditions:

a. Applicant shall provide a more comprehensive H_2S monitoring plan that includes monitoring at each of the facility's property boundaries. A plan detailing this monitoring plan shall be submitted to the Division prior to commencement of operations. Also, Applicant will be required to submit the monitoring results to the Division monthly for the first two years of operation, and quarterly thereafter.

b. Applicant shall manage the facility in such a manner that all truck traffic disposing waste at the facility is accommodated on-site, and off-site traffic entering the facility complies with New Mexico Department of Transportation requirements.

c. 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.

d. Applicant shall not operate the facility until all required local, state, and federal permits are obtained, including any permits that the New Mexico Environment Department, United States Environmental Protection Agency, or New Mexico Department of Transportation may require.

e. Applicant shall, prior to commencing operations, summarize to the Division its efforts to obtain additional local, state, or federal permits that may be required. This shall include copies of permits obtained, correspondence with these agencies, and any other information that will demonstrate that Applicant has obtained necessary permits from other jurisdictional agencies.

2. 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. The Division shall not issue the final permit until Applicant provides financial assurance in a form acceptable to the Division for the facility's estimated closure and post-closure costs as stated in the Division October 13, 2016 tentative approval.

3. Jurisdiction over this case is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year designated above.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

ROBERT BALCH, Member

PATRICK PADILLA, Member

DAVID R. CATANACH, Chair

SEAL

Griswold, Jim, EMNRD

From: Griswold, Jim, EMNRD
Sent: Tuesday, April 4, 2017 2:55 PM
To: Bryce Karger - DNCS (bryce@kargerholdings.com)
Subject: Permit for Ck Disposal
Attachments: ck disposal order.pdf

Bryce,

Attached you will find a copy of the order that was signed today. In the coming days I will be amending the tentative decision to include the conditions of the order. That will be your permit. Before I can issue that permit, I need CK to have its financial assurance in place. I will help you with that effort, but the primary person here at OCD in that regard is Denise Gallegos, our bond administrator. Her phone number and email are: 505-476-3453 and denise.gallegos@state.nm.us. Thanks for your patience thru this process.

Jim Griswold
Environmental Bureau Chief
Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
505.476.3465
email: jim.griswold@state.nm.us

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

CASE NO. 15617

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

APPLICANT'S RESPONSE TO PROTESTANT URENCO'S MOTION TO STAY

COMES NOW, CK Disposal, LLC ("Applicant"), and files this Response to URENCO's ("URENCO" or "LES") Motion to Stay ("Motion") the Oil Conservation Commission's Order No. R-14254-B issued on April 4, 2017 ("Order") that granted permit authority to CK Disposal, LLC with certain conditions.

I. BECAUSE PART 36 PERMITTING REQUIREMENTS ARE MET, A STAY CANNOT BE GRANTED AND IS NOT APPROPRIATE.

A permit has already been issued over URENCO's spurious objections. It was already found 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 (and without gross negative consequences to URENCO, the only protestant at the hearing). URENCO's Motion employs the same arguments it presented at the hearing. Like the arguments at hearing, it seeks to draw the Commission beyond the bounds of its regulatory authority. To provide such relief is not only unjustified by the law, but it would be detrimental to the future issuance of Part 36 permits in New Mexico. 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. Granting URENCO's Motion would only discourage potential applicants from investing the resources to seek a permit for these much-needed facilities. This cannot be the state of the law.

Based on the Application and the evidence presented at hearing, the Applicant demonstrated compliance with all Part 36 requirements. In fact, the Applicant 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. The Commission determined that the permitting requirements were met, and an order granting the permit was appropriately issued.

The permit issuance standard is important. Considering the standard displays the fallacy of URENCO's Motion. 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 statues and rules without endangering fresh water, public health safety or the environment. In this case, each of these prerequisites has been 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 statues and rules without endangering fresh water, public health or the environment. In accordance with the applicable regulations, the Commission approved the application of CK Disposal, LLC for a Surface Waste Management Permit because the permitting standard has been met. With the permit standard met, it is impossible for URENCO to prove through its Motion that a stay is required to protect the environment, public health, or affected persons. The hearing already occurred, and URENCO lost.

II. URENCO's REQUEST FOR A STAY IS ABSURD AND MISCHARACTERIZES THE STANDARDS FOR ISSUANCE OF A STAY.

URENCO's request for a stay ignores the permitting issuance standard utilized at the hearing that it lost, but additionally, URENCO's Motion to stay is self-defeating. URENCO's Motion is predicated on arguments that it already presented at hearing. Those arguments were fully heard to the extent of the Commission's jurisdiction, and the correct decision to issue the permit has subsequently been made. URENCO's arguments do not meet any of the criteria for issuance of a stay of the Order – it is not even close. As URENCO concedes in its Motion, a stay must be necessary.[1] Here, a stay is not necessary to protect public health or the environment, to prevent waste, or to prevent gross negative consequences to an affected party. On the contrary, it is completely unnecessary to stay the Order, and therefore the law does not support a stay.

[1] *See* URENCO's Motion to Stay at 1 (citing 19.15.4.23(B) NMAC).

A. A stay is not necessary to protect public health or the environment.

First, URENCO failed to demonstrate that a stay is necessary to protect public health or the environment. URENCO argues that a stay is necessary to protect public health and the environment because other agencies have various permitting responsibilities that relate to the subject oil and gas waste management facility. Each of these arguments is self-defeating, because the permitting authorities and procedures of other agencies act to ensure that public health and/or the environment are protected from the effects of activities regulated by each respective agency to the extent required by law. The applicable law requires CK Disposal to obtain each necessary permit prior to construction and operation. Moreover, the applicable permits are required prior to operation as a condition of the Commission's Order. URENCO unsuccessfully urged variations of this argument throughout the hearing in this matter and it was not effective. Here, the argument is even less effective because there will be no public health or environmental concerns before the facility begins to accept waste. Moreover, the evidence in the record of the three day hearing conducted on this matter overwhelmingly shows there will be no public health or environmental concerns after the facility begins to accept waste.

URENCO also argues for a stay on the basis that a more comprehensive H_2S monitoring plan is to be submitted prior to operation. Here too, there is no basis to conclude a stay is necessary to prevent harm to the environment. First, URENCO failed to prove any harm to public health or the environment based on the miniscule maximum possible quantities of H_2S emissions that were modeled in the application and discussed at hearing. At hearing, URENCO alleged that the miniscule increase could harm its equipment. This harm is speculative at best, but the Commission has required a permit condition for more comprehensive H_2S monitoring that is beyond any regulatory requirements and highly protective against potential releases.

Finally, URENCO argues that its concerns justify a stay of the permit authority throughout any lengthy rehearing and appeals process. URENCO attempts to support this argument with a general claim that there are "public health, safety, environmental protection, and due process issues" with the Order. This argument is largely baseless, and provides no specific reason that a stay is necessary to protect the environment or public health. Regardless of the argument advanced by URENCO requesting a stay for environmental or health protection, it could not prevail because there are no existing imminent or long-term environmental or public health threats presented by this state-of-the-art and highly protectively designed facility. Indeed, no such concerns could even conceivably arise prior to actual operation of the facility.

B. A stay is not necessary to prevent waste of oil and gas resources.

Second, URENCO failed to demonstrate that a stay is necessary to prevent waste. The regulation allows a stay "if necessary to prevent waste" is referring to waste of oil and gas resources, but URENCO argues that a stay should be granted to avoid a *potential* waste of money resources by interested parties in potential legal actions. This argument ignores the waste of money resources that would be required of the Applicant if a stay were granted, but more importantly it erroneously ignores that prevention of "waste" is referring to waste of oil and gas resources, which the Commission is charged with preventing. Without citing any legal authority, URENCO also argues that the Commission should avoid the appearance of "prejudgment," but fails to acknowledge that an extensive 3-day hearing was already held in which URENCO's concerns about permitting by other agencies and H_2S were addressed and found to be insufficient to prevent issuance of the permit under controlling Part 36 regulations. Regardless of URENCO's flawed arguments, there could not be a waste of oil and gas resources from the issuance of the permit, the construction, or the operation of the facility. Rather, operation of the

facility will have the opposite effect, providing needed disposal services to the oil and gas industry. Thus, URENCO's arguments fail to demonstrate the points they attempt to make, and fail to demonstrate that a stay is necessary to prevent waste of oil and gas resources.

C. A stay is not necessary to prevent gross negative consequences to an affected party.

Third, URENCO failed to demonstrate that a stay is necessary to prevent gross negative consequences to an affected party. URENCO argues that it needs a stay to allow a determination by another agency regarding an alleged property issue under the jurisdiction of the State Land Office. Like URENCO's other arguments, this was raised at hearing and found to be insufficient to prevent issuance of the permit. Instead, this issue is only proper before the State Land Office or a district court. Because legal processes exist that URENCO can avail itself of (and has) relating to this issue, URENCO cannot effectively argue that the permit will cause gross consequences to an affected party, or that a stay is necessary to prevent such consequences. Indeed, only adjudication of URENCO's alleged complaints before the proper forum could potentially prevent any alleged trespass to URENCO. Here again, URENCO fails to make the required showing.

D. A stay would be highly prejudicial to Applicant and would discourage Part 36 applications.

The only party that would be highly prejudiced and deprived of due process in the event of a stay is the Applicant. A stay would be highly prejudicial to Applicant because it has already spent extensive time and monetary resources developing a compliant application, and has spent even more resources going through the hearing process that was caused by URENCO. Applicant has conclusively demonstrated compliance with Part 36 requirements for its permit, and the Commission has accordingly ordered that a permit be granted. Because a stay must be necessary

to protect public health, the environment, prevent waste, or prevent gross negative consequences to an affected party, granting a stay cannot be legally supported by the applicable regulations. To strip such authority through an unjustified stay would be highly prejudicial and a deprivation of Applicant's due process. Moreover, granting URENCO's Motion would discourage future potential applicants from investing the resources to seek a permit for these much-needed facilities. This would prejudice the industry. To recover oil and gas resources, the industry needs disposal in sufficient quantities that is environmentally protective; it needs state-of-the-art facilities.

III. CONCLUSION

URENCO's motion to stay is merely a reiteration of its arguments at hearing. Those arguments were sparsely supported and insufficient to prevent the permit issuance at that time, and they do not justify the emergency relief that the regulatory stay provisions are intended to enable. When viewed through the lens of the regulatory requirement that a stay must be necessary, URENCO's requested relief cannot be justified. Instead, URENCO may use the appropriate existing legal processes to bring its claims like all other hearing participants. Applicant respectfully requests that URENCO's Motion be promptly and wholly denied.

Respectfully submitted,

HANCE SCARBOROUGH, LLP

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CERTIFICATE OF SERVICE

I hereby certify that the above pleading was served on the following parties by electronic mail on April 19, 2017.

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

CASE NO. 15617

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

LOUISIANA ENERGY SERVICES, LLC'S 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 N.M. 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 (10th 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 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.[1] 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

[1] 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 Comm'n v. Yoakum, 1991-NMCA-153, ¶ 17, 113 N.M. 561 (collecting cases which show than 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.[2] 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

[2] The provision appears in NM1-61 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 Bohannan regarding DOT permitting and traffic safety issues), LES Ex. X (Bohannan 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 Bohannan, 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. Bohannan'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. Bohannan'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 (Bohannan 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 (Bohannan 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. [3] Moreover,

[3] 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/epas-2017-construction-general-permit-cgp-and-related_documents. 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. (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/final-2015-msgp-documents.pdf.

conditions the Commission effectively cut the public and LES out of the process. The timing of the conditions – i.e., 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 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 N.M., 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, 201[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.)[4] 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.)[5] 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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[4] 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.)

[5] 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 ("H2S") Remain Of Considerable Concern.

Another condition relates to H2S monitoring. During the technical hearing LES exposed serious flaws in CK's numeric modeling of H2S emissions from its planned facility and CK's H2S 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 H2S 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 Opp'n [LES's] Mot. 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 H2S sources that would be created by CK's planned facility;
- the non-calculation of the concentration of H2S 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 H2S emissions from CK's planned facility.

Other, more sophisticated modeling tools are available which would provide a more realistic assessment of the potential H2S 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 H2S monitoring plan, to the OCD. After the submissions, the public and LES, who both stand to be affected by H2S emissions from CK's facility, should be give 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 Envtl. 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 – i.e., 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 H2S. (Id. at 575-76, 583.) Additionally, CK's H2S modeling did not factor in wind direction. (Tr. (2/9/17) at 293, 309, 312.)[6]

Jay Peters also opined that CK's proposed H2S 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 H2S 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 H2S 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 H2S plume traveling north from the planned CK facility, LES employees evacuating its facility would have to travel in the direction of the H2S 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-

[6] Mr. Orwig also testified that had he modeled the multiple H2S 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 designs 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. Maldanado, 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 H2S 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 H2S 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,

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By 

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CERTIFICATE OF SERVICE

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

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