

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF THE DRAFT FINAL
PERMIT FOR THE TRIASSIC PARK
WASTE DISPOSAL FACILITY
U.S. EPA NO. NM0001002484

No. HRM 01-02 (P)

FINAL ORDER

This matter comes before me following a hearing before the Hearing Officer between October 15 and 19, 2001, in Roswell, New Mexico. Gandy Marley, Inc. ("GMI" or "Applicant") seeks approval for the construction and operation of a hazardous waste storage, treatment and/or disposal facility (TSDF) near Roswell in Chaves County, New Mexico.

The New Mexico Environment Department (NMED) Hazardous Waste Bureau (HWB) supports the issuance of the permit for a period of ten years, with conditions necessary to protect public health and welfare and the environment.

Having considered the administrative record, including the post-hearing submittals from the Applicant, the Bureau, Conservative Use of Resources and Environment (CURE), and Citizens for Alternatives to Radioactive Dumping (CARD), and the Hearing Officer's Report; and being otherwise fully advised regarding this matter;

I HEREBY ADOPT THE HEARING OFFICER'S DISCUSSION AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, EXCEPT AS FOLLOWS:

DISCUSSION

Environmental Justice and Public Participation

1. I concur with the Hearing Officer that the Department's procedural regulations already allow full access without discrimination to the permitting process, but I also believe that

improvements are called for, and I am directing the Bureau and other staff by separate memorandum to develop guidance or amendments to the Department's procedural regulations and proposed amendments to the Environmental Improvement Board and the Water Quality Control Commission which include the following elements:

- a. The establishment of criteria for the provision of public notices and fact sheets in Spanish, and for the interpretation of public meetings and hearings in Spanish.
- b. The opportunity to provide public comment outside of working hours in hearings with significant public interest.
- c. The possibility of requiring public information meetings during the permitting process and prior to the public hearing.
- d. A consideration of affected populations and other permitted facilities within three miles of the facility in question, based on readily obtainable information, sufficient to ascertain whether an adverse, discriminatory and disparate impact is likely to be found by the Environmental Protection Agency (EPA) under EPA's Interim Guidance For Investigating Title VI Administrative Complaints Challenging State Environmental Permits. This consideration must be made with an eye to the resources available in the Department to make such a consideration, and should not be carried out in a way that requires the revisiting of the siting regulations in each case, or assumes authority beyond that granted to the agency in the applicable statute.
- e. Other changes that may be suggested and are necessary to assure full participation in Department permitting activities.

2. I concur with the Hearing Officer's analysis of the applicable laws relating to environmental justice in this matter. I also believe the analysis of potential disproportionate impact in this matter would be a very simple one, and although the current permitting regulations do not provide for such an analysis, I have considered what such an analysis would look like in this permitting action:

- a. The facility is located in an area where it is not in close proximity (three miles or less) to any neighborhood. It is more than ten miles from any neighborhood. I have reviewed the Interim Guidance for Investigating Title VI Complaints Challenging State Environmental Permits, and although the Guidance does not define "proximity" other than to suggest that the environmental medium and the impact of concern be considered, I see nothing in the law or in the record to suggest that the radius of twenty-five to fifty miles suggested by CARD is the appropriate radius of concern.
- b. The nearest receptor is the Marley Ranch, 2.9 miles from the proposed facility, and the second nearest receptor is the Kolb residence, 4.75 miles away. There are fewer than a dozen receptors within 10 miles. Hagerman and Dexter are more than 30 miles from the proposed facility; Roswell is 40-45 miles away.
- c. At three miles, air modeling shows concentrations several orders of magnitude below EPA's levels of concern. At this distance the concentration of PCBs would be indistinguishable from background.
- d. Without a nearby affected population, no demographic analysis of that population is possible.
- e. NMED has not permitted any other facilities of this type or a similar type nearby.

- f. No adverse impact on a nearby affected population exists; therefore no disparity exists.

Although state permitting laws do not contemplate a consideration of disparate impact as part of the permitting process, and although state law does not provide such a ground for denial of a permit application, even if such an analysis had been performed and such a ground for denial did exist, the permit would not be denied.

The Ground Water Monitoring Variance

I have considered the record and the argument made in all post-hearing submittals concerning the ground water monitoring variance approved by the Bureau and recommended by the hearing officer. I believe there is sufficient evidence to conclude as required by regulation that there is no potential for migration of liquid from the facility to the uppermost aquifer during the active life and post-closure care period of the facility, that the predictions have been based on assumptions maximizing the rate of liquid migration based upon site-specific data relating to the uppermost aquifer under the facility, and that hazardous constituents will not migrate beyond the outer containment layer prior to the end of the post-closure care period. I am not persuaded by the discussions of hydraulic conductivity relating to the Upper Dockum adjacent to as opposed to beneath the facility, nor am I persuaded that angle drilling is necessary to ascertain the potential for fractures or fast flow paths at the site.

I am concerned, however, that the proposed monitoring system may not detect unsaturated flow. It was generally conceded by all parties that the monitoring system proposed does not fit the generally accepted definition of vadose zone monitoring, but the Bureau defended its approval of the proposed monitoring wells by stating that vadose zone monitoring equipment was "unreliable." Without further explanation, and particularly without some

alternative proposed means of detecting unsaturated flow, I cannot support a monitoring system in the vadose zone which is limited to monitoring wells and sumps.

On the basis of Mr. Rice's testimony, I am directing that at least 3 of the shallower wells or sumps be replaced with true vadose zone monitoring devices such as suction lysimeters, to be placed in areas deemed most likely to experience unsaturated flow; this may include the area adjacent to the leachate collection system.

Foreign Waste

I concur with the Hearing Officer's legal analysis on this point. I do not accept the Bureau's recommendation that representative sample analyses for each waste stream shall include testing for all constituents listed in 40 CFR 268.48; I believe this exceeds what is necessary to assure that waste characterization is done properly. I believe the Bureau's concerns as to the verification of compliance by non-U.S. generators can be addressed through increased auditing of those generators, and additional information submitted at the time of waste delivery to the facility.

On the basis of the Bureau's stated concern that accurate waste analysis be assured, I am directing the inclusion of a provision such as the following in the final permit: "The Applicant shall obtain from generators of in-bond waste under the La Paz Agreement as a supplement to the Waste Profile Form (Attachment F-2) all information used to classify the waste offered for acceptance, including process knowledge, analytical laboratory results, QA/QC and other information required by the Bureau necessary to assure that the waste characterization is accurate."

Financial Assurance

The hearing officer made several changes to the closure and post-closure plan relating to erosion control and re-vegetation. I believe additional changes are necessary to the closure and post-closure plan and the associated financial assurance to be sure that costs to the owner or operator of hiring a third party to close the facility are met. These changes are based primarily on the testimony of Paul Robinson.

(1) Water

As Mr. Robinson noted, water is needed to successfully complete revegetation at the site, and the cost of water can be significant.

I am directing the inclusion of a provision such as the following in the final permit: “Applicant shall submit its anticipated water requirements for the implementation of its closure/closeout plan, and the costs associated with a third party meeting the requirements of that plan, which shall include but not be limited to the acquisition of water, a water budget necessary for the implementation of the closure plan, including any additional costs associated with drilling, and potential development of infrastructure.”

(2) On-Site Disposal Costs

I am not persuaded by the arguments made on this point; I believe the Applicant has made the demonstration that on-site disposal capacity will exist at all times over the life of the facility.

(3) Indirect Costs

Insurance is a contractor-borne cost that is already included in the draft permit financial assurance estimate, and it would be duplicative to include it as a discrete, itemized

indirect cost. Profit is also already included, and is not appropriately itemized separately.

I believe the other indirect costs are appropriately estimated.

(4) Financial Assurance Mechanism

The applicable regulations call for the mechanism to be identified after the permit is issued and before the facility is opened. As a practical matter, I suspect financing is obtainable only after the permit is issued. I do not agree that this “is not protective of health or the environment.”

(5) Methodology

The use of construction bids as described provides reasonable assurance that the cost estimates obtained by the Bureau and the Applicant are not arbitrary, but I believe the use of the cost estimation handbooks mentioned by Mr. Robinson would provide still greater assurance and independent verification that the calculated estimate for financial assurance is reliable. I am directing that the cost estimation handbooks be used where applicable to re-calculate the cost estimates, and that the higher numbers be used if the results are different from those already obtained.

(6) Erosion Control and Revegetation

In addition to the language suggested by the Hearing Officer regarding the Applicant’s submittal on the re-vegetation of the Landfill and Surface Impoundment areas, Permittee shall also address “the type and density of the vegetation, criteria to determine when re-planting is required, the number and location of drainage structures, the type of topsoil and soil amendments, and water requirements.”

CURE also requests the opportunity to have public review and comment on the submittals made after the permit is issued, effectively requesting another hearing before the

permit has expired. Certainly, submittals from the Applicant required by the Permit are public record, and may be reviewed by CURE and others pursuant to the New Mexico Inspection of Public Records Act. The Department will also accept comment on the submittals, and may choose to act on that comment. I will not, however, wait to issue the permit before these submittals are received, nor will I direct that another hearing be held to address the changes. These are beneficial refinements made to a Permit which has already been the subject of extensive review and participation, refinements made to address points raised during review and participation, and the deficiencies noted and remedied here are not sufficient grounds to deny the permit application or to repeat the hearing process.

Changes to the Findings of Fact and Conclusions of Law supporting the directives above are attached.

ORDER

IT IS THEREFORE ORDERED:

The permit shall be issued for a period of ten years as it appears in the Final Proposed Form dated December 2001, with all editing remarks removed and with changes necessary to implement the Hearing Officer's recommendations and the directives above.



PETER MAGGIORE, SECRETARY

NOTICE OF JUDICIAL REVIEW

Pursuant to NMSA 1978, Section 74-4-14, any person who is or may be affected by any final administrative action of the Secretary may appeal to the court of appeals for further relief within thirty days after the action. All appeals shall be upon the record before the Secretary.