

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

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CASE NO. 15617
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APPLICATION OF CK DISPOSAL, LLC
FOR A PERMIT TO OPERATE A COMMERCIAL
SURFACE WASTE MANAGEMENT FACILITY,
LEA COUNTY, NEW MEXICO

OIL CONSERVATION DIVISION'S POST-HEARING BRIEF

POST-HEARING ISSUES

1. Does the OCC have jurisdiction to consider traffic safety in connection with its decision to approve or disapprove a surface waste management facility permit?

OCD Rule 19.15.36.12.A(1), at the time CK Disposal filed the application under review,
read:

The division may issue a permit for an[sic] new surface waste management facility . . . upon a finding that . . . the surface waste management facility . . . can be constructed and operated in compliance with applicable statutes and rules and without endangering fresh water, public health, *safety* or the environment. [emphasis added].

However, the statutory authorization for the OCD and OCC to regulate surface waste management facilities, NMSA 1978, Section 70-2-12.B(21), does not include the word "safety." It confers the power:

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]

An agency cannot confer on itself powers not granted by statute. Hence the authorization to address "public safety" in the quoted rule is of no force unless traffic safety is included within the statutory language "public health and the environment."

At the hearing, we urged that the Commission does not have jurisdiction to consider traffic safety because of the absence of any reference thereto in the statutory authorization. We continue to believe that traffic safety is the primary responsibility of the Department of Transportation. The Division and the Commission lack technical expertise in that area, and it would be unreasonable for the Commission to engage in speculation as to whether or not the Department of Transportation would authorize a "turn-out" from the public highway for the proposed facility. Thus we believe technical testimony addressing that issue was properly excluded.

However, after reviewing the New Mexico Supreme Court's decision in *Colonias Development Council v. Rhino Environmental Services*, 2005-NMSC-024, 138 N.M. 133, we believe the Commission can, and should, consider public comments at the initial phase of the hearing, held in Eunice on January 9, along with evidence about the amount and significance of traffic that may be generated by the proposed facility presented in Santa Fe, in reaching its decision.

The contention in *Colonias* was that the concentration of numerous landfills and other industrial facilities in proximity to the complaining community raised quality of life issues that the Environment Department should consider in deciding whether or not to permit a new landfill in the area. The Supreme Court Agreed, saying:

Unlike the Court of Appeals, . . . , we do find that quality of life concerns expressed during the hearing bear a relationship to environmental regulations the Secretary is charged with administering. 2005-NMSC-024, at P

If proliferation has an identified effect on the community's development and social well-being, it is not an amorphous general welfare issue, but an environmental problem. The adverse impact of the proliferation of landfills on a community's quality of life is well within the boundaries of environmental protection. Thus, the testimony regarding the impact of the proliferation of landfills is relevant within the context of environmental protection promised in the Solid Waste Act and its regulations. 2005-NMSC-024, at P32.

The public comments in the present case evidence similar "quality of life" concerns. The Supreme Court did not discuss traffic issues, but it did mention increased traffic as one of the concern that commenters had complained about. 2005-NMSC-024, at P5.

We recognize that there are differences between the Solid Waste Act which was the focus in *Colonias* and the Oil and Gas Act, as well as different agency rules involved. However, we believe that *Colonias* indicates that it is appropriate for the Commission address quality of life issues in this proceeding.

This conclusion does not mean that we are urging the Commission to deny the permit. The *Colonias* opinion stresses that "something as broad as 'social impact' may not require denial of a permit," [2005-NMSC-024 at P3]. The case holds only that the Environment Department should have considered the issue. The Division takes no position on what action the Commission should take.

2. Does OCD Rule 19.15.36.12.A(1) require the Commission to Consider Evidence on Technical Issues Affection the Proposed Facility that are within the Jurisdiction of other Agencies to Determine?

A literal reading of the cited rule (quoted at the beginning of Part 1 of this brief) might lead to the conclusion that the Commission could only grant a permit after all other agencies with jurisdiction over aspects of this facility had granted necessary permit, or perhaps after independently determining that such other agencies should do so. However, such a construction would be unreasonable.

Whenever operation of a facility requires multiple permits, the proponent must start somewhere. To require the applicant to obtain all other permits necessary for operation before the Commission can approve the facility would require the applicant, and the other agencies, to engage in a process that might prove futile. For the Commission to evaluate the technical evidence and determine whether or not the facility should be entitled to permits the Commission is not empowered to grant would be similarly futile, and would involve duplication of effort and possibly inconsistent results. The Commissioners should presume that their predecessors who adopt this rule intended either of these consequences.

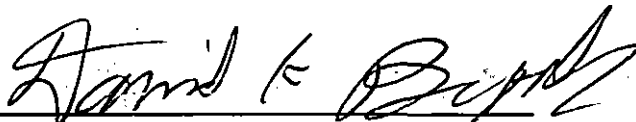
A reasonable interpretation of the rule is that the Commission may grant the permit only if it finds that the facility can be constructed and operated in compliance with applicable statutes and rules that the Commission and Division are responsible for administering, i.e. the relevant provisions of the New Mexico Oil and Gas Act and implementing rules.

To the extent that the Commission is in doubt about the facility's compliance with statutes and rules administered by other agencies, it can place conditions on any permit it approved requiring that the operator obtain the requisite approval of those agencies.

CONCLUSION

The Division therefore urges the Commission to consider whether or not traffic or other issues raised by member of the public justify denial of the permit on "quality of life" grounds, and make appropriate findings. The Division urges the Commission to decline to address whether or not any other agency might be expected to grant necessary permits or approvals.

Respectfully Submitted,



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