STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

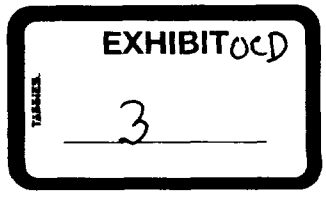
IN THE MATTER OF THE APPLICATION OF
LEA LAND, INC. FOR THE MODIFICATION
OF THE SOLID WASTE LANDFILL FACILITY
PERMIT FOR THE LEA LAND NON-HAZARDOUS
INDUSTRIAL SOLID WASTE LANDFILL SW 00-08 (M)

HEARING OFFICER'S REPORT. PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW

DISCUSSION

Applicant Lea Land, Inc. ("Lea Land" or "Applicant") seeks modification of its solid waste permit for an existing landfill facility, the Lea Land Non-Hazardous Industrial Solid Waste Landfill ("landfill" or "facility") located in Carlsbad, Eddy County, New Mexico. The modification would allow the installation of a twenty-foot berm to increase final cap elevation and recover waste capacity compromised by the impossibility of excavating into caliche; the modification would also expressly allow certain non-hazardous, non-domestic, non-unique oil and gas wastes to be accepted at the facility. The New Mexico Environment Department (NMED) Solid Waste Bureau (Bureau) supports the modification of the permit, which was originally issued in February, 1996, with conditions necessary to protect public health and welfare and the environment.

This matter was heard on September 12, 2000, in Carlsbad, New Mexico. The Bureau was represented by Tannis Fox of NMED's Office of General Counsel, and the Bureau's position was presented by Don Beardsley. Bureau Chief Butch Tongate was also present. Those present on behalf of the Applicant included Dick Blenden, of the



Blenden Law Firm; Bob Hall, President of Lea Land; and Kinneth Slaughter, manager of the landfill facility. There was a third party in the action: Controlled Recovery, Inc. (CRI), a nearby oil field surface waste management facility operating pursuant to a permit issued by the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department (OCD). Those present on behalf of CRI included Hunter Burkhalter and Susan Zulkowski of the Kemp, Smith Law firm in Austin Texas; Ken Marsh, President of CRI; and Mark Turnbough, CRI's consultant. Jerry Kamieniecki of the engineering firm Weaver, Boos and Gordon was present, but not representing anyone. No other member of the public was present; only the parties participated in questioning and testimony at the hearing.

The administrative record includes, *inter alia*, the application for permit modification, with extensive attachments, the notice of completeness determination, the notice of docketing, the hearing officer assignment, the notices of intent to present technical testimony, the transcript, extensive exhibits, several motions and responses, the post-hearing submittals from all parties, and this Report.

The hearing was conducted in accordance with 20 NMAC 1.4, and lasted approximately 6 and ½ hours. All parties had submitted notices of intent to present technical testimony. On the basis of a motion to exclude certain evidence filed by the Bureau, and argued at length among the parties at the beginning of the hearing, I did order certain limitations on the testimony that would be accepted during the hearing. The testimony, planned by CRI, would have gone to establish "legislative history" for the Solid Waste Act. The testimony would also have detailed the economic hardships

suffered by CRI as a result of Lea Land's purported "illegal competition," by virtue of its acceptance of oil and gas waste which might have otherwise gone to CRI.

Following is a brief summary of the testimony that was given:

On behalf of the Applicant, Mr. Slaughter testified concerning the operation of the facility, the facility's compliance with instructions from the Bureau; and the facility's agreement with the director of OCD, Roger Anderson, such that, for oil field waste generated in New Mexico, before the generator can dispose of the waste at Lea Land, the generator must obtain approval from Mr. Anderson. Mr. Slaughter also testified that Mr. Anderson had toured the facility, had indicated that the facility appeared sufficient to meet OCD's permitting requirements, and that Lea Land had applied for an OCD permit. He provided testimony concerning the construction of the berm, and discussed the limitation on taking only non-hazardous wastes at the landfill. On cross-examination by Mr. Burkhalter, he testified concerning the wastes associated with the production of oil and gas that had been accepted at the landfill, and the contracts with oil and gas production companies under which the wastes had been accepted.

On behalf of the Bureau, Mr. Beardsley, a Water Resource Engineering Specialist and currently acting Program Manager of the Bureau's Permitting Section, testified concerning his review of the application for permit modification. He testified that certain wastes not unique to the oil and gas industry are "industrial wastes." Mr. Beardsley testified that no other landfill had a permit condition like Lea Land's Condition No. 8, prohibiting the acceptance of waste regulated by OCD, and that at least three other major solid waste landfills in New Mexico are accepting or will accept at least certain portions

of the waste stream associated with the production of oil and gas. He also testified that he what he had intended to preclude at Lea Land with the existing Condition No. 8 was not the sort of non-unique oil and gas waste under discussion in this hearing, but a variety of sludges. Mr. Beardsley also testified to a letter of clarification that had been issued, on-going discussions concerning a detailed list of oil and gas wastes that might be accepted at a solid waste landfill, Lea Land's compliance with the manifest requirements imposed by the Bureau. and the disposal management plan (DMP) requirement with which the Bureau was proposing to replace existing Condition No. 8. Mr. Beardsley also testified that there would be "no further impact to the environment by the removal of Condition 8." On cross-examination, Mr. Beardsley stated that the fact that something is not a solid waste does not preclude its disposal at a solid waste landfill, and he gave the examples of sand and gravel, which are not solid wastes but are used for daily cover at landfills. He conceded that no express authority existed in the Solid Waste Act for either the acceptance of a non-solid waste at a solid waste landfill, or for the creation of a "unique/non-unique" distinction between certain oil and gas wastes. Finally, Mr. Beardsley conceded that, although the Bureau's position at hearing was that non-unique oil and gas wastes are industrial solid wastes, the regulatory definition of "industrial solid waste" excludes mining waste and oil and gas waste.

Mr. Turnbough testified as an environmental consultant with extensive solid waste experience that in his opinion "solid waste" as defined in New Mexico law and regulation does not include waste associated with the production of oil and gas. He stated he was concerned that the interpretation of acceptable wastes at a solid waste

landfill could change with the personnel at the Bureau, and he does not want his clients to be put in the position of having to dig up waste that had been approved previously for disposal.

Mr. Marsh testified that his facility, CRI, has been permitted since 1990 for oil and gas wastes, that there are certain wastes CRI does not accept, such as domestic wastes, which would be directed to a facility such as Lea Land, and that there are certain manifest requirements the generators must meet. He also testified that his motivation for contesting the permit modification was to assure compliance with the original permit and the law.

Every participant was allowed full opportunity to call witnesses, present testimony and other evidence, and cross-examine witnesses called by any other participant. The hearing was recorded and transcribed.

RECOMMENDATION

Based on the record, I recommend that the permit modification be issued as requested for the installation of the berm; that the existing Permit Condition No. 8 be deleted; that the request to insert a new permit condition expressly allowing the disposal of waste regulated by OCD be denied; and that the Bureau be directed to resolve the issues raised in this matter in a manner consistent with its statutory authority.

There was no challenge to the installation of the berm, and this portion of the permit modification will not be further discussed.

The hearing was almost entirely focused on the proposed deletion of Condition No. 8, and its replacement with a permit provision expressly allowing the disposal at Lea

Land of certain OCD-regulated waste, following the submission of a disposal management plan.

Essentially, this matter turns on an interpretation of the law, and not on any factual or scientific dispute. No evidence was presented that the acceptance of "non-unique" oil and gas waste at a solid waste landfill represents an environmental threat. As Mr. Beardsley stated, the same type of filters come from oil and gas production facilities as from blue jeans factories—this is what is meant by "non-unique." The Bureau has no plans to allow all oil and gas wastes, or any hazardous oil and gas wastes, to be disposed at solid waste landfills. The Bureau's position on this matter did not appear designed to work to anyone's detriment, but seemed to be a pragmatic and well-intentioned attempt to provide for the disposal of OCD-regulated waste identical to "solid waste" as that term is legally defined, at a time when OCD-permitted facilities, for whatever reason, are not widely available in the state. It was also clear from the hearing testimony and the exhibits that Lea Land is "unique" among permittees in that it is the only solid waste landfill in New Mexico expressly precluded by permit condition from accepting oil and gas wastes, and that there is no rational basis for this status. Having said that, I believe the Bureau has stepped outside of its statutory authority, and although it does not appear that any remedial action need be undertaken, I suggest that the Bureau be directed to bring its permitting actions more into line with a literal reading of the Solid Waste Act and its implementing regulations vis-à-vis wastes associated with the production of oil and gas. I did not find CRI's contention that Lea Land should be denied a permit on the basis of the "bad actor" language in the Act to be well-founded.

ANALYSIS
Statutory Construction

The New Mexico Solid Waste Act (Act), NMSA 1978, Sections 74-9-1 et seq., was adopted in 1990 with several purposes, among them, to "plan for and regulate, in the most economically feasible, cost-effective and environmentally safe manner, the reduction, storage, collection, transportation, separation, processing, recycling and disposal of solid waste." NMSA 1978, Section 74-9-2. The Act defines "solid waste," and in that definition, states that "solid waste does not include...drilling fluids, produced waters and other non-domestic wastes associated with the exploration, development or production, transportation, storage, treatment or refinement of crude oil, natural gas, carbon dioxide gas or geothermal energy." NMSA 1978, Section 74-9-3.N.

A year earlier, the New Mexico Legislature had amended the Oil and Gas Act, NMSA 1978, Sections 70-2-1, et seq, originally adopted in 1978. The Oil and Gas Act includes an enumeration of powers given to the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department (OCD); the 1989 amendment had expanded the enumeration to include the powers "(21) to regulate the disposition of nondomestic wastes [sic] 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 [sic] 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...."

Stated simply, and read together, these statutes provide that the regulation of non-domestic wastes associated with the production of oil and gas lies with OCD, not the NMED Solid Waste Bureau. The parties are in agreement that "domestic wastes" in the context of both statutes refers to waste ordinarily generated by a household, such as soda cans and sandwich wrappers. The parties were further agreed that domestic wastes associated with oil and gas production are regulated by the Bureau and are acceptable at a solid waste landfill.

Beyond domestic wastes, the Bureau's position is that non-hazardous waste "not uniquely associated" with the production of oil and gas is also regulated by the Bureau, and may be disposed of in a solid waste landfill. The Bureau, first citing Morningstar Water Users Ass'n v. N.M. Public Utility Comm'n, 120 N.M. 579, 904 P.2d 28 (1995), urges deference to its interpretation insofar as it implicates the agency's special expertise or a fundamental policy within the scope of the agency's statutory function. This begs the question of whether non-domestic, non-hazardous, non-unique oil and gas wastes *are* within the scope of the agency's statutory function, which is the question raised here. As the Court states in Morningstar, where the matter before a reviewing court is a question of fact, the court will generally defer to the decision of the agency. Morningstar at 120 N.M. 583, citing Attorney Gen. V. New Mexico Pub. Serv. Comm'n, 111 N.M. 636, 808 P. 2d 606 (1991). But the question of "whether an administrative agency has jurisdiction over the parties or subject matter in a given case is a question of law," and "New Mexico courts will accord 'little deference' to the agency's own interpretation of its jurisdiction." Morningstar at 120 N.M. 583, citing El Vadito de los Cerrillos Water Ass'n v. New

Mexico Pub. Serv. Comm'n, 115 N.M. 784, 858 P.2d 1263 (1993).

First, the text of a statute is the primary, essential source of its meaning. The Solid Waste Act is not ambiguous on a literal reading, particularly when read together with the Oil and Gas Act, and without ambiguity, there is no need to go further to attempt an interpretation. At no time did the Bureau contend that the statute, as written, is ambiguous. The Bureau's interpretation actually raises ambiguities rather than resolving them, particularly about what is meant precisely by "non-unique." When the words used in a statute are free from ambiguity and doubt, and express plainly the sense of the legislature, no other means of interpretation should be resorted to. City of Roswell v. New Mexico Water Quality Control Comm'n, 84 N.M. 561, 505 P.2d 1237 (Ct.App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973). See also State ex rel. Helman v. Gallegos, 117 N.M. 346, 871 P.2d 1352 (1994)(If the meaning of a statute is truly clear it is of course the responsibility of the judiciary to apply the statute as written and not to second-guess the legislature's selection from among competing policies or adoption of one of perhaps several ways of effectuating a particular legislative objective.)

Second, even assuming that the statute would benefit from some interpretation, the Bureau's interpretation of its jurisdiction in this matter fails a number of standard statutory construction tests:

> (1) Words [such as "non-unique" or "uniquely"] are not to be added to a statute unless it is necessary to add them to prevent absurdity, injustice or contradiction. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039 (1967); State ex rel. Barela v. New Mexico

State Bd. Of Educ., 80 N.M. 220, 453 P.2d 583 (1969). Again, no such claim was made by the Bureau or the Applicant. Moreover, while the application of *ejusdem generis* is not entirely apt, it is notable that the legislature did include one qualifier for oil and gas wastes excluded from solid waste ("non-domestic"), indicating they intentionally did not include any other qualifiers, such as "non-unique" or "non-hazardous." See Cardinal Fence Co. v. Commissioner of Bureau of Revenue, 84 N.M. 314, 502 P.2d 1004 (Ct.App. 1972)(*ejusdem generis* applies the presumption in statutory construction that having gone to the trouble of enumerating a particular list, the legislature must have had in mind no other kind).

(2) Two statutes covering the same subject matter should be harmonized, and if they are not irreconcilable, both shall be given effect. State v. Rue, 72 N.M. 212, 382 P.2d 697 (1963); Waltom v. City of Portales, 42 N.M. 433, 81 P.2d 58 (1938). There is a presumption that the legislature knew of the existing law, the Oil and Gas Act, as amended in 1989, when it adopted the Solid Waste Act a year later. The legislature's attempt to avoid overlapping jurisdiction for wastes associated with the production of oil and gas is clear on the face of the statutes, and should be honored by the respective agencies. Again, the Bureau did not claim, as it cannot, that the two acts are irreconcilable or contradictory.

(3) Words are given their ordinary meaning unless a different intent is clearly indicated. Davis v. Commissioner of Revenue, 83 N.M. 152, 489 P.2d 660 (Ct.App.), cert. denied, 83 N.M. 151, 489 P.2d 659 (1971). Without the insertion of the words "non-unique" or "non-hazardous" the parties were in agreement that the wastes in question were in fact associated with the production of gas and oil.

(4) Although long-standing interpretations by an agency of a doubtful statute are persuasive and will not be lightly overturned by the courts, the Bureau did not establish that its interpretation was long-standing, or that it had been published or formalized, either by regulation or in any executed agreement with OCD (a rough "draft agreement" between NMED and OCD was included among the exhibits; at this point it seems to be merely a list). The Bureau's position that these non-unique wastes are "industrial solid wastes" contradicts the Bureau's own regulations, both directly and indirectly: Before a waste can be "industrial solid waste," it must first be "solid waste." And the regulatory definition of "industrial solid waste" specifically excludes "oil and gas waste," without any qualifiers [see 20 NMAC 9.1.105(AK)].

(5) The Bureau's attempt to liken its insertion of the word "uniquely" with the insertion of that same word by the Environmental Protection Agency under Subtitle C is highly problematic, for many of the

reasons CRI discusses in its post-hearing closing argument submittal of October 30, and is not persuasive. I did not agree with CRI's contention that the agency's actions in the Joab matter in 1993 were relevant or enlightening; Joab had accepted drill cuttings and liquids, wastes associated with the production of oil and gas which are *not* "non-unique and non-hazardous," and the Bureau's position between the two cases is not contradictory. There was apparently no reason to draw the "unique/non-unique" distinction in Joab.

The "Bad-Actor" Basis for Denying a Permit Application

The evidence in the record shows that, over the past few years, Lea Land has been accepting certain non-unique, non-hazardous, non-domestic wastes associated with the production of oil and gas, with the Bureau's approval, and that when that approval was withdrawn temporarily, Lea Land honored that position as well. CRI contends that Lea Land's acceptance of any non-domestic wastes associated with the production of oil and gas should be considered a willful disregard for the environmental laws of this state, and that that disregard should serve as the basis for denying the application for permit modification under the "bad actor" portion of the Solid Waste Act, NMSA 19798, Section 74-9-24.B(5): A permit application may be denied if the Department has reasonable cause to believe that any person listed on the application has, among other things, exhibited a willful disregard for environmental laws of any state or the United States.

I believe CRI is out of line with this contention; it was undisputed that Lea Land

has never faced an enforcement action, or even been served with a notice of violation for any operations out of compliance with the laws or regulations as they are interpreted, implemented and enforced by the Bureau. The regulated community is entitled to reasonably rely upon the Bureau for specific direction in its operations and the construction of applicable regulations. Not only is it inappropriate to characterize Lea Land's conduct during the course of its existing permit as exhibiting "willful disregard," I suspect the Department would be estopped from suggesting anything of the sort, or from acting on an application on that basis. Although the hearing's only factual dispute related to some statements that may or may not have been made in meetings between NMED staff and CRI and its consultant, it appears that the Bureau's position was known to management, presumably increasing Lea Land's comfort level. The suggestion that Lea Land has been a "bad actor" is entirely unfounded.

The Acceptance of Oil and Gas Waste By Other Solid Waste Landfills

The record contains significant evidence concerning the acceptance of non-unique, non-hazardous, non-domestic oil and gas wastes by other solid waste landfills in New Mexico. The Bureau presented this evidence, apparently, to be clear about the fact that Lea Land was a "class of one" without reason or rationale, and to bolster its argument that its interpretation of the Act should be given deference. I did consider the evidence concerning the other landfills, and came to two conclusions: (1) Lea Land's permit should be modified to delete Condition No. 8, insofar as Lea Land is being treated differently from other solid waste landfills across the state without a rational basis; see Village of Willowbrook v. Olech, 120 S. Ct. 1074 (2000); and (2)

Ultimately, the clarity of the language in the applicable statutes overcomes the pragmatic considerations or existing realities related to the disposal of oil field wastes, and the Bureau should be directed to address the disposal of oil field wastes at all solid waste landfills, not just Lea Land, in a manner consistent with the statutes. This may mean pursuing a legislative amendment; this may mean facilitating a dual permitting program between the agencies—a number of options come to mind. Until one of these options is executed, however, the Bureau's attempt to provide for the regulation of waste expressly excluded from its jurisdiction should cease, and no new permit provision relating to the disposal of OCD-regulated waste should be included in a solid waste permit.

PROPOSED FINDINGS AND CONCLUSIONS

Procedural history

1. The New Mexico Environment Department (NMED) issued a solid waste landfill facility permit to Lea Land, Inc. ("Lea Land") on February 27, 1996.
2. The Permit contains Condition No. 8, which provides that "No petroleum waste or other substance regulated by the New Mexico Oil Conservation Division shall be disposed of in the proposed landfill."
3. On July 18, 2000, Lea Land applied to modify the Permit to install a twenty-foot berm and to remove Condition No. 8 from the Permit.
4. A hearing on the application was properly noticed and was held on September 12, 2000 in Carlsbad, New Mexico before a hearing officer properly appointed.

Installation of a Twenty-Foot Berm

5. Lea Land proposes to modify its existing Permit by installing a twenty-foot berm

and thereby increasing the final cap elevation.

6. The Lea Land landfill site is underlain by a dense calcrete (caliche) bed, which prevents the current disposal cell from being excavated to the permitted design depth.

7. The inability to excavate has resulted in a loss of waste disposal volume.

8. Installation of a twenty-foot berm will increase the final cap elevation and will restore the permitted waste volume.

9. The berm is designed to have a four-to-one exterior slope and a three-to-one interior slope. These dimensions meet NMED requirements.

10. The interior side slope of the berm will be composite-lined.

11. The side slopes will incorporate a sufficient number of armored down-chutes to control erosion.

12. The installation of the berm will be protective of the environment.

Removal of Condition No. 8

13. Lea Land requests removal of Condition No. 8, which prohibits the disposal into the landfill of substances regulated by the Oil Conservation Division of the New Mexico Department of Energy, Natural Resources and Minerals (OCD).

14. No other landfill in the State of New Mexico has a permit condition such as Condition No. 8 imposed upon it.

15. At least three other major landfills in the state accept or will accept non-unique oil and gas waste, the San Juan Regional Landfill, the Lea County Regional Landfill and the Camino Real Landfill.

16. These landfills have accepted or will accept non-unique oil and gas wastes (so long as they are non-hazardous) that include but are not limited to: gas condensate filter, glycol filter, grease buckets, iron sponge, junked pumps and valves, metal plates, metal cables, molecular sieves, pip dope, pipe scale and other deposits removed from piping and equipment, plastic pit liners, produced water filters, sacks of unused drilling mud, sandblasting sand, soiled rags and gloves, support balls, activated aluminum, activated carbon, amine filters, barrels, drums, catalysts, contaminated concrete, construction debris, cooling tower filters, dehydration filter media, demolition debris, detergent buckets, dry chemicals, ferrous sulfate, elemental sulfur, fiberglass tanks, and gas plant tower packing materials.

17. OCD does not object to deletion of Condition No. 8 from the Permit.

18. There are two landfills in the state that are permitted by OCD to accept oil and gas waste, CRI in Hobbs and the Sundance facility near Eunice, south of Hobbs.

19. Lea Land has applied for a permit from OCD which would allow it to accept oil and gas waste under the Oil and Gas Act.

20. The Bureau proposes the following condition be placed in the Permit in lieu of the existing Condition No. 8:

> Prior to acceptance by Lea Land Landfill of any waste regulated by the Oil Conservation Division of the New Mexico Energy, Minerals and Natural Resources Department, Lea Land Landfill shall submit to MED a Disposal Management Plan ("DMP") in accordance with 20 NMAC

9.1.711 and shall receive approval of the DMP by NMED. This condition does not apply to the following waste: office trash, paper, paper bags, soiled rags and gloves, construction debris, detergent buckets, fiberglass tanks, brush and other vegetation from clearing land, and sacks of unused drilling mud.

21. A DMP describes the nature of the handling and disposal techniques that are used for a specified waste.

22. As NMED characterizes it, non-unique oil and gas waste is industrial waste. For example, the same air filters can come from a blue jean factory as from oil and gas activities.

23. The acceptance of non-hazardous, non-unique, non-domestic oil and gas wastes at a landfill would not represent a threat to the environment, but is not consistent with a plain reading of the Solid Waste Act and the Oil and Gas Act.

24. NMED has jurisdiction to entertain Lea Land's application to modify its Permit.

25. Lea Land has not shown a disregard for the environmental laws of this state or the United States in its operation of the landfill under the existing permit.

26. Lea Land's request to install a twenty-foot berm complies with all of NMED's requirements, and should be granted.

27. Lea Land's request to delete Condition No. 8 from its permit will make its permit consistent with other solid waste permits across the state, and should be granted.

28. The Bureau's request for a permit provision expressly allowing the disposal of OCD-regulated wastes at the landfill, following the submission of a disposal

management plan, is not consistent with the Department's legal permitting authority, and should be denied.

RECOMMENDED FINAL ORDER

A draft Final Order consistent with the recommendation above is attached and incorporated by reference.

The Hearing Officer appreciates the verbal one-day extension granted December 6 by the Director for the submission of her Report.

Respectfully submitted,

Original signed by:
FELICIA L. ORTH
Hearing Officer