

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

2005 SEP 9 PM 1 28

**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.**

CASE NO. 13480

**CONTROLLED RECOVERY INC.'S RESPONSE TO
GMI'S REQUEST FOR REVIEW OF DENIAL OF REQUEST FOR PARTIAL STAY
OF DIVISION ORDER R-12306-B**

Citing only to the "inherent authority" of the Commission, Gandy Marley Inc. ("GMI") suggests the Commission should immediately intercede in this matter, overturn the Director's Order R-12306-C denying GMI's request for a stay of Order R-12306-B, and allow GMI to accept salt-contaminated wastes in "clay-lined cells" that GMI apparently intends to construct at its landfarm facility. *See* Request for Stay at p. 12.¹ Division Order R-12306-B denied GMI's request to turn its landfarm into a landfill because its application "failed to include all of the information required by Rule 711 and did not comply with the notice requirements of Rule 711." *See* Order R-12306-B at p. 19 (para. 5). In addition, 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 (*id.* at p. 14, Section H);
- Found concerns with the design, construction, operation, monitoring and closure of GMI's proposed landfill (*id.* at p. 15, Section I);
- Found that GMI's previous request for temporary authority to accept salt-contaminated wastes presented statements that were "not consistent with the facts available to GMI" and that "in light of the evidence presented at the hearing, it is clear that information can no longer be relied upon to support" any extension of GMI's temporary authority (*id.* at p. 17, Section J); and

¹ GMI offers no design for its proposed cells, no description as to where they will be located or how they will be constructed, and no indication as to how they will be managed. *See, generally*, NMAC 19.15.9.711(B)(1).

- Found that 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. *See also* CRI Exhibit 21 (attached hereto) (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).

The Division’s orders were issued after a two-day hearing, submission of proposed findings and conclusions by the parties, and careful review of the record.

GMI has sought de novo review of underlying Order R-12306-B. However in an unusual procedural move, GMI has asked the Commission to delay hearing the matter until GMI files “a revised permit modification application” that meets the requirements of Rule 711. *See* GMI’s Application for De Novo Hearing at p. 3. Accordingly, GMI has not requested a de novo review of Order R-12306-B per se (which addressed the existing application), but rather has asked the Commission to directly consider a “revised permit modification application” that GMI intends to submit at some future date. In other words, GMI intends to file a completely new case for review by the Commission.

In the meantime, GMI suggests the Commission should overturn the Director’s decision denying GMI’s request for a stay of Order R-12306-B and allow GMI to accept salt-contaminated wastes in “clay-lined cells” to be constructed at undisclosed locations and under undisclosed construction parameters. *See* GMI’s Request for Stay at p. 12. GMI’s request is not only unprecedented, but ignores the absence of any viable application before the Commission, the findings of the Division in Order R-12306-B, and the administrative safeguards comprising Rule 711.

A. With No Properly Filed Application Pending Before It, the Commission Has No Basis to Overturn the Director's Denial of GMI's Request for a Stay of Order R-12306-B.

Following a two-day hearing and careful review of the evidence, the Division found not only procedural problems with GMI's application, but also technical concerns with GMI's proposal to accept salt-contaminated wastes at its landfarm. See Order R-12306-B at Sections F, G, H, I, J, and K. With the benefit of that record, the Director determined that GMI's request for a stay of Order R-12306-B "is not well taken, and should be denied." Order R-12306-C. Indeed, the Division's concerns were sufficiently elevated to require the following:

"The GMI facility has taken salt-contaminated wastes for many years. The facility owners testified, however, they could not recall which of the cells have taken salt waste. The Division's Environmental Bureau should instruct the operator on a method to determine the location of salt wastes within its facility and then formulate a recommendation for what should be done about those wastes. A records search and detailed soils sampling project may be necessary."

Order R-12306-B at p. 15-16. Indeed this concern by the Division is well-founded. Exhibit H to GMI's Request for Stay contains soil samplings done by GMI in August of this year that reveal chloride levels 20 to 50 times higher than the background soil levels at GMI's landfarm. See Affidavit of Ian Keith Gordon (attached hereto).

GMI has requested that Commission action on its proposed landfill "be stayed until GMI submits a revised permit modification application to the Commission pursuant to Rule 711 and in accordance with the Order." Application for De Novo Hearing at p. 3. Accordingly, GMI recognizes that its present application before the Division (which was the subject of Order R-12306-B) is inadequate and that any appeal of the Division's decision on that application is futile. GMI essentially admits that it is still in the process of collecting the necessary data, still in the process of designing its landfill and still in the process of gathering the information required to determine whether its proposed landfill will "adversely impact public health or the environment." Rule 711(B)(1)(m). The Commission essentially has no application or case pending before it from which to determine whether GMI can accept non-remediable oilfield

wastes without adversely affecting the public health or the environment. Accordingly, the Commission has no basis to overturn the Division's denial of GMI's request to stay Division Order R-12306-B prohibiting GMI from accepting these dangerous wastes at its landfarm.²

Moreover, the regulations do not contemplate Commission review of stay requests involving Division orders. While Rule 1220.A provides for Commission review of the underlying order, nothing in Rule 1220 suggests the Commission is likewise required to review stay requests. Rather, Rule 1220.B provides that the Director rules on stay requests, because it is the Director that has the benefit of a Division hearing and record review from which to make a decision.

In sum, GMI's request for immediate Commission intervention to allow it to accept non-remediable oilfield wastes while GMI gets around to filing a proper application is not only highly unusual, but finds no record support. GMI has no application pending before the Commission that complies with Rule 711. GMI provides no specificity concerning the nature of the "clay-lined cells" it proposes to utilize, and fails to identify how it intends to address the cell depth, waste depth, clay compaction, horizontal migration, capping, re-vegetation, waste compatibility, leachate detection, and leachate removal concerns found by the Division. *See, e.g.* Order R-12306-B, at p. 16. Essentially, after providing false information to the Division and after failing to meet its reporting obligations under its existing permit (*see* Order R-12306-B at p. 17-18), GMI suggest that it's landfarm - and its landfarm alone - should be allowed to accept non-remediable oilfield wastes BEFORE meeting the requirements of Rule 711. There is no basis to provide GMI with as special exemption from the permitting procedures and requirements that all facilities in New Mexico must follow.

² GMI is being treated no differently than other permitted landfarms. In March of 2005, the Division Director issued a directive to all landfarms "to immediately cease accepting salt-contaminated oil field wastes" because these types of wastes "compromise the biodegradation capacity of landfarm operations and threaten groundwater." *See* Order R-12306-B at p. 1.

B. GMI Failed to Perfect Its Request for a Stay from the Division or Demonstrate the Necessary Legal Predicate.

From the outset, the Stay Request filed with the Division failed to establish the necessary legal predicates for a stay.

First, Rule 12220.B provides that any party requesting a stay of a Division order “must have attached a proposed stay order.” GMI’s request for stay did not meet this requirement.

Second, Rule 12220.B. provides that stays may be granted if “necessary to prevent waste, protect correlative rights, protect public health and the environment or prevent gross negative consequences to any affected party.” GMI provides no evidence of “gross negative consequences” to GMI if a stay is not granted. Rather, GMI simply alleges that it made investments in equipment and obtained contracts as if it were a properly permitted landfill. Any delay in GMI’s ability to operate as a landfill is not the fault of the Division. Rather, it is a direct result of GMI’s failure to submit an application meeting the requirements of Rule 711, as well as its failure to meet its reporting obligations under its existing NMED and OCD permits. Enforcing regulatory requirements does not amount to “gross negative consequences” for any regulated entity.

Third, properly permitted facilities already exist in the area to accept salt-contaminated wastes. GMI cannot suggest that it is now necessary to allow GMI – and GMI alone - to accept dangerous oilfield wastes BEFORE meeting the requirements of Rule 711. Indeed, the findings in Division Order R-12306-B demonstrate that public health and the environment are best served by requiring GMI to comply with Rule 711 and 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, Section I.

Finally, GMI acknowledges that “to obtain a stay, GMI must make a showing of likely or probable success on the merits.” Request for Stay at p. 4. GMI then notes it “will submit a

revised permit application that includes the information required pursuant to Rule 711 and that meets the public notice requirements.” *Id.* at p. 6. Accordingly, GMI acknowledges that the application before the Division (which was the subject to R-12306-B) is inadequate. The fact that GMI intends to submit a new application at some unknown time in the future that it hopes will meet the requirements of Rule 711 is of no consequence to the legal prerequisites for a stay. Indeed, any landfarm could make that claim. What is equally troubling is GMI’s suggestion that its history of non-compliance with existing reporting requirements is not relevant, and that all it needs to do is propose “a clay-lined cell with a leachate system.” Request for Stay at p. 6-8. The Division’s Order identified many problems with GMI’s defective application, other than its failure to propose a sufficient liner and leachate detection system. *See* Order R-12306-B at Sections E, F, G, H, I, J and K.

CONCLUSION

The following findings in Division Order R-12306-B demonstrate the problems with GMI’s request for a stay of that Order pending GMI’s filing of a proper application to operate what amounts to a hazardous waste landfill:

“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).

GMI's request for a stay is nothing short of an effort to avoid the “same high standards” and public review process that existing landfills in Southeast New Mexico were required to follow BEFORE accepting non-remediable oilfield wastes. Why should the Commission allow GMI to circumvent this process and allow GMI to accept non-remediable wastes that other landfarms are not allowed to accept? GMI provides no basis for special treatment, and the Commission should summarily deny this unprecedented request.

Respectfully Submitted,

HOLLAND & HART, L.L.P.



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Attorneys for Controlled Recovery, Inc.

CERTIFICATE OF SERVICE

I certify that on September 9, 2005, I served a copy of the foregoing document **Controlled Recovery Inc.'s Response to GMI's Request for Review of Denial of Request for Review of Denial of Request for Partial Stay of Division Order R-122306** to the following by:

Via Hand Delivery to:


Gail MacQuesten
State of New Mexico
Energy, Minerals, Natural Resources Department
Oil Conservation Division
1200 South St. Francis Drive
Santa Fe, New Mexico 87505

Via U.S. Mail, postage prepaid

Donald A. Neeper
New Mexico Citizens for Clean Air & Water Inc.
2708 B. Walnut Street
Los Alamos, New Mexico 87544-2050

Via U.S. Mail, postage prepaid & Facsimile to:

Peter V. Domenici, Jr.
Dolan & Domenici, PC
6100 Seagull Street., NE, #205
Albuquerque, New Mexico 87109-2500
(505) 884-3424 facsimile


Michael Feldewert



BILL RICHARDSON
GOVERNOR

State of New Mexico
ENVIRONMENT DEPARTMENT

Ground Water Quality Bureau
Harold Runnels Building
1190 St. Francis Drive, P.O. Box 26110
Santa Fe, New Mexico 87502-6110
Telephone (505) 827-2918
Fax (505) 827-2965



RON CURRY
SECRETARY

DERRITH WATCHMAN-MOORE
DEPUTY SECRETARY

NOTICE OF VIOLATION
Certified Mail – Return Receipt Requested

May 9, 2005

Larry Gandy
Gandy Marley Inc. Landfarm
1109 East Broadway
Tatum, NM 88267

RE: Notice of Violation, Gandy Marley Inc. Landfarm, DP-1041

Dear Mr. Gandy.

This letter is to notify you that the above referenced facility is operating in violation of its Discharge Permit, DP-1041 which was issued by the New Mexico Environment Department (NMED) to Larry Gandy on August 24, 2000.

You are required by Section 20.6.2.3104 NMAC of the New Mexico Water Quality Control Commission Regulations (20.6.2 NMAC) to comply with the terms and conditions of this Discharge Permit, including the monitoring and reporting requirements which are summarized on the enclosed sheet. You have violated your Discharge Permit by failing to submit the monitoring reports which were due on September 1, 2000; December 1, 2000; March 1, 2001; June 1, 2001; December 1, 2001; March 1, 2002; June 1, 2002; September 1, 2002; December 1, 2002; June 1, 2003; September 1, 2003; December 1, 2003; March 1, 2004; September 1, 2004; December 1, 2004; and March 1, 2005.

In order to correct these violations, you must submit the past-due monitoring reports within thirty (30) days of the date of this letter.

Nothing in this letter shall be construed as relieving the permittee of its obligation to comply with all requirements in this permit and other applicable federal, state, and local laws, regulations, permits or orders. This letter is intended to address violations of certain requirements of your permit and may not address all violations. It is the responsibility of the permittee to be familiar with and comply in full with its discharge permit.

Notice of Non-Compliance, DP-1041

May 9, 2005

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This letter is NMED's attempt to gain your voluntary compliance. Failure to comply with this letter may result in the issuance of a compliance order, civil penalties, or the filing of a civil action in district court.

If you have questions regarding this matter, please contact me at 505-827-2919 or George Schuman, Program Manager of the Ground Water Pollution Prevention Section, at 505-827-2945.

Sincerely,

William C. Olson
Bureau Chief
Ground Water Pollution Prevention Section

Enc: Discharge Permit Monitoring Summary

cc: Carlos Romero, District Manager, NMED District IV
NMED Hobbs Field Office



**New Mexico Environment Department Ground Water Quality Bureau
Discharge Permit Renewal and Modification Submittal and
Monitoring Summary**

Gandy Marley Inc., Landfarm, DP-1041

Submittal Due Dates:

The following summarizes the submittal requirements for this facility:

#	Submittal Description	Due Date
1.	Submit quarterly monitoring reports to NMED. See Monitoring Reports Table below for items to include.	March 1 st , June 1 st , September 1 st , and December 1 st

Monitoring Reports

The following specifies the items to be included in monitoring reports for this facility:

#	Item	Reporting Frequency
1.	Summary of manifests for soils and liquids accepted at the facility.	Quarterly
2.	Volumes and locations of water applied to remediation cells.	Quarterly
3.	Analyses of subsurface soil samples and a map showing sampling locations.	Quarterly
4.	Any analyses to demonstrate media has been remediated.	Quarterly

NOTE: See Discharge Permit for full requirement details.

Submit all reports to:

Ground Water Quality Bureau
PO Box 26110
Santa Fe, New Mexico 87502

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

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

CASE NO. 13480

AFFIDAVIT OF IAN KEITH GORDON, P.E.

BEFORE ME, the undersigned authority, on this day personally appeared Ian Keith Gordon, P.E., being by me duly sworn, who deposed and stated as follows:

1. My name is Ian Keith Gordon, P.E., and I am the president and principal engineer of Gordon Environmental, Inc. I was qualified in this matter as an expert engineer on land disposal issues and offered the expert testimony that is referenced on pages 7 and 8 of Order R-12306-B. My resume was submitted and accepted at the May 23rd hearing as CRI Exhibit 9.

2. I have reviewed the August 16, 2005, soil sampling reports that comprise Exhibit H to GMI's "Request for Partial Stay of Division Order R-12306-B. I have not reviewed the results for inorganic parameters (i.e., RCRA metals, cations, anions) referenced in Mr. Mansker's Affidavit (GMI Exhibit I) as GMI's Request for Stay did not provide that data.

3. GMI also did not provide the "background chloride levels" for soils located "outside the landfarm footprint" mentioned in Mr. Mansker's Affidavit. However, testimony from Larry Gandy at the May 23rd Division hearing indicates that, although salt contaminated waste was not segregated, Cell 22 did not receive any salt-contaminated waste. Therefore, in lieu of an appropriate background sampling program of ambient soil conditions outside the landfarm footprint, we have assumed that the samples from Cell 22 are representative of uncontaminated

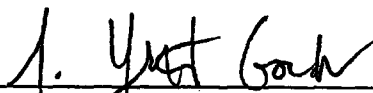
local soils. Table 1 contrasts the Cell 22 (background) chloride results with samples collected from three Cells known to have received salt contaminated waste:

Table 1
GMI Soil Chloride Values (mg/kg)

Values:	Background	Salt-contaminated Soils		
	Cell 22	Cell 15	Cell 18	Cell 20
Average	14.5	276	456	469
High	20	671	929	999

4. Based on this analysis, soil chloride levels in the cells is 20 to 50 times higher than chloride levels in the only cell known to be uncontaminated with salt.

Further, affiant sayeth not.



Ian Keith Gordon, P.E.

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANDOVAL)

Subscribed and sworn to before me by Ian Keith Gordon on this 9th day of September, 2005.



Notary Public

My Commission Expires

5-23-2009



OFFICIAL SEAL
Pamela Gonzales
NOTARY PUBLIC-STATE OF NEW MEXICO
My Commission Expires 5-23-09