

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

**APPLICATION OF GANDY MARLEY, INC. TO MODIFY
THEIR EXISTING NMOC Rule 711 PERMIT No. NM-01-019
SO THAT THEY MAY ACCEPT SALT-CONTAMINATED
OILFIELD WASTES.**

2005 MAY 17 PM 10
CASE NO. 13480

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

Controlled Recovery Inc. ("CRI") hereby moves the Division for an order excluding from consideration information not contained or disclosed to the public as part of Gandy Marley's revised Application For Waste Management Facility (Form C-137). Gandy Marley's pre-hearing statement reveals that sometime prior to March 29, 2005, Gandy Marley filed an incomplete application to modify its landfarm permit. By letter dated March 29, 2005, the Division requested additional information, prompting the filing on April 8th of a "revised Application for Waste Management Facility." *See* GMI Prehearing Statement at p. 2.¹ This revised application was noticed to the public on April 14th, made available to the public for review and comment, and set for hearing on May 19th. *Id.* at p. 3.

Gandy Marley has now submitted a pre-hearing statement that seeks to supplement its filed application yet again with new information that has not been made available for public review. This last minute effort to "beef up" deficiencies in its filed application is improper, fails to comport with fundamental due process, and is contrary to the administrative procedures applicable to these types of proceedings.

¹ The Division's request for additional information, and the filing of Gandy Marley's revised application, all took place *after* the Division entered its March 25th Order No. 12306-A authorizing Gandy Marley to accept salt contaminated oilfield waste on a temporary basis.

A. Gandy Marley's Pre-Hearing Statement Improperly Seeks To Supplement Its Filed Application With New Information Not Previously Made Available For Public Review.

Recognizing that its filed application is deficient in a number of areas, Gandy Marley's pre-hearing statement states: "Mr. Patrick Corser and Mr. William Mansker will testify that GMIs request for a permit modification, as presented in the Application for Waste Management Facility (Application) *and supplemented by this Pre-hearing Statement, submittals and exhibits, and the testimony to be presented at the hearing in this matter*, meets the requirements of §711(B)(1) and is consistent with the OCD Guidelines for Permit Application, Design and Construction of Surface Waste Management (Revised 7-97)." *Id.* at p. 4 (emphasis added). Accordingly, Gandy Marley intends to supplement its filed application with information not previously made available for public review, including the following:

- a closure plan and closure costs for the proposed landfill based on "third party estimates" (Pre-hearing statement at p. 4);
- a diagram of the proposed facility outlining existing structures and the proposed disposal cells (Exhibit 2 to the Pre-hearing statement);
- changes to the proposed cap and liner for the cells (Pre-hearing statement at p. 6);
- handling methods for "[s]olids, semi-solids and sludges" (*id.*);
- information from two previously undisclosed "test wells," including their location and construction (*id.*); and
- "geological and hydrological studies" presented to the New Mexico Environment Department in another proceeding, but not included as part of the filed application for this matter (*id.* 8).

Despite the requirements set forth in Rule 711.B and Form C-137, *this information was not provided as part of the filed, revised application* and accordingly has not been made available for public review and comment. Gandy Marley's attempt to now supplement its filed application with new information violates due process and prevents the meaningful public review vital to these types of proceedings. See *Martinez v. Maggiore*, 133 N.M. 472, 478, 64 P.3d 499, 505 (Ct.App. 2002) (noting that the failure to provide the general public with the information necessary for a "meaningful public hearing" rendered the proceedings void).

B. Rule 711(B) and Fundamental Due Process Requires the Filing of an Administratively Complete Form C-137 *Before* Public Notice and at Least a 30 Day Public Review and Comment Period On the Information Supporting the Application.

Rule 711.B(1) requires that any party desiring to “modify an existing facility” must file a Form C-137 with the Division in duplicate. Rule 711.B(1)(a)-(m) and Form C-137 list the information that must accompany this important filing. Once the Division’s staff has determined that the filing requirements have been met, Rule 711.B(2)(b) and (c) contemplate notice to the public of the filed application and at least a 30 day period for the public to review the application, file comments on the information contained therein, and request a hearing with the Division. *See also* NMRA 20.6.2.3108.D – K (requiring for discharge permits an administrative determination that the application is complete, public notice of the filed application, and “at least” a 30-day period for the public to review the information in the application and provide comment).

Accordingly, under the procedures applicable to these types of applications, you sink or swim with what you file and make available for public review and comment. An applicant is not allowed to file a “bare bones” application and then wait until the hearing to provide the information it is relying upon to support its proposed facility. Indeed, the public review and comment period would serve no purpose if an applicant were allowed to withhold the information it is relying upon until the time of the hearing.

In this case Gandy Marley recognizes that its application is deficient in a number of areas, including the absence of any filed information on a closure plan and estimated closure costs (Rule 711.B(1)(i)); a diagram of the proposed facility (Rule 711.B(1)(d)); a management plan for the proposed wastes (Rule 711.B(1)(e)); geological and hydrological evidence applicable to the proposed site (Rule 711.B(1)(j)); and other information necessary to meet its burden of demonstrating that the proposed landfill operations will not adversely affect the public health and environment (Rule 711.B(1)(m)). The cure for these deficiencies is to withdraw the ineffective application and the file a new, complete application for public review and comment. Fundamental due process - and the procedural rules applicable to these proceedings - do not allow an applicant to withhold from public review the information it is relying upon to meet its burden, or to supplement its deficient filing with last minute references to additional information.

Miller v. City of Albuquerque, 89 N.M. 503, 507, 554 P.2d 665, 699 (1976) (failure to comply with its own regulations was fatal to Commission's decision and worked a denial of due process); *Uhden v. New Mexico Oil Conservation Division*, 112 N.M. 528, 530, 817 P.2d 721, 723 (1991) ("the essence of justice is largely procedural"). All of the information an applicant intends to rely upon to support its facility must be disclosed well in advance of any hearing to allow time for meaningful and effective public review and comment. See *Martinez*, 133 N.M. 476-77, 64 P.3d at 503-04 ("The loss of these three months [due to inadequate notice] may well have been fatal to Appellants' and the public's ability to meaningfully participate in the permitting process.") (J. Pickard, specially concurring).

WHEREFORE, CRI respectfully requests that the Division enter an order precluding Gandy Marley from submitting data, studies, or other information in support of its application that are not referenced or provided in its filed, revised application with the Division.

Respectfully Submitted,

HOLLAND & HART, L.L.P.

A handwritten signature in black ink, appearing to read "Michael H. Feldewert", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on May 17, 2005, I served a copy of the foregoing CRI'S Motion To Exclude From Consideration Information Not Contained or Disclosed in Gandy Marley's Amended Application For Waste Management Facility to the following:

Via Hand Delivery to:

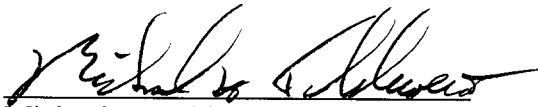
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Michael H. Feldewert