

FILED

JAN 12 2010

Jim Ruby, Executive Secretary
Environmental Quality Council

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE OBJECTION)
TO THE ISSURANCE OF SOLID WASTE)
PERMIT RENEWAL AND MAJOR)
AMENDMENT TO EASTERN LARAMIE)
COUNTY SOLID WASTE DISPOSAL) Docket No. 09-5801
DISTRICT LANDFILL. (SHWD FILE)
#10.330))
))
))

**EASTERN LARAMIE COUNTY SOLID WASTE DISPOSAL DISTRICT'S
BRIEF**

COMES NOW, the Respondent and Applicant, the Eastern Laramie County Solid Waste Disposal District, ("Landfill") by and through Alexander K. Davison of Patton and Davison, and pursuant to the request of the Chairman made at the Prehearing Conference on January 7, 2010, submits its Brief on the issue of the subject matter jurisdiction of the Environmental Quality Counsel ("EQC").

FACTS

In 1979, the Laramie County Board of County Commissioners established the Eastern Laramie County Solid Waste Disposal District by adopting Resolution 79-1204-20. Approximately 160 acres were purchased from Robert and Yvonne Steege. Landfill operations began in July of 1981. At the time of the land purchase, both seller and buyer accepted the boundary between the land purchased by the Landfill and that retained by Steege as the existing fence line. The property was purchased "fence line to fence line". The Steeges retained the remainder of the property bordering the Landfill purchase to the east. The Landfill began its operations relying on this property boundary and has continued operations ever since.

The Musgraves purchased the remaining Steege pasture land bordering the Landfill on the east in July of 1993. At that time, the Landfill was already fully operational. The property purchased by the Musgraves was described, not by meets and bounds, but by an aliquot description, since apparently no formal survey was conducted. In due course, it became apparent that the boundary fence had not been constructed on the section line separating Section 28, the Musgrave property, from Section 29, the Landfill property. Consequently, a portion of the Landfill operations, including certain appurtenances had been located east of the section line.

This situation has been further complicated by the discovery of the existence of a county public highway reservation, which was memorialized by Laramie County at its meeting on December 31, 1923. At that meeting, the Laramie County Board of Commissioners took advantage of a Wyoming Statute that provided that the commissioners of each county had authority to reserve such public highways as were deemed necessary for present and future use. These highways were 80' in width. The commissioners designated and reserved a large number of public highways, and among those reserved, was an 80' strip straddling the section line between Section 28 and 29. Certain Landfill operations are now understood to be located on this public highway as depicted in the attached exhibit. (Respondent Exhibit 13)

When the Landfill filed its renewal permit application seeking to expand its operations in portions of its property unrelated to this dispute, the Musgraves filed their objection. This was not the first time that the Landfill and the Musgraves had discussed this situation. Indeed, there has been a running boundary dispute between the Musgraves and the Landfill for a number of years. Offers and counteroffers have been made. But it was not until the filing of

the Objection by the Musgraves that the Landfill became fully aware of the existence and significance of the county highway reservation described in Exhibit 13.

The Objection filed by the Musgraves is now before the Environmental Quality Council and forms the subject matter of the present contested case.

ISSUES PRESENTED

1. What is the scope of subject matter jurisdiction of the EQC?
2. Is the Objection filed by the Musgraves within the subject matter jurisdiction of the EQC?
3. If the EQC lacks subject matter jurisdiction so that the Musgrave Objection must be dismissed, what is the result?

ARGUMENT

1. What is the scope of the subject matter jurisdiction of the Environmental Quality Council?

Agencies are statutory creatures and derive the entirety of their power from legislative enactment. *Platte Development Company v. State of Wyoming Environmental Quality Council* 966 P.2d 972, at 975 (Wyo. 1998). Agencies have no plenary authority and rely completely on the Legislature for their existence and authority. W.S. § 35-11-112 provides a comprehensive outline of the powers and duties of the Environmental Quality Council. The pertinent portion of this statute for consideration is the following:

The council:

- (a)
 - (iii). Shall conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof.

(iv) Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.

The above-referenced statutes clarify that the duties and responsibilities of the EQC include holding hearings on renewal permits and challenges to the rules adopted by the DEQ. In addition, the EQC considers and approves the rules proposed by the DEQ. Chapter 2, Section 2(b)(i) Permit Application Requirements states:

All permit application forms shall be signed by the operator, the landowner, and any real property lien holder of public record. All applications shall be signed by the operator under oath subject to penalty of perjury. All persons signing the application shall be duly authorized agents. The following persons are considered duly authorized agents.

A review of the authorizing statutes applicable to the Department of Environmental Quality, generally, and, in particular, landfill operations, does not reveal that the Legislature specifically included a requirement that a landfill permit must be signed by the landowner. There appears to be no statutory requirement that site control be demonstrated by the applicant. That notwithstanding, this rule has existed for a number of years, and it does make sense. Clearly, it would be illogical to grant a permit for operation of a landfill where the applicant did not have control of the real property on which the landfill was to be located.

The Wyoming Supreme Court has endorsed the doctrine that administrative agencies have certain implied powers necessary to the fulfillment of their statutory purposes. *BP America Production Co. v. Department of Revenue*, 130 P.3d 438, at 466 (Wyo. 2006). The Supreme Court, however, has cautioned that those implied powers are only those derived by necessary implication from the express statutory authority granted to the agency. The court has stated,

Generally, administrative agencies have the implied or incidental powers that are reasonably necessary in order to carry out the powers expressly granted. The reason for implied powers is that, as a practical matter, the legislature cannot foresee all the problems incidental to carrying out the duties and responsibilities of the agency. However, the inherent or implied power of an administrative agency is not boundless. Courts disagree as to how much latitude administrative agencies have with respect to implied powers. Some courts say wide latitude must be given to administrative agencies in fulfilling their duties. Some of these courts even say that the authority does not have to be "necessary" to effectuate the expressly delegated authority, but only "appropriate". Other courts say that powers should not be extended by implication beyond what may be necessary for their just and reasonable execution. Still, other courts state that implied powers are "necessarily implied", and that necessary implication is an implication which yields so strong a probability of intent to allow these powers that any intention to the contrary cannot be supposed. 2 Am.Jur.2d *Administrative Law* § 57 at 80-81 (2004)

BP America Production Co., Id.

2. Is the objection filed by the Musgraves within the subject matter jurisdiction?

The Landfill reiterates its suggestion made at the Prehearing Conference that to the extent the Department of Environmental Quality rule requires a demonstration of land ownership, the EQC has subject matter jurisdiction to determine if the applicant has complied.

The Musgraves' Objection basically raises the question of whether the Landfill can comply with Chapter 2, Section 2(b) of the DEQ Regulations as to a small portion of the Landfill. If the EQC had authority to approve the adoption of this rule, then logically and by reasonable implication, it has authority to adjudicate compliance with the rule. For this reason the Landfill contended at the Prehearing Conference and continues to assert that the EQC has subject matter jurisdiction over the issues raised by the Musgraves. Adjudicating that the Landfill is in compliance with the DEQ requirements would not have the same effect as quieting

title to the disputed property and would not preclude Musgraves from an independent action to secure title to the property now claimed by Laramie County.

3. If the EQC lacks subject matter jurisdiction so that the Musgrave Objection must be dismissed, what is the result?

If the EQC determines that it does have jurisdiction to proceed with the hearing and to adjudicate the objection of the Musgraves, then this hearing can proceed. However, if it is determined that the EQC does not have subject matter jurisdiction to decide whether the Landfill properly has control of the location of the site of its operation, then the Musgraves' Objection must be dismissed. In essence, such a determination is inherently a determination that the Musgraves have selected an incorrect forum to assert their ownership of the property occupied by the Landfill, and that the determination should be made by a District Court.

CONCLUSION

In conclusion, it may seem contrary to the interests of the Landfill to contend that the EQC has jurisdiction to hear the objection raised by the Musgraves. Indeed, it is tempting to encourage the EQC to simply dismiss the objection for the lack of subject matter jurisdiction, but legal analysis favors the arguments recited here by the Landfill. The implied powers doctrine is sufficiently broad to allow the EQC to adjudicate the Landfill's compliance with the DEQ application requirement of site control. It must be remembered that the EQC is not called upon to decide whether the Musgraves or Laramie County own and control the disputed property. If that were the issue, then Laramie County would be a necessary party to these proceedings. The Landfill's position is simply that it has been authorized by the County to continue its operations within the County's highway boundary and therefore has provided


evidence of control of the property at issue. The inquiry of the EQC need not look beyond the face of the grant of permission from the County to the Landfill. The Musgraves' dispute over ownership is not with the Landfill, but rather with Laramie County who has authorized the Landfill to operate on the disputed portion of the county highway reservation.¹ The Landfill would agree that the dispute between the Musgraves and the County should be decided in another forum, but that dispute is not before the council.

Therefore, the Landfill encourages the counsel to proceed, to hear, and adjudicate the Musgraves' Objection. In addition, it should be noted that the Musgraves have also raised an issue concerning litter, which must also be reviewed by the counsel and is certainly within its authority.

DATED this 12th day of January, 2010.

EASTERN LARAMIE COUNTY SOLID WASTE
DISPOSAL DISTRICT

By:



Alexander K. Davison - WY #5-2492
Patton & Davison
1920 Thomes Avenue, Suite 600
P. O. Box 945
Cheyenne, Wyoming 82003-0945
307-635-4111

¹ In light of Wyoming Supreme Court cases discussing ownership and control of streets and highways, the Landfill is confident that Laramie County's consent is sufficient and would be confirmed.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was delivered via the United States Mail, postage pre-paid to the following on the 12th day of January, 2010.

Robert and Barbara Musgrave
1630 State Highway 213
Burns, WY 82053

Mike Barrash
Department of Environmental Quality
122 West 25th Street
Herschler Building, Rm 1714
Cheyenne, WY 82002

John Corra
Director, Department of Environmental Quality
122 West 25th Street
Herschler Building, Rm 1714
Cheyenne, WY 82002

Carl Anderson
SHWD Administrator, DEQ
122 West 25th Street
Herschler Building, Rm 1714
Cheyenne, WY 82002



Alexander K. Davison

SECTION 29
T15N R62W

SECTION 28
T15N R62W

BURNS
LANDFILL

EXISTING WEST
LANDFILL FENCE

RIGHT-OF-WAY

SECTION LINE

EXISTING UNPAVED ROAD

80.00'

57.25'

65.78'

COUNTY ROAD 216

SECTION LINE



BenchMark
ENGINEERS PC

1920 Thomas Avenue, Suite 620
Cheyenne, Wyoming 82001
P 307.634.9064
F 307.778.8010
benchmarkengineers.com



Blumberg No. 5208
EXHIBIT
13

FIGURE 1
BURNS LANDFILL
BURNS, WYOMING
1-4-10