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 FINAL ARGUMENT BRIEF IN OPPOSITION TO APPLICATION OF C.K. DISPOSAL LLC FOR SURFACE WASTE MANAGEMENT FACILITY, LEA COUNTY, NEW MEXICO AND TENTATIVE DECISION TO ISSUE PERMIT

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I. INTRODUCTION

The OCD regulation for issuing a permit for an oil field waste disposal facility requires the OCD to make a finding that the facility can be constructed and operated "in compliance with applicable statutes and rules" and in addition, "without endangering fresh water, public health, safety or the environment." 19.15.36.12.A.1 NMAC (2015).[1]

CK's application fails to meet these standards: First, CK cannot show that it has legal access to the facility it proposes to build ("Facility"), that the access is safe, and that the New Mexico Department of Transportation ("DOT") would grant CK a permit to access a state highway. Second, CK's proposed operation would generate Hydrogen Sulfide ("H2S") in amounts and concentrations that would exceed recognized human health standards, and thus endanger public health and safety. Third, CK's proposed operation would generate airborne Volatile Organic Compounds ("VOCs"), chloride salts and other air contaminants that would endanger public health and the environment by exceeding human health standards, damaging electronic components of equipment, vehicles and other metal equipment, and contaminating LES's stormwater drainage pond. Fourth, CK's proposed operation would harm migratory birds.

More generally, CK's application should be rejected for the overarching concern – "location, location, location" – articulated by multiple public officials and other citizens during the course of the January 9, 2017 public meeting and the February 8-10, 2017 hearing. CK is proposing to build its Facility in what has been described as the worst location that it could have chosen in Lea County. It is a location that will magnify the traffic and air quality problems noted by the witnesses. And, precisely because of those problems and the fact that the Facility would

[1] Unless otherwise indicated, all citations to Section 19.15.36.12.A.1 of the New Mexico Administrative Code are references to the 2015 version of the regulation – the version that applies to CK's Application.

be located directly across Highway 176 from LES's $5 billion uranium enrichment plant, it will inflict incalculable harm to Lea County's efforts to encourage economic development.

Oil field waste disposal facilities may be a necessary component of the oil and gas industry. But the choice for the OCC is not simply whether to permit CK to build an oil field waste disposal facility. The choice is also whether to permit CK to build the Facility at this particular location or to instruct CK that it must find another location, one that will not create so many traffic- and air quality-related problems for the local community. The OCC should deny CK's application and invite CK to submit another application to construct and operate its Facility somewhere else in the Permian Basin.

II. BEFORE THE OCD/OCC CAN GRANT A PERMIT TO CK, CK MUST DO MORE THAN ESTABLISH THAT IT CAN MEET THE REQUIREMENTS OF PART 36. IN ADDITION, CK MUST PROVE THAT ITS PROPOSED FACILITY (1) CAN COMPLY WITH ALL OTHER APPLICABLE STATUTES AND REGULATIONS, AND (2) CAN BE CONSTRUCTED AND OPERATED WITHOUT ENDANGERING FRESH WATER, PUBLIC HEALTH, SAFETY AND THE ENVIRONMENT.

A. CK's Burden of Proof

1. 19.15.36.12.A.1 NMAC (2015)

The OCD "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 [application process and notice requirements] and 19.15.36.11 NMAC [financial assurance requirements] 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.A.1 NMAC (2015). Thus, the regulation requires that, before OCD can grant a permit to CK, CK must demonstrate four basic points:

1. It has filed an acceptable application.

2. It has complied or can comply with specified requirements in 19.15.36. NMAC, *e.g.*, application, notice, financial assurance.

3. It has complied or can comply with all *other* applicable statutes and rules.

4. It can construct and operate the Facility without endangering fresh water, public health, safety or the environment.

The third prong is the "compliance" requirement and the fourth prong is the "no endangerment" requirement. As discussed below, the "compliance" requirement broadly and without qualification applies to all statutes and regulations, not just the OCD's regulations. The "no endangerment" prong broadly and without qualification requires an affirmative showing that the Facility can be constructed and operated without endangering fresh water, public health, safety and the environment. As Applicant, CK bears the burden of proof in this matter. *See Pub. Serv. Co v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-083, ¶ 15, 112 N.M. 379 (applicant for regulatory abandonment faced burden of proof before regulatory commission); *see also Int'l Minerals & Chem. Corp. v. N.M. Pub. Serv. Comm'n*, 1970-NMSC-032, ¶ 10, 81 N.M. 280 ("Although the statute does not specifically place any burden of proof on [the applicant], the courts have uniformly imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof.").

2. <u>The "Compliance" Prong Broadly Applies to All Statutes and Regulations, Not Just OCD's</u>.

The "compliance" requirement is unqualified. By the regulation's own terms, its scope is not limited to OCD's statutes and rules or limited in any other way. The plain meaning of the regulation is that it applies broadly to all other statutes and regulations, state and federal. The New Mexico Court of Appeals recently weighed in on this point:

> In interpreting sections of the Code, we apply the same rules as used in statutory interpretation. We look first to the plain language of the regulation, giving the words their ordinary meaning, unless there is an indication that a different

> meaning was intended. When a regulation's language is clear and unambiguous, this Court must give effect to that language and refrain from further interpretation.

Rodarte v. Presbyterian Ins. Co., 2016-NMCA-051, ¶ 21, 371 P.3d 1067 (internal quotation marks & citations omitted) (alterations omitted), *cert. denied*, 2016-NMCERT-005, __ P.3d __ . The intent is gleaned from the language of the regulation itself: "[W]e determine and effectuate the intention of the administrative agency using the plain language of the regulation as the primary indicator of its intent." *State v. Ybarra,* 2010-NMCA-063, ¶ 7, 148 N.M. at 373 (citing *State v. Willie*, 2009 NMSC 37, ¶ 9, 146 N.M. 481).

There is no indication that a meaning of 19.15.36.12.A.1 NMAC (2015) different from its plain meaning was intended, and the compliance prong is unambiguous. A construction of the prong that deviates from its broad application would inappropriately add a qualification – "compliance with applicable *OCD* statutes and rules" – to the language. *See Wood v. State Educ. Retirement Bd.*, 2011-NMCA-020, ¶ 12, 149 N.M. 455 (unless the Legislature expresses a contrary intent, court is to give statutory words their ordinary meaning, and court is prohibited from reading into a statute language which is not there, particularly if it makes sense as written); *see also* NMSA 1978, § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning.").

The OCD is required to act in accordance with its own regulations. *See Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 15, 125 N.M. 786. "No deference is due to an agency interpretation which contradicts the regulation's plain language." *Copar Pumice Co. v. Bosworth*, 502 F. Supp. 2d 1200, 1211 (D.N.M. 2007) (citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)), *aff'd sub nom. Copar Pumice Co. v. Tidwell*, 603 F.3d 780 (10th Cir. 2010). If the OCD were to read the "compliance" prong as limited to OCD statutes and regulations, it will not be entitled to deference. Rather, because such a limitation by the OCD

would be unreasonable and contrary to the plain meaning of the regulation, the reviewing court would substitute its own independent judgment for the OCD's. *See Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶¶ 50-51, 148 N.M. 21. Thus, CK must demonstrate that it has complied or can comply with all other applicable statutes and rules, not just those of the OCD.

The OCD's regulations are to be liberally construed to carry out their purposes and the purposes of the Oil and Gas Act, NMSA 1978, §§ 70-2-1 through 70-2-38 ("OGA"). *See Atlixco Coalition*, 1998-NMCA-134, ¶ 15 (liberal construction of New Mexico Environment Department ("NMED") regulations to carry out the purpose of the Solid Waste Act). Under the OGA, the OCD is given the specific power to "make rules, regulations and orders":

> (21) to regulate the *disposition of nondomestic wastes* resulting from the exploration, development, production or storage of crude oil or natural gas to *protect public health and the environment*; and
>
> (22) to regulate the *disposition of nondomestic wastes* resulting from the oil field service industry, the transportation of crude oil or natural gas, the treatment of natural gas or the refinement of crude oil to *protect public health and the environment*, including administering the Water Quality Act ....

NMSA 1978, §70-2-12(B) (emphasis added). The OCD regulation has followed from and reflects these powers. The purposes stated are to *protect public health and the environment*. The compliance prong of 19.15.36.12.A.1 should be construed broadly and liberally, that is, without qualification or limitations, to achieve these purposes.

The powers granted by statute to the OCD do not allocate the public's protection to another agency. Indeed, the OCD has specific authority under Sections 70-2-12(B)(21) and (22) over matters pertaining to oil and gas that may also be under the purview of other state agencies. The OCD is given the "jurisdiction, authority and control of and over all persons, matters or things *necessary or proper to enforce effectively the provisions of this act or any other law of*

this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations." NMSA 1978, § 70-2-6 (emphasis added).

For these reasons, 19.15.36.12.A.1 NMAC (2015) must be construed without qualification according to it plain meaning to include statutes and rules concerning public health, safety, environment and fresh water that might be subject to concurrent jurisdiction of other agencies. Such other applicable statutes and rules necessarily would include permitting statutes and regulations.

3. The "Endangerment" Prong Broadly and Without Qualification Requires an Affirmative Showing That the Facility Can Be Constructed and Operated Without Endangering Fresh Water, Public Health, Safety and the Environment.

For the reasons described above for the "compliance" prong, the "no endangerment" prong must also be construed in accordance with its plain meaning.

The plain meaning rule of construction applies to "safety" as well. As stated in *Rodarte*, looking to the plain language means to give the words their ordinary meaning. 2016-NMCA-051, ¶ 21. According to the dictionary, "safety" means "the condition of being safe from undergoing or causing hurt, injury, or loss." Merriam-Webster, https://www.merriam-webster.com/dictionary/safety (last visited on Feb. 21, 2017). The meaning is broad. The use of the term "safety" in the 2015 OCD regulation is without qualification and is not ambiguous. Traffic safety is not excluded. Any interpretation that excludes traffic safety would be unreasonable and would invite a court to substitute its interpretation of the regulation for the OCD's interpretation. *See Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶¶ 50-51.

In addition, the OCD's broad grant of authority to protect public health and the environment dictates that traffic safety be addressed. *See* NMSA 1978, § 70-2-12 (authority to

regulate "the disposition of nondomestic wastes resulting from the exploration, development, production or storage of crude oil or natural gas *to protect public health and the environment*.") (emphasis added). Protection of the "public health" refers to more than safeguarding the physical health of individuals working at a facility. Public health means "[t]he health of the *community*." *See Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 465 (2001) (emphasis added). For OCD to protect the public health, it must necessarily look beyond the four corners of the Facility itself to the health risks that the community will face as a result of the Facility's operation. It is indisputable that increased traffic associated with construction and operation of the proposed Facility, and the increased pollution and accident risks that accompany it, constitute public health concerns.[2]

And, it is recognized that adverse traffic conditions impact "safety" in general. In Massachusetts, "a site is not suitable if traffic impacts from the facility operation would constitute a *danger to the public health, safety, or the environment* based on considerations of traffic congestion, pedestrian and vehicular safety, road configurations, and vehicle emissions." *Nat'l Reclamation of Raynham, LLC v. Donahue*, No. 2006-1240, 2008 Mass. Super. Lexis 499, *48-*49 (Mass. Super. Ct. Oct. 22, 2008) (quotation marks & citation omitted) (emphasis added). In a case where a casino was proposed in an area with an already saturated transportation infrastructure, a federal district court found that "[t]he disruption is not limited to the substantially-increased traffic delays and congestion that would inevitably result in the area as a result of the additional usage, but also safety issues that would flow from such a scenario. For example, plaintiffs' expert testimony credibly established that the use of local roads to access

[2] *See, e.g.*, S. Gopalakrishnan, *A Public Health Perspective of Road Traffic Accidents*, J Family Med Prim Care 144 (Jul.-Dec. 2012); *Emissions from Traffic Congestion May Shorten Lives*, HARVARD UNIV., https://www.hsph.harvard.edu/news/hsph-in-the-news/air-pollution-traffic-levy-von-stackelberg/; Robert Lee Hotz, *The Hidden Toll of Traffic Jams*, WALL ST. J., Nov. 8, 2011, *available at* https://www.wsj.com/articles/SB10001424052970203733504577024000381790904.

Westwoods, especially when considering the unreasonable delays on the major highways and roads that would ensue, would create enormous safety issues for motorists and residents." *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 285-286 (E.D.N.Y. 2007), *vacated on other grounds*, 686 F.3d 133 (2d Cir. 2012). The court noted the evidence that "extraordinary delays" resulting from the unsignalized intersections being unable to handle the increase in traffic would "encourage unsafe choices by motorists" thereby "increasing the potential for accidents." *Id.* at 286 (quotation marks & citations omitted).

4. The "Endangerment" Prong Requires That an Applicant Must Prove That Its Proposed Facility Will Not Create Any Risk of Harm to Fresh Water, Public Health, Safety or the Environment.

The "no endangerment" standard appears to be derived from solid waste disposal laws and regulations. *See, e.g., Colonias Dev. Council v. Rhino Envtl. Servs. (In re Rhino Envtl. Servs.)*, 2005-NMSC-024, ¶ 31, 138 N.M. 133 (discussing Solid Waste Act regulations); 20.9.3.19(A)(4) NMAC (solid waste disposal permit to be denied if the permitted activity "endangers public health, welfare or the environment"). Therefore, judicial construction of those authorities properly informs the construction of 19.15.36.A.1 NMAC (2015). One such standard is set forth in the federal Resource Conservation and Recovery Act of 1976 and Solid Waste Disposal Act, as amended, 42 U.S.C. 6901, *et seq.*, ("RCRA"). RCRA includes a citizen suit provision applicable against any person "who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an "imminent and substantial *endangerment to health or the environment*." 42 USC § 6972(a)(1)(B) (emphasis added). "The term 'endangerment' has been interpreted by courts to mean a threatened or potential harm, thus, it is not necessary that [Plaintiff-Appellant] show proof of actual harm to health or the environment." *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007) (citing *Dague v. City of Burlington*,

935 F.2d 1343, 1355-56 (2d Cir. 1991), *rev'd in part on other grounds,* 505 U.S. 557 (1992); *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982)). This gives effect to Congress' intent to confer authority "to eliminate *any risk* posed by toxic wastes." *Id.* (quoting *Dague*, 935 F.2d at 1355.

The RCRA standard is "imminent and substantial" endangerment. "[A]n endangerment can only be 'imminent' if it threatens to occur immediately," but a showing that actual harm will occur immediately is not needed "as long as the risk of threatened harm is present." *Id.* (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485-86, (1996). "Endangerment is 'substantial' under RCRA when it is 'serious.'" *Id. at* 1021 (quoting *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005); citing *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004); *Cox v. City of Dallas*, 256 F.3d 281, 300 (5th Cir. 2001)). Substantial endangerment exists "where there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken." *Id.* However, even with the "imminent" and "substantial" qualifications, "if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment." *Id.* (quoting *Interfaith*, 399 F.3d at 259.[3]

[3] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601, *et seq.*, ("CERCLA," a/k/a "Superfund") also provides insight into the "no endangerment" standard. Section 7003(a) of CERCLA provides that "upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit ... against any person ... who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both." *United States v. Valentine*, 856 F. Supp. 627, 632 (D. Wyo. 1994) (quoting 42 U.S.C. § 6973(a) (emphasis omitted).) Courts have recognized the sweeping nature of the authority conferred by the provision, including the "broad authority ... to grant all relief necessary to ensure *complete* protection of the public health and the environment." *Id.*, 856 F. Supp. at 632-33(quoting *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 199 (W.D. Mo. 1985); (citing *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989); *United States v.*

The "no endangerment" standard in 19.15.36.12.A.1 NMAC (2015) does not include RCRA's "imminent and substantial" qualification. Therefore, under the New Mexico regulation, a lesser showing of endangerment will mandate denial of an oil field waste disposal facility permit. The RCRA and CERCLA case law demonstrates that the test is whether there is a risk of harm, and that the OCD must err on the side of protecting public health, safety and the environment.

5. The OCD/OCC may consider other factors under the OCD regulation and must consider community concerns with a nexus to the regulation.

The language of 19.15.36.12.A.1 NMAC is permissive — it does not *require* granting of a permit upon demonstration of the listed factors. Rather, the OCD "may" issue the permit upon making the requisite findings. Alternatively, the OCD may deny the permit based upon additional considerations.

Community concerns with a nexus to the regulation are just such additional considerations. The OCD's statutes and regulations provide for public meetings and public comment. *See* NMSA 1978, § 70-2-23; 19.15.36.10 NMAC. Therefore, OCD/OCC *must* consider concerns raised by the public at any public meeting, if there is a nexus to fresh water, public health, safety or the environment.

In *In re Rhino Environmental Services*, 2005-NMSC-024, 138 N.M. 133, the New Mexico Supreme Court considered an application for a solid waste facility that had been approved by the NMED. The applicable regulation for issuance of a permit in that case had prongs similar to the OCD's regulation at issue in this proceeding: "The regulations regarding permit issuance direct the Secretary to issue a permit if the applicant fulfills the technical

Price, 688 F.2d 204, 211, 213-14 (3d Cir. 1982); *Middlesex Cty. Bd. of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715, 722 (D.N.J. 1986).

requirements and 'the solid waste facility application demonstrates that neither a hazard to public health, welfare, or the environment nor undue risk to property will result.'" *Id.* ¶ 31 (quoting 20.9.1.200(L)(10) NMAC; citing 20.9.1.200(L)(16)(c) NMAC (providing that a specific cause for denying a permit application is a determination that the permitted activity "endangers" public health, welfare or the environment)).[4] The court held that the NMED Secretary "abused his discretion by limiting the scope of testimony during the public hearing and interpreting the Department's role as confined to technical oversight." *Id.* ¶ 27. The court stated that the regulations "clearly extend to the impact on public health or welfare resulting from the environmental effects of a proposed permit." *Id.* ¶ 31. The court noted that "a certain amount of discretion is necessary to administer and enforce regulations so as to implement legislative enactments and meet the needs of individual justice." *Id.* ¶ 35. To that end, the court held that the NMED had to consider public comment regarding the impact of the landfill on the community's quality of life, provided the impact had a "nexus" to the regulation. *Id.* ¶ 29. The court found that nexus present, because "the impact on the community from a specific environmental act, the proliferation of landfills, appears highly relevant to the permit process." *Id.* ¶ 30. The court stated that "[t]he adverse impact of the proliferation of landfills on a community's quality of life is well within the boundaries of environmental protection." *Id.* ¶ 32.

Quality of life concerns encompass traffic issues.[5] In a case involving a conditional use permit application, a city relied on evidence that included traffic studies to conclude that the proposed use would injure or otherwise harm the neighborhood and the public health, safety and welfare, even though the streets were not at capacity. *RDNT, LLC v. City of Bloomington*, 861

[4] This "endangers" language is now found at 20.9.3.19.A(4) NMAC.
[5] As noted elsewhere, traffic issues are also encompassed by "safety" concerns.

N.W.2d 71, 77 (Minn. 2015). The court paraphrased the City's planners: "[T]his is not a capacity issue, it is a livability issue." *Id.*

It follows that community concerns raised at public meetings or in public comments on the CK application that relate to any prong of the OCD standard must be considered by the OCD/OCC. In particular, as discussed in more depth below, those concerns are focused on the traffic and air quality issues triggered by the specific location of the proposed Facility, which in turns affects the community's future non-oil and gas economic development opportunities.

B. Timing: OCD/OCC Cannot Grant a Permit Unless/Until the Applicant Affirmatively Establishes Both the Compliance and No Endangerment Requirements.

1. The Showing Must Be Made Prior to Granting of the Permit; the OCD/OCC Cannot Grant the Permit on Condition That the Applicant Subsequently Meet the Requirements or Obtain Permits From Other Agencies.

As demonstrated above, CK must meet its burden of proof on all prongs prior to granting of the permit. This timing is required by the plain language of the regulation, which is not ambiguous. The key language on timing is included in the regulation: The OCD may issue a permit "upon finding" certain requirements have been met and the Facility "can be" constructed and operated as required. 19.15.36.12.A.1 NMAC (2015). The term "upon finding" requires the showing prior to issuance of the permit. The term "can be" requires a showing that, among other things, other necessary permits can be obtained.

A contrary construction – that the showing need not be made prior to the granting of the permit – would deprive the public of an opportunity to review and comment on CK's proposed plans. The public would be denied a right they are supposed to be afforded under 19.15.36.9.D NMAC (2015). *See In re Rhino Envtl. Servs.*, 2005-NMSC-024, ¶ 41 ("Allowing the Secretary to ignore material issues raised by the parties in this manner would render their right to be heard

illusory.") (internal quotation marks & citation omitted). This is particularly true with respect to any other permit CK is required to obtain, such as the DOT highway access permit, that does not provide for public input. *See* 18.31.6 NMAC.

As a matter of logic as well as proper respect for the jurisdiction of other state agencies, the OCD should to the extent feasible require the applicant to obtain all necessary permits and approvals from those agencies as opposed to making a showing to the OCD of its ability to do so; if not, the OCD will risk second-guessing and/or prematurely substituting its opinion on a permitting decision that the Legislature has delegated to a sister agency.[6] However, instead of allowing the requirements be met after the OCD permit is issued, to comply with the requirements of 19.15.36.12.A.1 NMAC and accommodate the public's due process right to have meaningful input, the OCD/OCC properly can and should require an applicant to obtain other required agency permits first, before it seeks a Part 36 permit. This is the appropriate way to resolve, consistent with the language of the regulation, any OCD/OCC concerns about lack of expertise/resources or interfering with another agency's jurisdiction.[7]

Ensuring compliance with statutes outside the OCD's jurisdiction is in keeping with other agencies charged with a similar standard. In evaluating the meaning of the phrase, "subject to the provisions of applicable law" in a statute describing the Bureau of Land Management's (BLM) regulatory authority for public lands, the Tenth Circuit determined that the BLM must ensure that the uses approved by the BLM were "in compliance with other statutes imposing limitations on the uses of ... land and the activities of federal agencies such as [the National

[6] In addition, the possibility exists that requirements or conditions imposed by other agencies in connection with their permitting decisions could change operational aspects of the proposed oil field waste disposal Facility. Such changes in turn could affect the OCD's permitting decision. Indeed, any such changes effectively could modify the application in material respects, with the result that neighbors and other interested parties would be deprived of any opportunity, much less a meaningful opportunity, to comment on and possibly challenge the requested permit.

[7] Although, as discussed above in Section I.A.2, the OCD/OCC in fact have jurisdiction over public health and the environment. *See* NMSA 1978, § 70-2-12(B), NMSA 1978, § 70-2-6, 19.15.11.9 NMAC, 19.15.36.12.A.1 NMAC.

Environmental Policy Act], the Endangered Species Act, and [the Federal Land Policy and Management Act]." *Greater Yellowstone Coalition v. Tidwell*, 572 F.3d 1115, 1127 (10th Cir. 2009). That is, BLM must ensure compliance with statutes that are outside BLM's jurisdiction. This is similar to how the NRC ensures compliance with other agency permitting requirements before it licenses nuclear facilities. *See* February 8-10, 2017 Hearing Transcript ("Tr.) 453:15-23.; *see also* 10 C.F.R § 51.45(d).

An alternative approach would be for the OCD/OCC to make an interim determination that the applicant has satisfied the other Part 36 requirements, but then place further processing of that application in abeyance until the applicant obtains necessary permits from other agencies. After such permits have been obtained, the Part 36 proceeding can be re-opened. This approach respects the public's right under the OCD/OCC statutes and rules to have a meaningful opportunity to review and have input on the application, given appropriate notice after it is reopened.

Indeed, unless CK is required to obtain the necessary permits from other agencies before the OCD considers granting its permit, LES and the public will be deprived of due process. LES has a property interest that will be deprived when CK's delivery trucks drive across property in which LES holds an interest. *See* Part III.A.3.(d) below. The public has a property interest in the economic well-being of the community. *See* Part IV.H.1 below. "Administrative hearings that affect a property or liberty interest must comply with due process." *N.M. Dep't of Workforce Solutions v. Garduno*, 2016-NMSC-002, ¶ 10, __ P.3d __. Other governmental agencies from which CK must obtain permits, such as DOT, do not afford notice, an opportunity to be heard, or any other due process. Thus, if OCD grants CK a permit for the Facility before

other required permits are granted, the public and LES will effectively be denied their opportunity to be heard.

C. Under the 2015 Version of Part 36 Applicable in This Proceeding, the Applicant Must Make Its "Compliance" and "No Endangerment" Showing in Its Application. The Applicant Cannot Supplement or Revise Its Application.

The initial process that an applicant must follow in seeking a permit to construct and operate an oil field waste disposal facility is straightforward and set out in 19.15.36.8 NMAC (2015). The applicant must file the OCD's Form C-137, including in the form all of the information listed in 19.15.36.8.C NMAC (2015). Following receipt, the OCD will review the application and make a determination whether it is "administratively complete," *i.e.*, whether it provides the information set forth in 19.15.36.C and .D NMAC (2015). 19.15.36.8.E NMAC (2015). If the OCD determines that the application is administratively complete, then the regulation provides for public notice of the determination and an opportunity for public comment on the application. 19.15.36.9.A, .B and .C NMAC (2015). If the OCD determines that the application is not administratively complete, "the division shall notify the applicant of the deficiencies ... and state what additional information is necessary." 19.15.36.8.E NMAC (2015), *i.e.*, the OCD will simply reject (with explanation) an application that is not administratively complete. At that point, the applicant is free to submit a *new* application that remedies the deficiencies.

The amended 2016 oil field waste disposal facility regulations – which do not apply here – permit an applicant to revise or supplement its application in order to remedy any deficiencies in the application. 19.15.36.9.B.2 NMAC ("[I]f the division determines the application is not approvable, the division shall ... mail a deficiency letter ... [that] identif[ies] and address[es] all of the division's concerns in specific detail allowing the applicant the opportunity to correct the

deficiencies *by submitting a revised application.*" emphasis added)). The 2015 regulations contain no such language authorizing supplementation or revision of an application. Instead, the only action available under 19.15.36.8.E NMAC (2015) to an applicant whose application is deficient is to submit an entirely new application that corrects the deficiency.

Further, neither the 2015 nor the amended 2016 oil field waste disposal facility regulations permit any supplementation or revision of an application following issuance of an administrative completeness determination. This is for good reason: if the Application is supplemented or revised after it is deemed "administratively complete," the facility's neighbors, other interested persons, and the public at large effectively will be deprived of any opportunity to review and comment on the revisions or supplementation, contrary to the right they are supposed to be afforded under 19.15.36.9.D NMAC (2015).

OCD requested and permitted CK to supplement and/or revise its application three times – once in or around April 2016, prior to issuance of the administrative completeness determination, once in May 2016 and once in September 2016, after issuance of the administrative completeness determination. CK Ex. G. All of these actions were in conflict with the 2015 version of Part 36, which is the version that is applicable to CK's application. CK's supplementations cannot be considered by the OCC in determining whether the application meets the two-prong standard of 19.15.36.12.A.1 NMAC (2015).

III. OCD/OCC IMPROPERLY REFUSED TO CONSIDER EVIDENCE RELEVANT TO CK'S FAILURE TO COMPLY WITH OTHER APPLICABLE STATUTES AND RULES, AND LACK OF ABILITY TO OPERATE ITS FACILITY WITHOUT ENDANGERING FRESH WATER, PUBLIC HEALTH, SAFETY OR THE ENVIRONMENT. OCD/OCC SHOULD RE-OPEN THE HEARING AND PERMIT LES TO PRESENT THIS EVIDENCE.

A. Legal Access.

1. CK Must Prove Its Legal Right of Access Across the SLO Property Lying Immediately to the North of CK.

It is clear from the record that CK needs to cross State Land Office ("SLO") property and access Hwy 176 in order to operate its Facility. CK Ex. AA, Att. A, Fig.A.2;[8] Tr. 184:4-20; Tr. 443:9-19.

(a) OCD regulations require a showing of legal access to the proposed Facility.

OCD regulation 19.15.36.8.C.2 NMAC (2015) requires that CK demonstrate that it has legal access to its proposed site. 19.15.36.8.C.2 NMAC (2015) states that an application must include "a plat and topographic map showing ... highways or roads *giving access* to the surface waste management facility site." 19.15.36.8.C.2 NMAC (emphasis added). The only sensible construction of this requirement of showing access is that the applicant must show, and thus possess, *legal* access. A showing of non-legal access would be useless as well as misleading. Indeed, the requirement of a "*plat* ... showing ...roads giving access," necessarily reflects a requirement that the access be a legal one. Plats must accurately describe legal access to the subject property. *See* NMSA 1978, § 47-6-3(A) ("The final plat shall ... accurately describe legal access to, roads to and utility easements for each parcel"). Thus, CK in its Application must show that it has legal access to the proposed site.

(b) CK cannot cross SLO land without the SLO's permission.

The CK application indicates that it anticipates gaining access to the proposed Facility by way of State Highway 176 (also known as State Highway 234). However, State trust land lies between CK's property and the highway. According to SLO regulations, an easement issued by the Commissioner of Public Lands ("Commissioner") must be obtained; if it is not, crossing of the state land, unless authorized by the Commission in "extenuating circumstances" is trespass. SLO regulation mandates:

[8] CK Ex. AA is CK's application. Tr. 89:14-15.

> A. *Any use of trust lands for right of way or easement purposes prior to the grant of a right of way or easement as provided by this Part 10 shall constitute an unauthorized use of such lands and will be deemed a trespass. The use of trust lands for easement or right of way purposes, if based upon any approval by any means other than as provided for in this Part 10, will likewise be deemed a trespass.* However, in extenuating circumstances and for good cause shown, the commissioner may, in his discretion and upon written request, waive the trespass penalties set out below when the trespass consists of an inadvertent failure to obtain or renew an easement or right of way and that failure is promptly corrected when discovered.

19.2.10.9 NMAC (emphasis added). In addition, it is only the *actual* right-of-way or easement that can be used unless permits are issued for temporary access for maintenance and other specified activities. *See* 19.2.10.17 NMAC. Significantly, no rights may be obtained by prescription:

> Easements or rights of way on trust lands may be acquired only by application and grant made in compliance with this part and applicable laws. No easement, right of way, or other interest in trust lands may be acquired by prescription, or pursuant to any other legal doctrine, except as provided by statute.

19.2.10.8 NMAC.

(c) CK cannot obtain a highway access permit from the NMDOT without being able to prove its right of legal access.

An access permit from the NMDOT requires that the applicant have the right to cross land for gaining access. By NMDOT regulation, a permit application may be refused "when there is no written evidence of the ownership of the property surface rights provided in the application." 18.31.6.14.D.2 NMAC. At the February 8 – 10, 2017 hearing, LES was not allowed to present evidence on DOT permitting requirements, including the requirement of legal access. Tr. 52:1-14; Tr. 61:15-24; Tr. 521:6-18. The evidence, if heard, would show that CK cannot obtain a DOT highway access permit.

2. LES is entitled to present evidence that CK cannot prove its legal right of access across the SLO land.

As discussed in more detail below, CK cannot prove its legal right of access across the SLO land between Hwy 176 and the proposed Facility. As discussed above, the OCD cannot grant an oil field waste disposal facility permit unless the applicant first proves it can comply with applicable statutes and rules. LES attempted to present evidence on legal access, but it was denied by the OCC. Tr. 61:15-24. LES is entitled to present such evidence. *See Estrada v. Cuaron*, 1979-NMCA-079, ¶¶ 10-11, 93 N.M. 283 (exclusion of relevant evidence that interfered with jury's truth-finding function warranted new trial); *Boespflug v. San Juan Cty. (In re Termination of Boespflug)*, 1992-NMCA-138, ¶ 17, 114 N.M. 771 (exclusion of noncumulative, relevant evidence was reversible error); *see also Chavarria v. Basin Moving & Storage Co.*, 1999-NMCA-032, ¶¶ 33, 34, 127 N.M. 67 (decision of WCJ reversed and remanded for reconsideration in light of evidence that had been improperly excluded and that, if considered, could have affected findings). The proceedings on CK's application should be reopened to allow the OCC to consider evidence that CK has no legal right of access to the Facility it proposes to build.

3. CK Indisputably Does Not Hold the Purported Easement for Access.

The land lying between State Highway 176 and CK's property is held in trust by the New Mexico State Land Commissioner for the benefit of the citizens of the State. CK's claim of legal access across the State trust land is premised on an April 23, 2009 easement, No. 30337 ("the Sims Easement") that the State granted to Leo V. Sims, II (LES Ex. N-1). State Land Office records reflect that the Sims Easement purportedly has been assigned as follows:

1. April 29, 2015 assignment from Sims to J.D. and Joann Davis (LES Ex. N-2);

2. April 30, 2015 assignment from Davis et ux. to A. Bryce Karger (LES Ex. N-3); and

3. May 27, 2015 assignment from Bryce Karger to A. Bryce Karger and Johnny Cope (LES Ex. N-4).

Even assuming for the sake of argument that these assignments to other persons are valid[9], no easement has ever been assigned or otherwise granted to C.K. Disposal LLC. Therefore, CK has no legal access from Highway 176 to the land on which CK proposes to build the Facility.

(a) CK Disposal Proposes Its Entrance at a Location Where It Has No Easement.

The Sims Easement is for a 40 foot wide strip of land located approximately *522 feet west* of the southeast corner of Section 32, T. 21 S., R. 38 E., and running approximately north to New Mexico Highway 176. *See* LES Ex. N-1. In theory, the Sims Easement, if valid, could have provided some limited access to the land that CK now owns, which is due south of Section 32. *See* CK Ex. AA, Application Fig. A.3, Topographic Map. However, the Sims Easement is located approximately 500 feet away from the entrance that CK proposes for its Facility: the Application represents that the entrance gate is at the southeast corner of Section 32. *See* CK Ex. AA, Application Fig. A.2, Site Development Plan, and Fig. A.3, Topographic Map. There has never been an easement at the location CK proposes for access. Therefore, CK's Application proposes an entrance where CK unquestionably has no easement. The Application is defective on this fundamental ground, and should be refused.

(b) The Sims Easement was a nullity from the time of creation.

Where a granted right-of-way did not and never had extended to a street, the Supreme Judicial Court of Massachusetts found that the easement was a nullity. The court applied the rule

[9] As demonstrated below, these assignments were not valid.

that "[w]hen a right in the nature of an easement is incapable of being exercised for the purpose for which it is created the right is considered to be extinguished" to the situation where "the only purpose for which the easement was created was, at the time of the creation of the easement, and has since remained, impossible of attainment." *Comeau v. Manzelli*, 182 N.E.2d 487, 492 (Mass. 1962). Because the respondent in that case never had the right to use the easement, the easement was a nullity. *See id.*

The specified purpose of the Sims Easement is for "gaining ingress to and egress from *Grantee's land*" and "providing personal ingress and egress to Grantee," for Section 7. LES Ex. N-1. (emphasis added). Just as the easement was incapable of being exercised at creation in *Comeau*, the Sims Easement was incapable of being exercised at creation because Sims never owned the property being accessed. Even though the accessed property was referred to as "Grantee's land," it was not Sims' property[10] nor was Sims entitled to personal ingress and egress. For these reasons, and applying the reasoning of *Comeau*, the Sims Easement was a nullity at the time of creation.

(c) Even assuming it was not a nullity *ab initio*, the Sims Easement was, according to its own terms, abandoned by April 24, 2010 for non-use.

In *State ex rel. State Highway Comm'n v. Dannevik*, 1968-NMSC-181, 79 N.M. 630, the New Mexico Supreme Court stated the rule for ascertaining the meaning of the language of a grant:

> To ascertain the nature of the easement created by an express grant we determine the intention of the parties ascertained from the language of the instrument. Such intention is determined by a fair interpretation and construction of the grant and may be shown by the words employed construed with reference to the attending circumstances known to the parties at the time the grant was made.

[10] Apparently, Sims was the personal representative for the actual property owners at the time. *See* LES Exs. K-1 through K-5. However, the easement was not issued to him as their personal representative. *See* LES Ex. N-1.

Id. ¶ 5 (internal quotation marks & citation omitted) (alterations omitted). The habendum clause in the *Dannevik* case provided

> that if the highway over said right of way should at any time be discontinued by non-use thereof for a continuous period of five years * * * then * * * the same shall be considered as having been abandoned within the meaning hereof, and the easement hereby granted shall thereupon terminate.

Id. ¶ 2 (internal quotation marks & citation omitted). Because there was nonuse of the easement for the period specified in the habendum clause, the court found that the easement had been abandoned. *Id.* ¶ 6.

The Sims Easement expressly provides that the conveyance was:

> ...a personal right-of-way for the sole and exclusive purpose of gaining ingress to and egress from Grantee's land described. The right-of way granted herein does not run with any land of Grantee.

LES Ex. N-1, second paragraph. Further, the Sims Easement specifies that it will be abandoned if not used:

> Non-use of the right-of-way granted herein for any period in excess of one (1) year without the prior written consent of Grantor shall be conclusive proof of abandonment of the right-of-way, and shall cause the right-of-way to lapse ipso facto and revert to Grantor without further action or notice required of Grantor; and non-use for shorter periods shall place upon grantee the burden of proving that there was no intent to abandon. Grantee's abandonment cannot be waived by any action or inaction of Grantor or by Grantor's failure to discover such abandonment. The resumption of use by Grantee after abandonment shall be deemed a trespass.

LES Ex. N-1, § 11. Clearly the grant was of a personal right-of-way and did not run with the "land of the Grantee," *i.e.*, the benefitted land. Further, the benefitted land was identified at the time as owned by Tom and Winnie Kennann, *see* LES Ex. N-1, Ex. A. Because the Kennanns were deceased, the benefitted land was actually held by their estates. On December 29, 2009, the benefitted land was transferred from the Kennann estates to S&D Ranch, LLC. *See* LES Exs. K-

1 & K-2. S&D Ranch, LLC held the property until January 3, 2011, at which time the property was transferred to Leo V. Sims, LLC. *See* LES Ex. K-3.

The chain of title demonstrates that the benefitted property was not held by Leo V. Sims II at the time the Sims Easement was granted on April 23, 2009. Nor did Leo V. Sims II own the benefitted property at any time during the following year. Indeed, Sims never held title to the benefitted land – the same land now owned by CK and upon which it proposes to build its Facility. Therefore, it is impossible that Leo Sims ever used the easement for its sole, stated permissible use. As a result, following *Dannevik*, the Sims Easement, if it was ever valid, which is doubtful, was abandoned by its own terms – non-use for more than one year. There is no record of any "prior written consent" of the Commissioner of Public Lands as to non-use. Therefore, the right granted in the Easement reverted to the State on April 24, 2010, after a year of not being used for access to any land owned by Leo Sims.

(d) As of August 3, 2010, any new easement across Section 32 south of Highway 176 has required LES's consent.

On August 22, 2003, the State Land Commissioner and LES entered into an Agreement Regarding Land Use Restriction or Condition ("LURC"). The LURC prohibited the Commissioner from leasing or otherwise encumbering, including with additional easements, the Section 32 land north of Highway 176 now occupied by LES's plant. *See* LES Ex. L-1. The agreement was amended on August 3, 2010, to encompass that portion of Section 32 that lies south of Highway 176 and north of CK's proposed Facility. *See* LES Ex. L-2. Section 1 of the LURC requires LES's prior written consent in order for the Commissioner to exercise the right to "lease or otherwise dispose of or encumber the Land or any interest incident thereto, for any purpose, *or grant additional easements, rights of way and grants across, under or over the land.*" (Emphasis added.) Thus, as of August 3, 2010, any new easement for ingress to and

egress from the proposed Facility is subject to LES's valid existing right to consent, or withhold consent, as established by the LURC.

(e) CK Disposal has no easement rights across Section 32, because LES has not consented to any such grant.

The aforementioned 2015 assignments of the 2009 Sims Easement were subject to the August 3, 2010 LURC amendment. However, LES never consented to them. LES never provided any written or other form of consent to any assignment after August 3, 2010. Indeed, LES was never approached, or alerted, by the State Land Office regarding the three assignments made in 2015 within LURC-protected land. The assignments are therefore invalid. Any use of the Sims Easement since 2010 by Sims or any third party including CK has been a trespass.

Presumably, CK will argue that the 2015 assignments are continuations of the 2009 Sims Easement and do not constitute new easements; therefore LES's consent was not required. That argument will fail for three reasons. First, Section 7 of the Sims Easement, when read as a whole, implies that an original easement ends upon an assignment. Section 7 states:

> Grantee shall not sell, assign, or in any way transfer or cause to be transferred, directly or indirectly, any interest in this right-of-way to any person or entity without the prior written approval of Grantor. Such approval may be conditioned upon the *agreement by Grantee's assignee to additional conditions* and covenants and may require payment of additional compensation to Grantor. This right-of-way is for the *sole purpose of providing personal ingress and egress to Grantee*, and for no other purpose.

(Emphasis added.) The second sentence provides for additional conditions regarding the right-of-way. The following sentence re-states the purpose of the easement, which is for personal ingress and egress to *Grantee*. The reference is to "Grantee," not to "Grantee's assignee" in the third sentence, implying that the sole purpose described would be conditioned upon assignment, presumably to provide personal ingress and egress to "*Grantee's assignee*," rather than "Grantee." This would be a new purpose.

The two assignments that were made, which are identical, allocate the liability between Grantee and Grantee's assignee according to periods designated by the dates of the assignments: "...Assignor shall remain fully liable for all damage to the subject trust lands arising from or in conjunction with Assignor's use of the subject right-of-way; and ... Assignee assumes all subsequent liability from the date of this assignment forward...." In effect, then, the assignment operates as a new easement as to liability. Further, "Assignee ... agrees to be strictly bound by all the terms of the assigned right-of-way." As the original easement refers to "Grantor's assignee" once (see above), this implies that "Grantor's assignee" is to be treated as "Grantor" and the easement is essentially a new easement between the assignee and the Commissioner.

That the assignments were new easements is supported by the SLO regulation on assignments, which states:

> **ASSIGNMENT – RELINQUISHMENT:** An easement or right of way may be assigned to third parties or relinquished to the state with the prior written approval of the commissioner and upon such terms and conditions as he may prescribe ....

19.2.10.24 NMAC. Assignment is treated together with relinquishment in the regulation. Relinquishment is a situation where the easement ends. Assignment, then, also ends an original easement.

Second, the Sims Easement was abandoned and thus terminated by its own terms – "*ipso facto*" – by no later than April 24, 2010. As a matter of law, therefore, the 2015 assignments constitute the grant of new easements which themselves are invalid for lack of consent by LES. Any use of the abandoned easement is a trespass under the terms of the original easement.

Third, and alternatively, the 2015 assignments are invalid for the reason that LES's right under the LURC constituted a "valid existing right" as of 2010. Section 8 of the Sims Easement states: "The rights herein are subject to valid existing rights." Once the 2010 LURC amendment

took effect, LES held a "valid existing right" regarding future entry on to the land: a right that third party access could not be granted without its consent. The consent was not obtained and the 2015 assignments are therefore void.

For all of these reasons, neither Karger nor Cope nor CK Disposal holds easement rights across that portion of Section 32 that lies south of Highway 176. CK's proposed use of the abandoned easement for access to its proposed Facility would be a trespass.

B. Traffic Safety

1. To Obtain a Highway Access Permit, CK Must Satisfy the DOT That Such Access Will Not Create a Safety Hazard.

DOT regulation 18.31.6 NMAC, "State Highway Access Management Requirements," along with its associated State Access Management Manual, "provides procedures and standards to preserve and protect the public health, safety and welfare, to maintain smooth traffic flow, and to protect the functional level of state highways while considering state, regional, local, and private transportation needs and interests." 18.31.6.6.A NMAC; *see also* http://dot.state.nm.us/content/nmdot/en/Engineering_Support.html#f (link to Access Management Manual). The regulation mandates that "no person shall construct or modify any permanent or temporary access providing direct vehicular movement to or from any state highway from or to property in close proximity to or adjoining a state highway without an access permit," which is issued by DOT. Permittees must comply with the requirements for design and location of driveways, intersections and other points of access to public highways set forth in the State Highway Access Management Requirements regulation. 18.31.6.6.D & E NMAC. A traffic engineering evaluation must be conducted. 18.31.6.14.D, 18.31.6.15, 18.31.6.16 NMAC. Crucially, the use of highway right-of-way for non-highway purposes must not result in

impairment of the highway or operational interference with the health, safety and public welfare of road users. 18.20.5.6.B NMAC.

2. LES Is Entitled to Present Evidence That CK's Proposed Access to Highway 176 Would Create a Safety Hazard, and That As a Result the DOT Likely Would Not Grant a Highway Access Permit.

Ronald Bohannan offered to testify at the February 8-10, 2017 hearing that CK's proposed access to Hwy 176 would create a safety hazard, and that as a result the DOT likely would not grant a highway access permit. The OCC did not allow the testimony. Tr. 521:6-18. This evidence was directly relevant to CK's burden of proving both the compliance and the no endangerment prongs of 19.15.36.12.A.1 and should have been considered.

C. NMED Permitting

At the hearing on February 8 – 10, 2017, LES offered the testimony of both Clayton Orwig and Liz Bisbey-Kuehn regarding the air quality permitting requirements that CK would have to satisfy in order to construct and operate its proposed Facility. The OCC did not allow the testimony. Tr. 52:1-14. This evidence, and additional proof that CK could not comply with these permitting requirements, was relevant to the issue of CK's ability to satisfy the compliance prong of 19.15.36.12.A.1, and should have been considered.

For the reasons described in this Section III, the OCD/OCC should reverse its previous rulings regarding this evidence relating to CK's legal access, traffic safety, and SLO/DOT/NMED permitting and then re-open the hearing to permit LES to present it. *See Dewitt v. Rent-a-Center, Inc.*, 2009-NMSC-032, ¶ 37, 146 N.M. 453 ("Because we have determined that the testimony of Worker's HCPs [health care providers] should not have been categorically excluded, we reverse and remand to the WCJ [Workers Compensation Judge] to ensure that the testimony of Worker's HCPs are fully considered."); *see also Progressive Cas. Ins. Co. v. Vigil*, 2015-NMCA-031, ¶ 2, 345 P.3d 1096 ("Because we conclude that the district

court erred when it excluded certain evidence from being admitted at trial, we reverse the judgment as to the bad faith claim."), *cert. granted*, 2015-NMCERT-003, 346 P.3d 1163.

IV. CK'S APPLICATION SHOULD BE DENIED BECAUSE IT DID NOT MEET ITS BURDEN OF PROOF FOR THE APPLICATION AND/OR BECAUSE THE EVIDENCE PRESENTED PROVES IT CANNOT.

A. CK's Application Should Be Denied Because It Cannot Show It Will Have Legal Access to Its Proposed Facility, Including for Safe Highway Access.

1. CK's Proposed Access to Highway 176 Requires Permission From the SLO and a DOT Highway Access Permit.

CK proposes to access its Facility from Hwy 176, along the east edge of Sections 32 and 5, through SLO property. Tr. 465. CK must have a DOT highway access permit to access Highway 176. *See* Section III.B. CK also must have permission from the SLO to cross the SLO property that lies between Hwy 176 and CK's property. CK must make these showings as part of its proof of compliance with all other applicable statutes and regulations.

CK's Application does not mention any request for an access permit or contact with DOT regarding the same, does not provide driveway design information and does not evaluate state highway traffic impacts. The Site Operation Plan only discusses how roads onsite will be signed to direct waste haulers. CK Ex. AA, Att. K, § 3.3. There is no discussion of how access to the Facility would be coordinated with LES's access to its property, as required under 18.31.6.18 NMAC.

CK has failed to present any evidence, much less to prove, that it can obtain a highway access permit. In addition, CK has failed to present any evidence, much less to prove, that it can obtain SLO permission to cross the SLO property along the east edge of Section 32 lying to the north of CK's property.

2. To Obtain a Highway Access Permit From the DOT, CK Also Would Have to Demonstrate That Its Proposed Access From Highway 176 Would Not Create a Safety Hazard.

(a) CK has failed to show that it could satisfy the traffic safety requirements for issuance of a DOT access permit.

The Application estimates that the proposed oil field waste disposal Facility will receive up to 12,000 barrels per day ("bbl/dy"), which translates into 93 trucks per day with 130 barrels per truck. CK Ex. AA, Att. K, § 5; Tr. 606:18-23. Based on these estimates and assumptions, the Facility will increase the truck traffic on Highway 176 by up to 200 truck trips per day. During periods of heightened oil and gas activity, the number could be higher: double or more. Tr. 181:17-182:2; Tr. 473:20-25; Tr. 472:24-473:11. This is a significant number of additional large vehicles turning off of and onto a two-lane rural highway. The Application clearly fails to show the proposed Facility will comply with the DOT regulation on access or that it will not endanger public safety.

CK's Application does not establish, or even address, how the right-of-way will be preserved and not obstructed by trucks waiting on Highway 176. Nor does the application describe how the traveling public will be kept safe, as required by DOT regulations and the OCD "no endangerment" standard. Evidence presented on truck backups at the hearing established that there could be lengthy delays in processing and extensive truck backups at the proposed Facility. Tr. 471:5-472:12; Tr. 472:13-21; Tr. 183:4-19.

In sum, CK has failed to show both that it could comply with all applicable statutes and regulations, and that operation of its Facility would not endanger safety.

B. **CK's Application Should Be Denied Because Its Proposed Facility Would Generate VOCs in Amounts That Would Endanger Public Health and the Environment.**

1. CK's Proposed Facility Would Emit Into the Atmosphere As Much As 800 TPY of VOCs and As Much As 27.5 TPY of Benzene.

Based on published literature, the amount of organic compounds that will be processed and potentially emitted at the CK Facility can be estimated at 100 tons per year ("tpy"), including 9 tpy benzene and 20 tpy ethylbenzene. LES Ex. BB 2016 Khan report; Tr. 602. However, additional information from the Halfway oil waste disposal facility indicates that potentially 800 tpy VOCs, 27.5 tpy benzene and 125 tpy total hazardous air pollutants ("HAPs") will be emitted. Tr. 603.

2. <u>These Emissions Would Result in Benzene Concentrations of 8 PPM and 160 PPB At CK's South and North Fence Lines, Respectively, and Exceed the General Health Standard of 40 PPB and the Occupational Health Standard of 1 PPM</u>.

"Ambient air" means "the outdoor atmosphere, but does not include the area entirely within the boundaries of the industrial or manufacturing property within which the air contaminants are or may be emitted and public access is restricted within such boundaries." LES Ex. II. Ambient air is the proper environment in which to assess public health risks. Tr. 661:11-14; Tr. 573:18-24. Thus, the proper location to measure VOC concentrations is at the all fence lines, including the closest fence line, given wind blows in all directions. Tr. 573:18-574:11. The closest fence line at the proposed CK Facility is the south fence line; further, it is realistic that at times emissions would be blown south to that location. Tr. 311:2-5; Tr. 203:1-3; LES Ex. AA. It is irrelevant, based on the definition of ambient air and the proposed project life, that there is no present use of the land lying to the south of CK. CK Ex. AA, Att. K, § 4.5; Tr. 661:15-662:8.

The predicted concentration for benzene at the south and north fence lines is 8 ppm and 160 ppb, respectively. Tr. 605:9-24. The EPA range of protective levels for benzene is 0.5 ppb to 40 ppb, below the estimated north fence line concentration of 160 ppb and far below the south

fence line concentration of 8 ppm. Tr. 665:19-22. The threshold for workers is 1 ppm; the estimated south fence line concentration far exceeds that threshold. Tr. 665:19-22.

This evidence, unrebutted by CK, demonstrates that its proposed Facility would endanger public health and the environment.

3. OCD/OCC Cannot Assume That the NMED Will Prohibit CK from Emitting VOCs At Levels That Will Endanger Human Health and the Environment.

It would be a mistake for the OCD to assume that the New Environment Department will intervene to stop the Facility's VOC emissions. VOC emissions may not be regulated by the NMED. For instance, the NMED construction permit exemptions include National Emission Standards for Hazardous Air Pollutants ("NESHAPs"), to which federal emission limits apply. *See* LES Ex. II, 20.2.72.202.C NMAC; 20.2.72.7.R NMAC. The exemption is that the requirements for a permit are to "take into account all federally enforceable emission limits established for such sources." LES Ex. II, 20.2.72.202.C.2 NMAC. However, the emission limits are industry-specific and the industries addressed are not likely to apply to oil field disposal facilities. The NMED would thus not regulate the emissions unless they became subject to regulation, that is, emissions of 250 tpy. Until then, the NMED would require only emissions inventorying and reporting. *See* LES Ex. JJ, 20.2.73.300 NMAC.

C. **CK's Application Should Be Denied Because Its Proposed Facility Would Generate H2S in Amounts That Would Endanger Public Health.**

1. CK's Own Modeling Demonstrates the Potential That It Would Emit H2S in Amounts That Would Result in a Fence Line Concentration of 0.5 to 0.6 PPM.

Based on CK's model,[11] its Facility is estimated to emit H2S in amounts that would result in concentrations of around 0.5 and 0.6 ppm (1 hour average) on the south, or nearest, fence line. Tr. 573:1-13; Tr. 311:2-5. The modeling, however, likely underestimates CK's H2S emissions. Tr. 571:12-15; Tr 583:3-11.

2. The Predicted H2S Concentration At the South Fence Line Endangers Human Health Based on Government Standards.

New Mexico's Ambient Air Quality Standards ("AAQS") for H2S applicable in the area of the Permian Basin in which the proposed Facility is to be located is 0.1 ppm (1/2 hour average). This standard is the New Mexico standard that would be applicable at CK's fence line. Tr. 573:1-24. CK's modeling contemplates the potential for H2S concentrations several multiples above this standard, even without considering that the modeling result is a 1 hour average and underestimates the result for a ½ hour AAQS standard. Tr. 583:3-11. The modeled concentrations are two orders of magnitude greater than the EPA's health-based level of 0.006 ppm. Tr. 663.

3. Under CK's H2S Management Plan, No Action Is Taken to Reduce H2S Concentrations at the Evaporation Ponds Until Concentrations Reach 10 PPM and No Evacuation Is Undertaken Unless the Fence Line Concentrations Reach 20 PPM.

CK's H2S Management Plan does not mandate any action to reduce H2S concentrations at the Facility's evaporation ponds until concentrations reach 10 ppm. CK Ex. AA, Att. K, App. A, § 1.3. No evacuation is to occur until fence line concentrations "downwind" reach 20 ppm. *Id.* This effectively allows concentrations under 10 ppm to occur continuously, including at the

[11] CK's Sept. 2016 H2S modeling was submitted after issuance of the administrative completeness determination – a violation of the 2015 version of Part 36. For the reasons stated in Part II C, above, CK's H2S modeling should not be considered by the OCC. Therefore, CK makes absolutely no showing that its H2S emissions won't endanger public health. Insofar as the OCC may be considering CK's H2S modeling, the permit should be denied for the reasons stated in this section.

fence line. Tr. 675:6-16. This level of H2S violates government air standards and is not protective of the public. Tr. 679:7-20.

Thus, CK has failed to demonstrate that operation of its proposed Facility would not endanger public health and the environment.

4. The OCD/OCC Cannot Assume That the NMED Will Prohibit CK From Exceeding the NMAAQS for H2S; the NMED Does Not Enforce Compliance With That Standard.

The NMED's own regulation on ambient air quality standards states: "The requirements of this part are not applicable requirements under 20.2.70 NMAC [air quality operating permits] ...." LES Ex. II, 20.2.3.9 NMAC. Further, "Ambient Air Quality Standards are not intended to provide a sharp dividing line between air of satisfactory quality and air of unsatisfactory quality. They are, however, numbers which represent objectives that will preserve our air resources." 20.2.3.108 NMAC (emphasis added). Thus, the NMAAQS for H2S will not necessarily be enforced. The standard instead appears to be a goal. Satisfaction of OCD's "no endangerment" prong therefore should be assessed in the context of health-based standards, such as the EPA standard for exposure to the public discussed above. Using health-based standards, CK's proposed Facility endangers public health. See Section IV.C.2., above.

D. CK's Application Should Be Denied Because Its Proposed Facility Would Emit Air Contaminants in Amounts That Would Endanger the Environment and Result in Damage to Electronic Components At LES's Plant.

CK's own modeling demonstrates the potential that it would emit H2S in concentrations of 5 ppb at LES's buildings. H2S at this concentration can cause, or contribute to, corrosion of the electronic components used in LES's plant. Tr. 734:7-16. CK's proposed Facility potentially also could generate Sulphur Dioxide ("SO2") and chloride salts in amounts that could cause, or contribute to, corrosion of such electronic components. Tr.734:17-735:3; Tr. 700: 21-25; Tr. 710:23-711:2.

Because of this risk of corrosion of electronic components, which CK has not attempted to rebut or otherwise address, CK cannot show that it can operate its Facility without endangering the environment. It is irrelevant that H2S, SO2 and/or chloride salts from other sources may cause, or contribute to, corrosion of electronic components at LES's plant. The relevant question is whether the additional H2S, SO2 and/or chlorides emitted from CK's proposed Facility would add to or exacerbate the corrosion risk. Further, LES does not have an obligation to take affirmative measures to eliminate the risk that H2S, SO2 and chlorides generated by CK's proposed Facility would cause or contribute to corrosion of electronic components at LES's plant.

E. CK's Application Should Be Denied Because Its Proposed Facility Would Emit Air Contaminants in Amounts That Would Endanger the Environment and Result in Damage to Vehicles and Other Metal Equipment on LES's Premises.

CK's proposed Facility would emit chloride salts into the atmosphere in amounts that potentially could cause corrosion of metal equipment and vehicles on LES's premises. Tr. 707:18-708:16; Tr. 709:7-16; LES Exs. EE & FF. Because of this risk of corrosion of metal equipment and vehicles on LES's premises, which CK has not attempted to rebut or otherwise address, CK cannot show that it can operate its Facility without endangering the environment.

F. CK's Application Should Be Denied Because Its Proposed Facility Would Emit Air Contaminants in Amounts That Would Endanger the Environment and Contaminate LES's Stormwater Drainage Pond.

LES's permit for its stormwater drainage pond is to ensure protection of groundwater. Tr. 758;11-16. CK's proposed Facility would emit chloride salts, semi-volatile organic compounds and metals into the atmosphere in amounts that potentially could be deposited into and contaminate LES's stormwater drainage pond. Tr. Tr. 748:25-749:11; Tr. 755:19-24.

Because of this risk of contamination of LES' stormwater drainage pond, which CK has not attempted to rebut or otherwise address, CK cannot show that it can operate its Facility without endangering the environment.

G. CK's Application Should be Denied, Because Its Proposed Facility Would Likely Injure Migratory Birds and Thus Endanger the Environment.

OCD regulation 19.15.36.13.I NMAC requires that ponds such as that proposed for the Facility be screened, netted or covered from migratory birds. Alternatively, CK must provide a plan showing an alternative method to protect migratory birds. CK requested a variance from the requirements, but did not submit a plan to protect the birds. Tr. 746. Instead, CK proposes to inspect ponds daily after it begins operations and will submit a plan or screen the pond only if it is "a recurring problem." CK Ex. AA, Att. NMAC, at 18, 40.

Generally, CK's evaporative pond water will be Produced Water ("PW") containing metals, salts and petroleum products, including semi-volatile organics. Tr. 7468-13. Even if CK removes 99% of the oil, 10,000 ppm of the oil remains. Tr. 747:16-748:4. If CK builds and begins operating its Facility as proposed, including disposing of PW into ponds, birds likely will land in the evaporation ponds and will ingest contaminants in the PW – particularly metals and hydrocarbons – that will harm their reproductive capacity or affect their longevity. Tr. 747:10-22; Tr. 748:8-19. Thus, CK's application does not comply with OCD regulations regarding the protection of migratory birds. As proposed, CK's Facility would endanger migratory birds and thus the environment.

H. CK's Application Should be Denied Because Its Proposed Facility Would Compromise Economic Development in the Area.

1. The Comments of Public Officials and Other Citizens From the Community Reflect a Substantial Concern Regarding the Negative Impact CK's Proposed Facility Will Have on Future Economic Development.

Steve Vierck is the President and CEO of the Economic Development Corporation of Lea County ("EDCLC"), a private partnership comprised of municipalities, businesses and educational institutions in Lea County. Mr. Vierck appeared at the January 9, 2017 hearing and spoke in opposition to the proposed Facility. 1/9/17 Tr. 34:25–35:5. Mr. Vierck noted that everyone is dedicated to working together to try to "expand and improve the economy." 1/9/17 Tr. 35:5-7. He stated that the proposed site for CK's Facility was "one of the worst sites selected as the location for an activity of this nature." 1/9/17 Tr. 35:22-23. Moreover, Mr. Vierck stated that the economic impact of the proposed site is "serious and substantial." 1/9/17 Tr. 35:25-36:1. He described how the location is not only a few miles from Eunice, but adjacent to a "strategically important intersection" for Eunice and would impact the EDCLC's ability to attract commercial operations in the area. 1/9/17 Tr. 36:2-9. Mr. Vierck asked the question: "What kind of message does it send to the marketplace and other prospective employers if a waste disposal facility is parked right across the street from a five million [billion] dollar investment that employs 275 people." 1/9/17 Tr. 37:6-10. He stated that the EDCLC recognizes it must diversify the local economy and that "[i]t's very critical for our economic future and the livelihood [sic] kids, our grandkids." 1/9/17 Tr. 37:10-14. Mr. Vierck stated that at least two of the EDCLC's largest prospects are related to using byproducts of URENCO and that the proposed oil field waste disposal Facility "puts those projects at risk" as well as the area's "reputation as a location for these types of operations." 1/9/17 Tr. 37:25-38:1-5.

At the evidentiary hearing in February 2017, Representative Dave Gallegos from District 61, Lea County, made a statement in opposition to the proposed Facility. Tr. 609-613. Representative Gallegos's main concern was the proximity to Eunice: "location, location, location." Tr. 610; 612. He stated that he "would like to have the discussion about a ten-mile

buffer around the community" and that the community is "an entryway from Texas." Tr. 612 Referring to issues related to a similar facility, R360, in between Carlsbad and Hobbs, he stated: "that mess there I know I don't want in my State or my County" and "we don't want to have the same type of issue this close to our community as R360 is between Carlsbad and Hobbs." Tr. 613. Representative Gallegos stated that the community is anticipating traffic issues on Highway 176. Tr. 611.

Senator Carroll Leavell, referring to the proposed Facility, stated: "It will be, above all else, I guess unsightly and this will be one of the first experiences our travelers have as they enter New Mexico on Highway 176." Tr. 295:19-22. He stated that "large tractor-trailers will make up most of the additional traffic." Tr. 295:25-296:1. Senator Leavell stated that "[t]he proposed C.K. operation will devalue the surrounding properties." Tr. 296:16-17. He stated that he opposed the Facility even though it was the first oil-related project he had opposed in 20 years. Tr. 296:22-24.

Senator Gay Kernan also gave a statement, including that she "believe[s] that the location of the proposed waste disposal Facility in the immediate vicinity of URENCO-USA, the town of Eunice, [sic] is a quality of life issue and a health concern for the employees of URENCO and the citizens of Eunice." Tr. 298:19-24. Senator Kernan stated that the location "so close to a major highway, directly across from this 4 billion-dollar facility ... does a disservice to those who work diligently to secure the enrichment facility in our County." Tr. 299:3-8. She summed up by stating: "Surely a more appropriate location should be considered." Tr. 299:14-15.

These concerns – buffering the community; spoiling an entryway from Texas; not having a "mess"; and devaluing property – reflect that the community wants to preserve its positive attributes. But the comment about those that diligently worked to bring LES to the community is

telling. The community wants to preserve its positive attributes for future economic development.

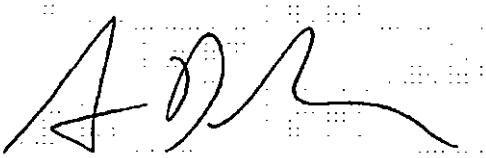
2. The OCC Must Take Into Account Community Concerns Because They Relate to the OCD's Regulatory Bar Against Endangering Public Health, Safety and the Environment.

As discussed in Section I.A.5, the New Mexico Supreme Court has directed that an agency must consider community concerns on quality of life that have a nexus to the governing regulation. The OCD/OCC "cannot ignore concerns that relate to environmental protection simply because they are not mentioned in a technical regulation." *Rhino Envtl. Servs.*, 2005-NMSC-024, ¶ 34, 138 N.M. at 142. In this context, the concerns of the public and their elected officials are focused on the location of the proposed Facility and the community's future non-oil and gas economic development opportunities. These concerns relate to the environment and the fourth prong of the OCD standard. It follows that these concerns must be considered by the OCC.

On the basis of the foregoing comments, with which no public official or other citizen has disagreed, CK's application should be denied.

Respectfully submitted,

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

By: 

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing pleading was e-mailed on February 23, 2017, to:

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