

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

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

CASE NO. 13480

2005 SEP 29 PM 3 41

**CRI'S RESPONSE TO APPLICANT'S EMERGENCY MOTION TO ENFORCE AND
FOR PRESENTMENT OF ORDER**

At its September 23rd meeting, the Commission "in effect, voted not to adopt" an order seeking to overturn Division Director Mark E. Fesmire's reasoned decisions in Orders R-12306-B and R-12306-C. *See* 9/23/05 Tr. at p. 10, lines 10-15. By taking this action, the Commission sent a clear message that the technical requirements, public notice, public review and financial assurance requirements embodied in Rule 711 are not meaningless formalities. By refusing to allow GMI to operate as a landfill without first meeting all of Rule 711's requirements, the Commission echoed the sound policy expressed by the Division Director:

"The waste GMI requests permission to receive at its facility is a potential threat to health and the environment and the public deserves an opportunity to meaningfully participate in such proceedings on an informed basis."

Order R-12306-B at p. 14 (fourth paragraph).

"The proposed permit modification represents a fundamental and substantial change from GMI's existing landfarm operation to a landfill facility and would entail permanent disposal of salt-contaminated waste that can never be remediated, as well as the likely occasional disposal of materials that would be considered hazardous, in the absence of the RCRA oil field exemption.

To ensure protection of the public health and the environment, both today and in the future, such application should strictly adhere to all Division permitting rules and guidelines and follow all industry best practices available for the design, construction, operation, closure and post closure of landfills. The permit application should be sufficiently detailed and the operator's compliance record with the Division should be of a sufficient quality to reasonably ensure the facility will protect public health and the environment.

Id. at p. 15 (fifth and sixth paragraphs).

“In the record in this case are numerous letters submitted to the Division by operators and others in Lea and Chavez counties. Most of these letters expressed the need for additional facilities to be permitted to dispose of solid oil field wastes. The Division understands the need for an adequate number of permitted facilities located close enough to current drilling. However, one Division mandate is to regulate the oil and gas industry to protect the environment. Landfills are facilities that permanently store oil field wastes that cannot be remediated. The permitting process for these facilities must be appropriately thorough – and all landfills should be held to the same high standards.

Id. at p. 16 (seventh paragraph).

The record before the Commission simply does not condone undercutting the Division Director’s courageous effort to uniformly enforce the “high standards” in Rule 711 that are necessary to adequately protect human health and the environment from improperly stored oilfield waste.

POINT I

The Division’s Findings Do Not Support Special Permitting Treatment for GMI’s Unspecified Landfill.

Orders R-12306-B and R-12306-C were issued by Division Director Mark E. Fesmire after the benefit of a public comment period, a two-day public hearing, and careful consideration of the record. In contrast, GMI asks the Commission to cast aside the reasoned analysis of the Division and enter an order allowing GMI to immediately accept salt-contaminated wastes in unspecified “clay-lined cells” (a) before GMI files a Rule 711 application, (b) before the Division has sufficient time “to review the application to determine if it is administratively complete” and (c) before the public has a meaningful opportunity to comment upon the application. *See* Emergency Motion at p. 4. There are no findings or evidence to support such a drastic and unprecedented departure from the Rule 711 permitting requirements.

The record contains no design for GMI’s proposed cells, no description as to where the proposed cells will be located, no construction specifications, no specifications for the proposed “clay” lining,” no description or design of the proposed “leachate system,” no description as to how these cells will be managed or closed, and no financial assurance. Indeed, GMI suggests that it – and it alone - should be allowed to commenced operations as a landfill once it submits unspecified “engineering designs to the Division for Division review and approval.” *See* GMI’s Emergency Motion at p. 3.

Division Orders R-12306-B and R-12306-C, which denied GMI's request to immediately turn its landfarm into a landfill, rest on more than just concerns over GMI's proposed clay liner and the absence of a leachate detection and removal system:

- The Division found that a protected "fresh water supply" exists below GMI's landfarm that requires a determination as to whether it has a present or reasonably foreseeable beneficial use. *See* Order R-12306-B at p. 14, Section H.
- The Division found specific problems with:
 - the design of the cells,
 - the depth of the cells,
 - waste placement within the cells,
 - the capping of the cells,
 - the compatibility of the proposed waste with a clay liner,
 - the absence of a leachate detection and removal system,
 - revegetation of the proposed cells,
 - horizontal movement of salt contaminated wastes, and
 - monitoring and closure of the proposed cells

Id. at p. 15-16, Section I.

- The Division found that GMI's temporary authority to accept salt-contaminated wastes rested on statements that were "not consistent with the facts available to GMI at the time GMI filed its application," that "in light of the evidence presented at the hearing, it is clear that information can no longer be relied upon," and that "key findings relied upon to issue" the temporary authority "are no longer valid." *Id.* at p. 17, Section J.
- The Division found GMI has a "history of non compliance with OCD rules and orders in meeting its reporting requirements to the Division" and that "a period of time (possibly six months to one year) should be required for GMI to first demonstrate that it can comply with Division reporting requirements before it should be allowed to operate a landfill facility" *Id.* at p. 18, Section K.¹
- The Division found that GMI "could not recall which of the cells have taken salt waste" and that the Division's Environmental Bureau "should instruct the operator on a method

¹ *See also* CRI Hearing Exhibit 21 (Notice of Violation from the New Mexico Environment Department noting GMI's failure to meet virtually every single reporting obligation to that agency since August of 2000).

to determine the location of salt wastes within its facility and then formulate a recommendation for what should be done about those wastes.” *Id.* at p. 15-16.²

No application is pending before the Commission that complies with Rule 711, or that purports to meet any of these concerns. GMI’s pleadings fail to provide any specificity concerning the “clay-lined cells” it proposes to utilize or how it intends to address the cell depth, waste depth, clay compaction, waste compatibility, horizontal migration, capping, revegetation, leachate detection, and leachate removal concerns found by the Division. *See, e.g.* Order R-12306-B, at p. 16. The Division found that GMI has been unable to meet its reporting obligations under its landfarm permits. *Id.* at p. 18. The Division found GMI provided false information to the Division to support its request for temporary authority to accept salt-contaminated wastes, and further found GMI has been unable to track those wastes. *Id.* at p. 15 and 17. This record simply does not support a Commission order that affords GMI special permitting treatment, and that brushes aside the concerns and policies expressed by the Division Director after his careful consideration of the record.

POINT II.

Rule 711 Does Not Allow The Commission To Arbitrarily “Pre-Permit” Landfills.

By suggesting that all it needs to do is submit “engineering designs” for approval by the Division staff (*see* Emergency Motion at p. 3), GMI essentially asks the Commission for a special closed door permitting process that puts on hold the technical submissions, public notice, public review and financial assurance obligations required by Rule 711(B). Neither Rule 711 nor the Oil and Gas Act authorize the Commission to “pre-permit” oilfield waste landfills. Instead, Rule 711 specifically states that neither the Division nor the Commission has authority to authorize a facility to accept for disposal oilfield related wastes unless there are findings that:

1. An application has been filed that contains all the requirements of Rule 711(B)(1);

² The concern expressed by the Division is well-founded. Exhibit H to GMI’s Request for Stay contains August soil samples that reveal chloride levels 20 to 50 times higher than the background soil levels at GMI’s landfarm. *See* Affidavit of Ian Keith Gordon (submitted with CRI’s response to GMI’s Request for Review of Denial of Request for Partial Stay).

2. The public notice, comment period, and hearing (if applicable) required by Rule 711(B)(2) has taken place; and
3. The financial assurances required by Rule 711(B)(3) have been met.

See Rule 711(B)(7) (“The Director may issue a permit upon a finding that an acceptable application has been filed and that the conditions in paragraphs 2 and 3 above have been met.”) None of these necessary findings exist in this case.

“An agency’s action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.” *Colonias Development Council v. Rhino Environmental*, 138 N.M. 133, 117 P.3d 939 at ¶41 (2005). The only facts found by either the Division or the Commission following a public hearing are contained in Division Order R-12306-B. That order specifically found that GMI failed to meet Rule 711’s requirements for a major modification of its existing landfarm permit, and “that key findings relied upon to issue the Emergency Order and the extension are no longer valid.” Order R-12306-B at p. 18. Indeed, Commission records reflect that there are at least four properly permitted facilities in Southeast New Mexico capable of immediately accepting salt contaminated wastes.

The Commission simply does not have the evidence, the findings or the authority to issue the order proposed by GMI.

POINT III.

GMI’s Proposed Order Belittles The Public Review Process New Mexico Courts Recognize Is Vital To The Landfill Permitting Process.

As noted in Division Order R-12306-B, New Mexico Courts have stressed the importance of a meaningful public review before authority can be granted to operate a landfill:

Our courts have previously emphasized that legislative policy favors the public’s ability to participate meaningfully in the landfill permitting process. In *Martinez*, the Court of Appeals found that the Department’s failure to comply with statutory notice requirements rendered subsequent administrative proceedings invalid.

Given the concern expressed in *Martinez* that procedural defects can undermine the meaningfulness of a public hearing, we must construe the permit procedures to facilitate meaningful participation by members of the public.

Colonias Development, 138 N.M. 133, 117 P.3d 939 at ¶22 and ¶42. GMI's proposed order renders the public review process – and the technical requirements of Rule 711 - meaningless by affording GMI immediate authority to accept dangerous, non-remediable oilfield waste. How can it be said that the public has been afforded an opportunity to “participate meaningfully in the landfill permitting process” if by the time an application is filed and a public hearing is held GMI already has Commission authority to dig a cell and accept unknown amounts of non-remediable oilfield wastes? How can public confidence in the permitting process be maintained if the Commission on this record overturns Orders issued by the Division Director that were rendered *with* the benefit of a public comment period, a two-day public hearing, and careful consideration of the record?

Public confidence is not served by special closed-door permitting decisions. Rather, as the Division found, public health and the environment are best served by upholding the high standards and procedural requirements embodied within Rule 711 for all facilities. The findings and conclusions in Division Orders R-12306-B and R-12306-C, which result from imposing these high standards, demonstrate that the public health and the environment are best served by requiring GMI to comply with Rule 711 and to demonstrate that it can meet its existing permit obligations before entertaining a request that amounts to “a fundamental and substantial change from GMI's existing landfarm operation”. Order R-12306-B at p. 15.

CONCLUSION

For these reasons, and for the reasons set forth in CRI's Response to GMI's Request For Review of Denial Of Request for Partial Stay of Division Order R-12306-B, CRI respectfully requests that the Commission uphold Director Fesmire's reasons decisions in this matter and deny GMI's request for any order that grants GMI special dispensation from the stringent permitting requirements in Rule 711.

Respectfully Submitted,

HOLLAND & HART, L.L.P.

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

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CERTIFICATE OF SERVICE

I certify that on September 29, 2005, I served a copy of the foregoing document **CRI's Response to Applicant's Emergency Motion to Enforce and for Presentment of Order** to the following by:


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