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July 28, 2017

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Edward Smith
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4300 Cherry Creek Dr. S.
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Re: Demand for Withdrawal of Compliance Advisory
Dated May 31, 2017 and Immediate Issuance of a
No Violations Letter
for Elk Springs Recycling and Recovery

Dear Mr. O'Rourke and Mr. Smith:

I have reviewed the Compliance Advisory dated May 31, 2017 issued by you as well as the regulations you have cited, and based on that review, I find your Compliance Advisory has no merit and is not based in material fact in accordance to the regulations. It is also very obvious you have both exceeded your authority in issuing the Compliance Advisory and attempting to utilize a Guidance Document for authority and jurisdiction in this matter which is completely outside the constraints of the regulations.

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First, 1.8.1(B) states, "A detailed written estimate of the cost of hiring a third party to close the largest area of a site and facility that may require closure shall be the basis for the closure estimate. The closure cost estimate must equal the cost of closing the largest area requiring closure during the active life of the site and facility when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan."

The narrative of the original Design and Operation Plan and Closure Plan was submitted in 1986. The narrative was resubmitted by me in 1996 after historical review (because the Colorado Department of Public Health and Environment (the "Department") said it was never submitted; however in 2010 the original Design and Operation Plan and Closure Plan mysteriously reappeared in Ms. Donna Stoner's desk after being misplaced for 24 years.) **The Department never apologized and never reimbursed Mr. Bethell for the costs associated with resubmitting the Plan in 1996 from historical review due to the Department's misplacing the original Plan. Employees of the Department irresponsibly advised the United States Environmental Protection Agency (USEPA) that Mr. Bethell was operating without a Design and Operation Plan, which led to an entire myriad of issues and threats to resolve at additional costs to Elk Springs Recycling & Recovery (ESRR), all because of the Department's incompetent, malicious and unmitigated intent toward clay-lined production water impoundment facilities and its failure to maintain records properly.**

The narratives for Closure and Post Closure as well as Closure and Post Closure costs were once again upgraded and resubmitted to the Department during judicial arguments regarding financial assurance through a Court Order issued by Joel S. Thompson, District Court Judge, on May 15, 2001. The Closure and Post Closure Plan narratives as well as the establishment of closure and post closure costs for financial assurance were approved and accepted by all parties, and the final Closure and Post Closure Plan narratives and closure and post closure costs for financial assurance for ESRR were established through the June 12, 2001 submissions. The Court requested that a third party develop the costs for closure and post closure, and a third party was brought forward to establish those costs in accordance to the Judge's request.

The Closure and Post Closure narratives were upgraded when ESRR was compulsorily moved from Section 9 of the regulations to Section 17 of the regulations through the *Application to Amend the Certificate of Designation to Incorporate the Requirements of Section 17 in the Retrofit of a Preexisting Production Water Impoundment Facility* dated March 20, 2009.

I submitted the January 2016 Updated Cost Estimates for Closure and Post Closure Care for ESRR with a very short Special Note of explanation. There is no regulatory requirement in this section of the regulations for any additional "detailed information" or additional "unit costs" regarding closure as they are already inclusively placed in the Plan.

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Your demand comes from the Guidance Document which is not any part of regulatory requirements.

Judge Joel S. Thompson required third party costs for closure and post closure of the entire site, which is what our continuing cost estimates have reflected. What the Department has continually overlooked in ESRR's Closure and Post Closure plans is the absolute fact that the largest portion of the site and facility will never be closed. As stated in all previous plans over many years, Mr. Bethell has been approached by both sheep and cattle interests in Moffat County and has the opportunity to lease the site for grazing after closure. Mr. Bethell's plans would also include the lease of his water and water rights for agricultural interests.

Evaporation Impoundments #4 and #5A, and proposed Evaporation Impoundment #5B on the south side of Elk Springs Draw would make excellent reservoirs for agricultural purposes. These impoundments are currently used for clear water evaporation only. Mr. Bethell plans to leave these impoundments in place to develop agricultural reservoirs as well as fire control reserves. At the time of closure, these impoundments would be evaporated, cleaned by decontamination utilizing bioremediation, and refilled with water from Elk Springs Draw to create agricultural reservoirs. Since this is private property, Mr. Bethell still maintains proprietary rights under the U.S. Constitution.

Second, 1.8.2(C) states, "The owner or operator of any solid wastes disposal site/facility shall maintain:" which is inconclusive until you add 1.8.2(C)(1) which states, "A detailed written estimate of the cost of hiring a third party to close such site/facility." As stated in 1.8.1(B) above, the detailed written estimate of cost of hiring a third party to close such site/facility has been submitted multiple times through the Closure Plan and Post Closure Plan with the continuing update yearly and every five years in summation of the Updated Cost Estimates for Closure and Post Closure Care utilizing the inflation factors as provided by the Department. Any additional "detailed information" or additional "unit costs" are not required by the regulations as it is already inclusively placed in the Plan.

Third, 1.8.3(D) states, "Owners or operators of a site and facility must replace original cost estimates with new cost estimates every five (5) years unless otherwise required by the Department." ESRR has complied with this section of the regulations through submission of the Updated Cost Estimates for Closure and Post Closure Care. No additional "detailed information" or additional "unit costs" are required. ESRR has submitted updated cost estimates based on its original Closure and Post Closure Care Plan every five (5) years as required by the regulations.

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Fourth, Section 1.8.3(E) states, "Cost estimates for closure, post-closure or corrective action may be increased or decreased. Justification for changing the financial assurance must be presented to the Department and the local governing body having jurisdiction, and must be acceptable to [the] Department. Such justification shall be made a permanent part of the operating record of the site and facility." ESRR has never requested a decrease and has continually upgraded its financial assurance for closure and post closure care based on those consumer price index figures provided by the Department.

IN SUMMARY

After a thorough review of the regulations, specifically the entirety of Section 1.8 Financial Assurance Criteria, you are taking and using the regulations out of context and misinterpreting as well as misapplying those regulations in their application to ESRR. Employees of the Hazardous Materials and Waste Management Division (the "Division") are also attempting to force ESRR into utilizing a Guidance Document, which is not any part of the regulations which ESRR is required to abide by, and in reality only represents a regulator's wish list of more cost-prohibitive over-regulation.

You further state on page 2 of your Compliance Advisory, "The item of non-compliance must be addressed in order to protect human health and the environment." That is an absolute lie, and both of you should be ashamed of using that statement in relation to this administrative matter as ESRR is a site and facility that is environmentally sound and protects human health from produced water being systematically dumped all over the state of Colorado which was a common occurrence prior to production water impoundment facilities opening for acceptance of this byproduct from the gas and oil industry.

CONCLUSION

A review of Section 1.8 Financial Assurance Criteria in its entirety is very revealing. This section was written with one purpose in mind, and that was for the regulation of solid waste disposal sites and facilities. This section in and of itself was written for the closure and post closure of sanitary landfills and those types of solid waste sites and facilities, and no consideration was given to the fact that it would be misapplied to production water recycling facilities such as ESRR. In the Department's haste to move production water recycling facilities and impoundment facilities into Section 17 as solid waste facilities, it has failed to consider the consequences to the owners and operators of these facilities both in financial costs and impossible regulatory burdens. The requirements for closure and post closure of a true solid

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waste facility and a production water recycling facility or impoundment facility are completely different. I hold a certificate in the management of landfill operations and have managed multiple solid waste landfills in my career with both public and private corporations. I have also been recognized by the Colorado judicial system as an expert in the operations of production water impoundment facilities and have worked with them since 1995 (22 years).

There is very little similarity between the operations of a solid waste facility and a production water recycling facility/impoundment facility. The crux of the regulatory problems I have seen have been all based on the absolute fact that the Department has forcibly included production water impoundment facilities and solid waste facilities under the same regulations with little regard given to the dissimilarity of the two different types of sites and facilities.

A solid waste facility has a finite life span whereas a production water recycling facility/impoundment facility has an infinite life span. ESRR has been in operation since 1986 (31 years) and operates on a site that incorporates a total of 36.25 acres of land. The air space that is constantly available in the impoundments will allow this site to operate continually for another 100 to 200 years, without exaggeration, based on the fundamental recycling of production water. A solid waste facility such as a sanitary landfill, on the other hand, operating on a 36.25 acre site and depending on the volume of waste disposal, compaction, depth and height limitations, would be constrained to between 10 and 20 years prior to final closure and post closure. Some solid waste landfill operations actually move through the closure process during the time the site is open due to cells being full of solid waste requiring intermediate or partial closure at these types of facilities. The solid waste remains in these sites and facilities forever as they are disposal operations. This is not the case at production water recycling facilities.

Production water recycling facilities primarily take one byproduct from the gas and oil industry. That byproduct is production water. In most cases, 99% of that byproduct is sea water that comes from beneath the surface of our planet.

Solid waste sites and facilities take virtually every waste stream under the sun, whether knowingly or unknowingly, including household waste, business waste, industrial waste, construction waste, medical waste, hazardous waste, chlorinated solvent waste, biological waste, PVC waste, asbestos waste, chemical waste, pesticide waste, dead animals, etc. The Department once again, in its haste, demands that production water recycling facilities test for constituents that are found in solid waste facilities and that are not indigenous to production water.

I have not had the time to review or study how and why production water impoundment facilities in the gas and oil industry were placed under the regulatory control of the Colorado Department

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of Public Health and Environment, Solid and Hazardous Waste Division, but as an expert in their operations and relationship to the gas and oil industry, it is evident this was a huge legislative blunder. I have heard rumors that the Department not only lobbied but demanded authority and jurisdiction over this portion of the gas and oil industry. The Department does not understand the operations of production water impoundment facilities and attempts to regulate them as solid waste facilities, which they absolutely are not. Production water impoundment facilities such as ESRR should be under the authority and jurisdiction as well as regulated by the Colorado Oil and Gas Conservation Commission (COGCC). The COGCC is charged with fostering the responsible development of Colorado's oil and gas natural resources in a manner consistent with the protection of public health, safety, and welfare, including the environment and wildlife resources. **Production water impoundment facilities need to be regulated by an agency that understands all aspects of their operations and their direct relationship to the gas and oil industry in Colorado.** The very regulations being promoted and forced upon production water impoundment facilities by the Department through the misguided approach of the regulatory implementation of synthetic liners is extremely detrimental to public health, safety, welfare, the environment, and especially wildlife resources. **All production water impoundment facilities in the State of Colorado must be removed from the authority and jurisdiction of the Department and placed under the direct authority and jurisdiction of the COGCC in order that this vital industry to Colorado's gas and oil economic future not be destroyed and put out of business through over-regulation and excessive financial burdens.**

In order to prove my point, I would like to discuss just one of the many improprieties in the Department's regulations concerning production water impoundment facilities. People in the gas and oil industry refer to "boom and bust" cycles. Gas and oil exploration and production in the United States moves through cycles. A boom cycle is when gas and oil exploration and production expands, and a bust cycle is when gas and oil exploration and production contracts. Currently, Colorado as well as the United States is in a bust cycle and gas and oil exploration and production is contracting. The volume of production water accepted by ESRR is extremely small and the site and facility could go through a dry spell for several years based on this contraction. However, the Department states through their regulations that, "The facility will implement the closure plan if the facility ceases operation including the discontinued receipt, treatment or processing of waste for 90 days." This means the facility will have to close permanently, forever. This in and of itself proves two undeniable facts. The first fact is the Department has no understanding of the business and operations of that business it is attempting to regulate. The second undeniable fact is the proof that the Department is regulating the business as a solid waste facility. The Department still calls production water a waste stream when in fact it is a byproduct of gas and oil extraction and production and it is recyclable. A solid waste facility accepts solid waste at a constant rate with very little change in flow characteristics during the entire finite life of the facility. **Unfortunately, the employees of the**

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Department, specifically the Solid and Hazardous Waste Division, have no understanding of the operations they are attempting to regulate, and that is why it is vitally urgent that production water impoundment facilities be removed from their authority and jurisdiction and placed under the authority and jurisdiction of the COGCC-- men and women who understand the intricacies of the gas and oil industry.

As I stated previously, production water sites and facilities such as ESRR have an infinite life span regarding their operational parameters. ESRR provides an extremely important service to the gas and oil industry for the proper recycling of production water, thereby protecting the health and environment of the people of Colorado as well as ensuring the viability of the gas and oil industry which significantly boosts Colorado's economy. The only threat to their existence is misregulation, over-regulation, and excessive financial regulatory burdens which has clearly become the case in the State of Colorado in regards to this small family-owned and operated business in Moffat County under the regulatory control of the Colorado Department of Public Health and Environment, Solid and Hazardous Waste Division.

Sincerely,



John R. Watt, Jr.

cc: Governor John Hickenlooper
Dr. Larry Wolk, Executive Director, CDPHE
Mr. Gary W. Baughman, Division Director, CDPHE
Senator Randy Baumgardner
Representative Bob Rankin
Moffat County Commissioners
Jerry Hoberg, Moffat County Planning
Phil Bethell, ESRR