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May 20, 2005

VIA FACSIMILE (505) 476-3462 **No Pages: 12**
Florene Davidson
Hearing Clerk
EMNRD
Oil Conservation District
1220 So. St. Francis Drive
Santa Fe, NM 87505

Re: Case No. 13480; Originals of Fax Filing

Dear Ms. Davidson:

Please find attached the GMI's Response in Opposition to CRI's Motion to Exclude From Consideration Information Not Contained or Disclosed In Candy Marley's Amended Application For Waste Management Facility. The originals are being mailed. Please endorse the extra copy and return to our office in the enclosed stamped envelope.

Thank you for your courtesies in this matter.

Sincerely,
DOMENICI LAW FIRM, P.C.

Glenna Bergeron

ggb/1548
Encl.
cc: file

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

APPLICATION OF GANDY MARLEY, INC.
TO MODIFY TH
EIR EXISTING NMOCD
RULE 711 PERMIT NO. NM-01-019

RECEIVED
MAY 23 2005
OIL CONSERVATION
DIVISION

CASE NO. 13480

GMI'S RESPONSE IN OPPOSITION TO CRI'S MOTION TO EXCLUDE FROM CONSIDERATION INFORMATION NOT CONTAINED OR DISCLOSED IN GANDY MARLEY'S AMENDED APPLICATION FOR WASTE MANAGEMENT FACILITY

COMES NOW Gandy Marley Inc. (GMI), by and through undersigned counsel of record, and respectfully requests that the Hearing Examiner deny CRI's motion to exclude certain information identified by GMI in its Pre-Hearing Statement. CRI argues, without citation to any statutory or regulatory provisions or relevant caselaw, that GMI may only present information at the hearing that was specifically included in its permit modification application. CRI's position, which would prevent GMI from presenting testimony and exhibits in support of its application, is not supported by due process requirements for administrative hearings or by the Division's regulations, which set forth procedural rules that are consistent with recognized due process requirements.

I. The Pre-Hearing Statement identifies evidence that will be presented in support of the information provided in the GMI's application.

GMI does not "recognize that its filed application is deficient in a number of areas," as alleged by CRI. The application filed on April 8, 2005 meets the requirements of 19.15.9.711.B(2) (Section 711) and is administratively complete. The Pre-Hearing Statement submitted by GMI identifies evidence, to be presented at the hearing, in support of the information in the application. GMI has not identified any new or additional information that is

not consistent with the application and the public notice. All of the information that CRI alleges is information not previously made available for public review is supporting evidence for the information in the application, as shown by the following:

- The current permit includes a closure plan for the facility. The application includes a closure plan for the proposed changes to the facility and states that the facility already has closure bonds in place. (Application at X). Testimony will be offered in support of the closure plan identified in the application.
- The diagram of the facility is not new information. The application states that the proposed landfill will be contained within the perimeter of the existing landfarm and will use existing cells. (Application at IV, VI, VIII). The diagram shows the existing structures, berms and facility components that are already in place under the current permit. These are not being changed by the proposed modification and the diagram does not provide any new information.
- The Pre-Hearing Statement does not identify changes to the proposed cap and liner for the cells. The description of the cap and liner are the same in the application as in the Pre-Hearing Statement. (Compare Application at IV, X and Pre-Hearing Statement at 6).
- The Pre-Hearing Statement does not contain new information about handling methods for solids, semi-solids and sludges. The application states that such wastes will be disposed of in the landfill cells and describes the stabilization process for semi-solids and sludges, which is not a new process being proposed as part of the permit modification request. Under the current permit, semi-solids and sludges are stabilized before disposal and this practice will not be changed. The application states that cells

will be filled starting at one end, as does the Pre-Hearing Statement. (Application at IV).

- The application proposed the installation of at least two monitoring wells. (Application at IV). GMI completed two test wells and will submit information on the location and construction of the wells in support of its proposal to use the wells as monitoring wells. The test wells also confirm and verify the information on site characteristics contained in Section XI of the application.
- The existing permit and the application contain information on the geological and hydrological conditions at the site. (Application at XI). The geological and hydrological information in the application is the same information that was included in the original permit application. As stated in the application, the information is based on geologic data from a sub-surface drilling program conducted in the region in 1994. The studies that GMI proposes to introduce as evidence support the site characteristics already identified and will not present new information that would change the information already in the application.

CRI is incorrect in stating that the Pre-Hearing Statement identifies new information that should have been included in the application. Instead, the Pre-Hearing Statement identifies the testimony that will be presented in support of the information provided in the application. Therefore, the motion should be denied.

II. CRI has not been deprived of procedural due process

Due process, for purposes of administrative hearings, requires notice and an opportunity to be heard. It has long been established that "administrative adjudicatory proceedings involving substantial rights of an applicant must adhere to fundamental principles of justice and procedural

due process." *State of New Mexico ex rel Battershell v. City of Albuquerque,* 108 N.M. 658, 777 P.2d 386 (N.M.App. 1989). Due process requires reasonable notice and an opportunity to be heard. *Santa Fe Exploration Co. v. Oil Conservation Commission,* 114 N.M. 103, 110, 835 P.2d 819 (S.Ct. 1992); *Southworth v. Santa Fe Services,* 125 N.M> 489, 963 P.2d 566 (N.M.App. 1998).

The purpose of the notice requirement is to ensure that all interested parties are reasonably informed of the issues to be presented at the hearing. *Id.* at 111; *Uhden v. New Mexico Oil Conservation Commission,* 112 N.M. 528, 530, 817 P.2d 721 (S.Ct. 1991). The New Mexico Supreme Court has rejected, in at least two cases, arguments that the notice provided was not sufficiently specific to allow a party to prepare for issues to be addressed at a hearing. *Id.; National Council on Compensation Insurance v. New Mexico State Corporation Commission,* 107 N.M. 278, 756 P.2d 558 (S.Ct. 1988)("*NCCI*"). In both cases, notice was provided in compliance with statutory and regulatory requirements and in both cases the appellants argued that the notice should have been more specific. In both cases, the Court held that "general notice of issues to be presented at the hearing was sufficient to comport with due process requirements." *Santa Fe Exploration,* 114 N.M. at 111. In *NCCI*, the Court found that the notice met due process requirements because "the notice provided NCCI an opportunity to be heard by reasonably informing NCCI of the matters to be addressed at the hearing so that is was able to meet the issues involved." 107 N.M. at 284. Due process requires that the parties have "adequate notice of the issues that [are] going to be addressed to allow them to prepare their cases." *Santa Fe Exploration,* 114 N.M. 111.

The Oil and Gas Act (OGA) requires that reasonable notice be provided for all oil and gas hearings and that any person having an interest in the matter be given the opportunity to be

heard. §70-2-23; *Johnson v. New Mexico Oil Conservation Division,* 1999-NMSC-021, ¶19, 127 N.M. 120. In *Johnson*, the Court found that reasonable notice is a "condition precedent to a hearing" and that the Division has adopted notice requirements that comport with the statutory requirements. *Id.* at ¶¶19-23. The Division regulations state that a public notice of hearing "shall specify: whether the case is set for hearing before the commission or a division examiner; the number and style of the case; the time and place of hearing; and the general nature of the application. Notice shall also state the name of the applicant...the notice shall reasonably identify the subject matter so as to alert persons who may be affected if the application is granted." NMAC 19.15.14.1205.B.

The notice requirements do not require an applicant such as GMI to submit its entire case to the Division prior to a hearing being set. An applicant requesting a permit modification is required to submit Form C-137, which GMI did on April 8, 2005. The Division then provided notice of the hearing in the Roswell Daily Record on April 15, 2005 and in the Lovington Leader on April 14, 2005, as required by NMAC 19.15.1204 and Section 711. The notice stated that GMI "has applied for a modification to their surface waste management facility permit," identified the type of waste to be accepted, identified the location of the facility and stated that GMI "has provided information describing the construction of the cells and conditions at the site that make it suitable for the acceptance of such waste. The operator will keep salt-contaminated oilfield waste separate from hydrocarbon-contaminated oilfield waste." The published notice met the requirements of 19.15.14.1205.B and provided general notice of issues to be presented at the hearing, reasonably informed the public of the matters to be addressed at the hearing, and provided adequate notice of the issues to allow interested parties to prepare their cases.

The Court's holding in *Martinez v. Maggiore,* 2003-NMCA-043, 133 N.M. 472, does not support CRI's position. In that case, the Court found that the notice published by the applicant did not substantially comply with the requirements governing the manner of publication. *Id.* at ¶1. The Court found that the opponents of the application were prejudiced because the lack of notice denied them adequate time to "organize, locate counsel and expert witnesses, and prepare a notice of intent to present technical testimony." *Id.* at ¶17. In other words, the lack of notice hindered the ability of the opponents to prepare for the hearing. CRI has not made any such claim, as indeed they cannot because notice of the hearing was properly published and they have had adequate time to prepare for the hearing. *Martinez* does not support CRI's argument that GMI may not introduce additional evidence and testimony in support of its application at the hearing.

The second requirement of due process is the opportunity to be heard. At an administrative hearing, "[a] litigant must be given the full opportunity to be heard with all rights related thereto." *Uhden*, 112 N.M. at 530. A full and fair hearing requires that all parties be given the "opportunity to cross-examine witnesses, inspect documents, offer evidence in explanation or rebuttal, and to be fully apprised of the evidence..." *Yadon v. Quinoco Petroleum, Inc.,* 114 N.M. 808, 845 P.2d 1262 (N.M.App. 1992). The Division's procedural rules provide CRI with an opportunity to be heard by 1) requiring all parties to submit to the Division, and serve on all other parties, a pre-hearing statement that sets forth a concise statement of the case and identifies the party's witnesses, 2) providing CRI with an opportunity to present witnesses and exhibits in support of its position; and 3) providing CRI with an opportunity to cross-examine witnesses. NMAC 19.15.14.1208 and 19.15.14.1212. There is simply no support for CRI's contention that allowing GMI to present evidence is support of its

application will violate CRI's due process rights. CRI has not offered any explanation of how the additional information in support of the application would be unfairly prejudicial. *In re Termination of James Boespflug,* 114 N.M. 771, 775, 845 P.2d 865 (N.M.App. 1992).

The Division's notice and procedural requirements provide CRI with the procedural due process required by New Mexico caselaw. Procedural due process does not require the hearing examiner to limit GMI's testimony and evidence in the manner requested by CRI.

III. The Division's Regulations and the procedural history of this application do not support CRI's motion to exclude.

Without reference to any specific statutory or regulatory provisions, CRI argues that, for permit modifications under Section 711, "you sink or swim with what you file and make available for public review and comment." GMI did not submit a "bare bones" application and GMI does not believe that its application is deficient. Instead, in its Pre-Hearing Statement, GMI identified testimony that will be submitted in support of the information already contained in the Application and in rebuttal to the positions of other parties. There are simply not statutory or regulatory provisions that prevent an applicant from participating in the comment process by submitting additional information or from presenting testimony and evidence at the hearing in support of its application.

The procedural history of this case also does not support CRI's position that GMI may not supply additional information, testimony and evidence in support of its application. GMI has had a landfarm permit since January, 1995. On March 4, 2005, the Division unilaterally modified GMI's landfarm permit to prohibit GMI from accepting oilfield wastes contaminated with salts. (Order of the Division, Case No. 13454, Order No. 12306-A, ¶9.g).

On March 10, 2005, GMI applied for an emergency order allowing it to accept salt-contaminated oilfield waste pending a decision on its application for a permit modification. By

Emergency Order R-12306, issued March 11, 2005, the Division granted GMI temporary authorization to accept salt contaminated oilfield waste pending a decision on the requested permit modification. The Emergency Order expired on March 26, 2005. A hearing was held on March 25, 2005 and, following the hearing, the Division issued Order No. 12306-A, extending the Emergency Order R-12306 to allow GMI to continue to operate under its current permit without being subject to the Division's March 4, 2005 letter until a determination is made by the Division on GMI's permit modification request.

CRI participated in the March 25, 2005 hearing. During the hearing, all parties, including CRI, were informed that the Division would hold a hearing on GMI's application on May 19, 2005. CRI had almost 60 days notice of the hearing. Because of the Division's decision to unilaterally modify the permit and then require GMI to submit a permit modification, this case has not followed the usual procedural path to hearing. In light of the early notice of the hearing provided to CRI and the unusual procedural history, GMI should not be forced to rely only on the application. In addition, as has been stated by the Division, the burden of proof at the hearing is on GMI, indicating that GMI will be allowed to present additional information as part of the hearing process.

CRI's position undermines the Division's procedural regulations and would eliminate the need for a hearing. The Divisions procedural regulations, NMAC 19.15.14.1208 to 19.15.14.1212, clearly provide for the testimony of witnesses and the introduction of evidence and exhibits. The purpose of the pre-hearing statement is to notify the parties of the testimony to be presented. If the applicant was limited to presenting only what is in the application, the applicant would not need to submit a pre-hearing statement.

The regulations state that "[f]ull opportunity shall be afforded all interested parties at a hearing before the commission or division examiner to present evidence and to cross-examine witnesses...No order shall be made that is not supported by competent legal evidence." 19.15.14.1212.A. (emphasis added). Included in the full opportunity for a party to be heard is the ability to present evidence in support of the party's position. The regulations do not limit the evidence that may be presented by the applicant. Instead, the applicant, like all parties, is entitled to present testimony and evidence in support of its position and in rebuttal to the positions of other parties. The regulations also clearly allow for the submission of exhibits at the hearing. 19.15.14.1212.B.

Additionally, the "rules of evidence applicable to a trial before a court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served." 19.15.14.1212.A. The judicial rules of evidence state that "[a]ll relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules or by other rules adopted by the supreme court." NMRA 11-402. Unless a specific statute, regulation or rule prohibits GMI from introducing evidence in support of its application, all relevant evidence is admissible. CRI has not identified any such statute, regulation or rule. In fact, as already shown, the Division's regulations contemplate the admission of testimony and evidence in support of the application.

If an applicant such as GMI is required to disclose all of the information it is relying on to support the permit modification well in advance of the hearing, as CRI contends, there would be no need to hold a hearing because the applicant's entire case, including supporting testimony and evidence, would be in the record during the comment period. The Division could then make a decision based on the application and any written comments received. However, that is not the

procedure set forth in either the OGA or the Division's regulations. Both the OGA and the regulations allow, and in some cases require, that hearings be held. *See* §70-2-23 NMSA 1978, NMAC 19.15.14.1203. While not arguing that the Division should decide the matter based on a review of the application and written comments, CRI is trying to limit GMI to its written application while allowing other parties to introduce evidence not submitted during the comment period. Such a requirement would place an undue burden on the applicant that is not required by the regulations. It would also limit the Division's ability to impose new or modified requirements on the applicant during the hearing.

CRI's argument undermines the procedural requirements set forth in the Division's regulations and undermines the purpose of holding a public hearing. There are no regulatory or statutory provisions that support CRI's motion.

IV. Granting CRI's Motion to Exclude Evidence will violate GMI's right to procedural due process.

If the Hearing Examiner grants CRI's motion, GMI will be denied a fair and full hearing and will be denied procedural due process. The New Mexico Court of Appeals has held that it is reversible error for the hearing officer to deny admission of noncumulative, nonhearsay evidence that is relevant to a party's case. *Boespflug,* 114 N.M. at 775. Even if there is a possibility that the hearing examiner may discount testimony and exhibits offered by GMI during the hearing, GMI should be allowed to present the evidence and the hearing examiner should have the opportunity to hear the testimony. *Id.* If CRI's motion is granted, all parties except GMI would be allowed to introduce all relevant testimony and evidence at the hearing. Instead of being allowed to present all relevant evidence in support of its position, to cross examine and impeach witnesses, and as rebuttal to testimony and evidence to be presented by other parties (which GMI will not be aware of until the hearing since no substantive information on opposing positions has

been produced prior to the hearing), GMI would be limited to the specific contents of its application and would be denied the opportunity to offer evidence in explanation or rebuttal of its position. *Yadon*, 114 N.M. at 816. Such an outcome does not adhere to the fundamental principles of procedural due process and justice, particularly in light of the fact that the neither the OGA nor the Division's regulations put GMI on notice of such a limitation. *Id.; Uhden,* 112 N.M. at 530; *Battershell,* 108 N.M. at 662-63.

GMI respectfully requests that CRI's Motion be denied and GMI be allowed to present relevant evidence in support of its application, for purposes of cross-examination, and in rebuttal to the positions of other parties.

Respectfully Submitted,

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I hereby certify that a true and correct copy of the foregoing was sent via facsimile or U.S. mail to parties of record on the 20 day of May, 2005.

Pete V. Domenici, Jr., Esq.