

**KELLAHIN AND KELLAHIN**

ATTORNEYS AT LAW

EL PATIO BUILDING

117 NORTH GUADALUPE

POST OFFICE BOX 2265

SANTA FE, NEW MEXICO 87504-2265

W. THOMAS KELLAHIN\*

\*NEW MEXICO BOARD OF LEGAL SPECIALIZATION  
RECOGNIZED SPECIALIST IN THE AREA OF  
NATURAL RESOURCES-OIL AND GAS LAW

TELEPHONE (505) 982-4285  
TELEFAX (505) 982-2047

JASON KELLAHIN (RETIRED 1991)

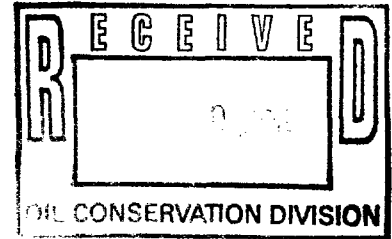
August 11, 1994

HAND DELIVERED

Mr. William J. LeMay  
Oil Conservation Division  
State Land Office Building  
310 Old Santa Fe Trail, 2nd Floor  
Santa Fe, New Mexico 87501

10507

R-9769-A



11086

Re: REQUEST FOR HEARING AND STATEMENT OF OBJECTIONS

*In the matter of the application of C & C Landfarm, Inc.  
for expansion of a commercial surface waste disposal facility,  
Lea County, New Mexico.*

Dear Mr. LeMay:

On behalf of W. T. (Trent) Stradley and S-W Cattle Co., please find enclosed our referenced Request for Hearing and Statement of Objections which we request be set for hearing before a Division Examiner.

Very truly yours,

A handwritten signature in black ink, appearing to read "W. Thomas Kellahin".

W. Thomas Kellahin

w/ Enclosure:

cc: C. Gene Samberson, Esq.

cc: Eddie Seay, agent for C & C Landfarm, Inc.

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

**IN THE MATTER OF THE REQUEST  
OF C & C LANDFARM, INC. FOR  
EXPANSION OF A COMMERCIAL SURFACE  
WASTE DISPOSAL FACILITY,  
LEA COUNTY, NEW MEXICO**

11086

**REQUEST FOR HEARING  
AND  
STATEMENT OF OBJECTIONS  
BY  
S-W CATTLE CO. AND W. TRENT STRADLEY**

Comes now W. T. (Trent) Stradley and S-W Cattle Co. ("the Opponents") by and through their attorneys, C. Gene Samberson, Esq. and W. Thomas Kellahin, Esq. and object to the New Mexico Oil Conservation Division granting the request of the applicant, C & C Landfarm, Inc. ("C&C"), to expand/modify its existing facility in the NE/4 of Section 3, T20S, R37E, Lea County, New Mexico, and in support states:

**INTRODUCTION**

Gene Samberson, attorney for W. T. Stradley, happened to read a copy of the Lovington Daily Leader on Tuesday, July 12, 1994 in which notice by publication was being attempted by the New Mexico Oil Conservation Division for the modification by C & C Landfarm, Inc. of its commercial landfarm facility located in the NE/4 of Section 3, T20S, R37E, NMPM, Lea County, New Mexico;

**Request for Hearing and  
Statement of Objections  
Page 2**

On August 8, 1994, a search of the New Mexico Oil Conservation Division ("NMOCD") files on the C&C's application were made and copies of all relevant documents were provided by Roger Anderson, Environmental Bureau Chief, New Mexico Oil Conservation Division ("NMOCD-EB"), concerning this application. C&C's submittal to the NMOCD consists of a single page letter attached as Exhibit "A" hereto.

**(1) INADEQUATE NOTICE**

Since April, 1992, the Opponents have complained about receiving inadequate notice from both the NMOCD and this applicant about this facility, including the NMOCD-EB approving this facility and the various amendments to that Application. The notice in this case is flawed and continues to violate due process.

Order R-9769-A perpetuated that violation of procedural due process by approving (contrary to NMOCD Rule 1207(11) and Rule 711) an order which allows amendments to this facility to take place without public notice or hearing. The OCD Conditions appended to Order R-9769-A, specifically, OCD Conditions #1 and #10 set up a process for the Applicant to expand its waste facility to accept other contaminants and to do so without public notice or public hearing.

The Opponents and their participation in this matter before the NMOCD is well known to both C&C and the NMOCD. Yet, rather than send actual written notice to the Opponents, both C&C and the NMOCD are attempting to rely exclusively upon notice to the Opponent by newspaper publication. Fortunately for the Opponents, Mr. Samberson happened to read the notice.

In no other proceeding before it does the NMOCD attempt to rely exclusively upon newspaper publication as adequate notice. Yet in this case, C&C is attempting to modify and expand its facility again without actual notice to the Opponents and without a public hearing.

**(2) FAILURE TO COMPLY WITH DIVISION RULE 711**

NMOCD Rule 711 requires that prior to the enlargement or a modification of a commercial surface waste disposal facility, a detailed application for such a modification/enlargement to an existing permit shall be filed with the NMOCD-Santa Fe to be accompanied with attachments addressing some eleven different enumerated items.

A search on August 8, 1994 of the NMOCD files on this matter revealed that the applicant filed a one page letter dated Jun 15, 1994 and nothing else. Applicant failed to comply with the Division Rule 711 and its request must be dismissed.

**(3) RULE 711 NOTIFICATION**

Rule 711 further requires written notification to the owners of the surface lands and occupants within one-half (1/2) mile. S-W Cattle Co. and W. T. Stradley are such owners/occupants and were not and have not been notified as required by Division Rule 711.

The applicant failed to comply with the notice requirements of Rule 711 and its request must be denied.

**(4) OCD-ENVIRONMENTAL REGULATIONS  
VIOLATE DUE PROCESS**

The Division is utilizing a complex set of rules and regulations (some of which are contrary to and inconsistent with existing Division rules and regulations) with which to process C&C's application and by which to establish operational regulations for this facility and to monitor compliance.

None of these environmental rules and regulations ever has been properly adopted by the Division. (See NMOCD Rule 1201).

**Request for Hearing and  
Statement of Objections  
Page 4**

The NMOCD, by avoiding its public hearing process (See NMOCD Rule 1201 and its general notification procedures (See NMOCD Rule 1207) has allowed its Environmental Bureau to unilaterally promulgate rules and regulations and issue amendments which are disguised as "guidelines" and in doing so has precluded both the oil and gas industry and the public from having meaningful comment, objection and input.

However well intended, such procedures are a violation of procedural due process and have resulted in invalid rules and regulations which the NMOCD is currently applying in this case.

**(5) ENVIRONMENTAL BUREAU ACTIONS**

The subject facility is being designed by the OCD and not the Applicant and is being permitted without any science or experience to know that it will work. This has been and continues to be a "make it up as you go" process by which the agency designs the specifications for the facility and then challenges the Opponents to prove them wrong. Such an adversarial role is not the proper role for this agency.

The Environmental Bureau-OCD based upon a phone call and a one page letter from the applicant apparently has undertaken C&C's burden to provide the necessary data to support such an application. Rather than functioning as a reviewing regulatory agency, the NMOCD-EB in this case has taken a facilitator's role by providing technical support and assistance to the applicant.

The methods used by the Division in processing this case violates procedural due process.

In its efforts to accommodate the requests of a former NMOCD employee, Eddie Seay, consultant for C&C, the Environmental Bureau's actions in this case have impaired and tainted its ability to be perceived as impartial.

**Request for Hearing and  
Statement of Objections  
Page 5**

This matter should be set for hearing before a Division Examiner in order to afford the Opponents their right to have such matters determined by an impartial hearing examiner.

**(6) APPEAL OF ORIGINAL APPROVAL**

Commission Order R-9769-A is fatally flawed and is still pending an appeal hearing in State District Court in the Fifth Judicial District for Lea County, New Mexico. Any action on this application to modify/expand this facility must be stayed pending a decision by the District Court in Case CIV 93-247.

**(7) TWO AQUIFERS TO BE PROTECTED**

One of the aquifers at risk is the Stradley Aquifer in the shallow alluvium down slope from the proposed waste facility. The issue is where are the vertical and horizontal limits of that aquifer and its recharge system.

Mr. Stradley, who has been over every part of this "White Break" area for decades, will testify that the original facility and its proposed expansion are located on the northeast edge of a natural topographical depression with his fresh water windmill located in the bottom of that depression and in excess of 30 feet lower than the surface waste facility.

A visual inspection of the surface of the facility allows the observer to infer that the surface topography would increase the risk of contamination to the Stradley Aquifer. The Division's records on this case already contain evidence of an extensive search of the State Engineer's records concerning fresh water wells in the area which show the presence of some forty-six (46) water wells in the area.

Mr. Tim Kelly, an expert hydrologist, will also testify and conclude that the likely direction of contaminant movement from the waste facility will be down gradient along the redbed surface; that there have been no

**Request for Hearing and  
Statement of Objections  
Page 6**

hydrologic studies of the area to determine gradients and therefore no way to know the length of time and distance of travel of the contaminants, that there has been no scientific study of the redbeds and the movement cannot be predicted. His point will be that the Division originally should not have approved this facility and cannot approve this expansion/modification until that determination is made.

In addition, the Ogalalla aquifer also is present under the waste facility. If the Division wants to decide this case based upon the presence or absence of the Ogalalla aquifer under the facility, then the fact is the Ogalalla aquifer IS PRESENT UNDER this surface waste facility.

**(8) APPLICANT HAS NOT PRESENTED SUBSTANTIAL  
SCIENTIFIC STUDY ABOUT THE STRADLEY AQUIFER**

C&C now seeks to expand and modify a facility which was improperly approved by the Division in the first place. It is C&C's burden of proof to demonstrate to the Division that the expansion of this facility will not harm the fresh water aquifer.

C&C has yet to provide evidence of the size, shape and hydrology of the Stradley Aquifer from which the Stradley windmill produces fresh water which continues to be a failure of the Applicant to meet its "Burden of Proof."

The ultimate factual issue for this expansion and its original facility is whether this surface waste facility creates a risk of contamination to the fresh water aquifer from which Trent Stradley's well has produced continuously in excess of forty-five (45) years and is the only fresh water supply for cattle in some nine sections and is referred to herein as the "Stradley Aquifer."

To answer that issue, it is essential for the Division to have proper scientific evidence about the Stradley Aquifer including its size, shape and

**Request for Hearing and  
Statement of Objections  
Page 7**

recharge mechanics. C&C has never submitted such scientific evidence and that failure of evidence is fatal to its case.

The fact that the Applicant did not find the Stradley Aquifer with some five shallow monitor wells drilled on the proposed facility does not substitute for a proper hydrologic study to determine the risk to the Stradley Aquifer. Contaminates can be introduced on the surface and with the introduction of rain will percolate into the ground both vertically and horizontally and migrate into the Stradley Aquifer.

Nobody knows how the Stradley Aquifer is recharged and from what source. Nobody knows the size and shape of the Stradley Aquifer. The Division up until now has ignored that absence of evidence and in doing so, failed to decide the ultimate issue in this case.

It is the Applicant's Burden of Proof and not the NMOCD or the Opponents' burden, to produce the hydrologic study of the Stradley Aquifer which must provide convincing evidence that no risk was being imposed upon the Stradley Aquifer by this waste facility.

**(9) APPLICANT HAS NOT PRESENTED ANY  
PROPER SCIENTIFIC STUDY ABOUT THE  
EXPANSION OF THIS FACILITY**

C&C has submitted no scientific data on soils tests and therefore no compaction data, no composition data, and permeability data from which to determine the construction and maintenance standards for the berm. Further C&C does not detail the constructions, maintenance or operations requirements for the berm.

In addition, the Applicant has failed to provide evidence as to any of the following:

- (1) composition samples and tests
- (2) soil samples and tests
- (3) compaction tests



**Request for Hearing and  
Statement of Objections  
Page 8**

- (4) permeability tests
- (5) Cation Exchange capacity tests
- (6) liquid and plastic tests of the redbeds
- (7) any soil properties tests and data
- (8) any hydrology studies
- (9) any groundwater studies
- (10) any percolation tests or data
- (11) any ground water migration tests/data
- (12) any contaminant mobility tests/data

**(10) NEED FOR ADEQUATE HORIZONTAL BUFFER ZONE:**

A Buffer Zone is essential but the proper distance must be based upon some site specific scientific reasons to determine that distance is adequate. There is no scientific basis for the distance being 100 foot horizontal setback ("buffer") as recommended by Kathy Brown of the OCD-EB. The adoption of an arbitrary distance for the Buffer Zone without any scientific basis is objected to by the Opponents.

**(11) TREATMENT ZONE MONITORING**

In Order R-9769-A, a mistake was made when it adopted the OCD-EB proposed conditions concerning the Treatment Zone and its Monitoring. The OCD-EB speculated that the first three feet of native soils will be an adequate "Treatment Zone" and with monitoring will protect ground water.

Again, Kathy Brown, previously testified in support of the adoptions of the OCD-EB conditions was not a qualified expert hydrologist and did not undertake an adequate scientific study to justify its Treatment Zone Monitoring.

The proposed monitoring of the Treatment Zone has no scientific basis for determining its reliability. There is no data from which to determine that the location of the cells in which the contaminated soils will

**Request for Hearing and  
Statement of Objections  
Page 9**

be placed have been located an adequate distance from either the excavated pits or from the boundary of the adjoining Stradley property. Nobody knows how frequently to sample and how many samples per acre to take in order to detect contamination in the Treatment Zone.

The OCD-EB Revised Recommendations are inadequate to detect any leaching process of movement of contaminants that could cause the pollution of nearby fresh water supplies.

In summary, should the Division use the former OCD-EB recommendations for this facility, they will be inadequate to provide reasonable protection of the valuable groundwater present in the immediate adjacent tracts.

Any approval of this expansion should correct the inadequacies made in the Order R-9769-A.

**OPPONENTS OFFER OF PROOF**

The Opponents WILL PRESENT evidence that the granting of this application by the Division will failed to protect human health and the environment and will constitute a risk of contamination of ground water, including the following:

- (a) The Applicant's proposed plan will place at risk shallow water wells located down-dip from the proposed landfarm which will be subject to contamination from seepage of leachate contaminants.
- (b) The Applicant's plans to prevent migration of contaminants down gradient along the redbed surface is inadequate.
- (c) The proposed monitor wells are improperly located and will not afford adequate assurance of detection of contaminants.

**Request for Hearing and  
Statement of Objections  
Page 10**

(d) The proposed dike identified in OCD Condition (10) in said Order is insufficient and conditions on compaction and verification are inadequate to stop the mobility of the leachate contaminants.

(e) The composition of the berm is not environmentally safe.

(f) Additional soil tests should be performed on the redbed soil including:

- (1) Falling head permeability tests,
- (2) Soil property tests,
- (3) Cation Exchange Capacity tests,

(g) Applicant needs to perform liquid and plastic tests on the redbeds.

(h) The Applicant's proposed barrier is inadequate for its proposed landfarm.

(i) Applicant's geology is inadequate and fails to include an east-west cross section.

The OCD-Environmental Bureau has previously assumed that the contaminated soils will be kept from any shallow fresh water because of about three (3) feet of native soil is to be used as a "treatment zone."

There is no characterization of the "redbeds." In this area there are the Triassic deposits, probably the Chinle shale, and referred to as the "redbeds." The integrity of this landfarm system is dependent upon the impermeability of the redbeds, but the Applicant has presented no data about the physical characteristics of these deposits, such as cation exchange rates, in-situ permeability, remolded permeability at specified compaction ratios, swelling characteristics, etc. All of these are critical factors that ensure that there would be no migration of leachate along the top of or through the redbeds.

There are inadequate horizontal and vertical buffer zones surrounding this proposed facility. The configuration of the upper surface of the redbeds in the 40-acre tract has not been defined.

**RECOMMENDATIONS**

Opponents recommend to the Division that the request to expand/modify this facility be DENIED.

Respectfully submitted,

KELLAHIN AND KELLAHIN,

A handwritten signature in black ink, appearing to read 'W. Thomas Kellahin', written in a cursive style.

W. Thomas Kellahin, Esq.  
P.O. Box 2265  
Santa Fe, New Mexico 87504  
(505) 982-4285

C. Gene Samberson, Esq.  
P. O. Drawer 1599  
Lovington, New Mexico 88260  
(505) 396-5303

ATTORNEYS FOR OPPOSITION-  
W.T. STRADLEY  
S-W CATTLE CO.

# EDDIE SEAY CONSULTING

601 W. ILLINOIS  
HOBBS, NEW MEXICO 88240  
(505) 392-2236  
FAX (505) 392-6949

ENVIRONMENTAL,  
GEOLOGICAL & REGULATORY  
SPECIALISTS

**PEAK**  
CONSULTING SERVICES



June 15, 1994

Ms. Kathy Brown  
NMOCC  
Box 2088  
Santa Fe, NM 87504-2088

SUBJECT: C & C Landfarm, Inc.

Dear Kathy:

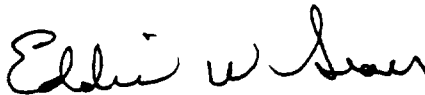
As we discussed a few weeks earlier, C & C would like to expand its boundaries to add an additional 40 acre tract to our facility.

This additional 40 acres is conjoined with the existing facility and only separated by our berms and buffer zone. The property is in Unit Letter B NW 1/4 NE 1/4. The property is deeded land owned by Jim Cooper and family, and all the offset landowners will be the same as on original application.

C & C will operate this property under the same conditions as stated in our original permit.

If additional information is needed or if you have questions, please call.

Sincerely,



Eddie W. Seay, Agent

EXHIBIT "A"