

FILED

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

JAN 12 2010

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE OBJECTION)
TO THE ISSUANCE OF SOLID WASTE)
PERMIT RENEWAL AND MAJOR)
AMENDMENT TO EASTERN LARAMIE)
COUNTY SOLID WASTE DISPOSAL)
DISTRICT LANDFILL (SHWD FILE #10.330))

DOCKET NO. 09-5801

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN
SUPPORT OF JURISDICTION FOR THE COUNCIL OVER THE PROPERTY
BOUNDARY DISPUTE

The Wyoming Department of Environmental Quality (DEQ), by and through the Wyoming Attorney General’s Office, submits this brief in response to the Wyoming Environmental Quality Council’s (Council) request for briefs on the issue of whether the Council has authority to address the property dispute between the Petitioners, Barbara and Robert Musgrave (Petitioners) and the Eastern Laramie County Solid Waste Disposal District (District). The Council has authority to address this issue because it is statutorily required to “[c]onduct 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” and is authorized to order that any permit be granted, denied or modified. WYO. STAT. ANN. §§ 35-11-112(a)(iv), 35-11-112(c)(ii). The Council also has a duty to act as the “trier of fact” and determine the factual issues arising in contested cases. As DEQ stated in its Pre-Hearing Memorandum, one issue in this case is whether DEQ may issue this permit before a dispute over who owns the property on which the landfill is located has been resolved.

1. The Council has the Statutory Authority to Hear Contested Cases

“The [Council] is the body established by the Wyoming legislature to hear and decide disputes arising from the implementation of the Wyoming Environmental Quality Act (the Act).” *Platte Development Co. v. State, Environmental Quality Council*, 966 P.2d 972, 975 (Wyo. 1998). It is well established that administrative agencies are bound

to comply with their enabling statutes. *Disciplinary Matter of Billings*, 30 P.3d 557, 568 (Wyo. 2001). When an administrative agency is explicitly or impliedly authorized by the enabling statute to conduct a certain action, the enabling statute will be given force and effect. *Id.* The Act is the Council’s enabling statute and directs the Council to “[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by [the Act.]” WYO. STAT. ANN. § 35-11-112(a)(iv). This statutory mandate grants the Council authority to hear and decide the types of issues that arise under such challenges to permits granted under the Act. In this case, one issue raised in the permit challenge involves a boundary dispute.

DEQ does not adjudicate property rights. For example, the Council adopted rules for the Water Quality Division of DEQ that specifically state that it is without authority to convey property rights with the issuance of permits. *See Wyoming Water Quality Rules and Regulations (WWQRR) Chapter 2, Section 2(c)*. WWQRR Ch. 2, Section 2(c) states “the issuance of a permit does not authorize any injury to persons or property or invasion of other property rights.” The Solid and Hazardous Waste Division does not have similar restrictions, however, that does not mean they are authorized to convey any sort of property right.

2. The Council is the Trier of Fact in Contested Case Hearings

In addition to the Council’s statutory authority to hear all contested permit cases, the Council also has the responsibility to be the trier of fact for contested cases. In *Knight v. Environmental Quality Council*, 805 p.2d 268, (Wyo. 1991), the Wyoming Supreme Court affirmed a holding from the District Court which held that the Council’s decision to issue a permit for an injection well was not arbitrary and capricious. In *Knight*, the Court adopted the District Court’s findings which described the proceedings in front of the Council. The District Court had held that the Council was the “trier of fact” and the weight it gave to the evidence presented was “to be determined by that agency in light of the expertise and experience of its members[.]” *Id.* at 273-274.

In this case, the Council may be presented evidence that reveals there is a factual issue of who owns legal title to the 80 foot wide strip of land in question. The Council may also find after receiving evidence that there is no material issue as to who has ownership or control of the property. In either case, there are factual issues that would be decided by the trier of fact, here the Council. These issues are factual and would require the Council to weigh the evidence and make a determination.

3. The Issue is Whether the DEQ Should Issue the Permit Before a Dispute Over Ownership of Property Has Been Resolved

This case came before the Council pursuant to WYO. STAT. ANN. § 35-11-502, which provides the framework for the issuance of solid waste facility permits by DEQ. DEQ reviews the information provided by the applicant and determines if the application is complete. After DEQ has determined that the application is complete and provides notice to the proper individuals, interested parties may submit written objections to the permit as it is proposed. This process provides a venue for interested parties, other than the applicant, to submit information to DEQ that may impact DEQ's decision to issue the permit. In this case, a property dispute between the applicant and an interested party affects DEQ's decision to issue the permit. The hearing process required by the statute is to address issues raised by such objections. The Council can hear evidence presented by the parties on property ownership and decide whether or not it establishes a genuine issue as to the ownership of the property in dispute. If the Council determines that there is no genuine issue of ownership, the Council can decide whether the draft permit should be issued. If the Council decides there is a genuine issue as to ownership of the disputed property, then the Council can decide how to address it.

4. Conclusion

The Council's authority to hear issues arising from contested cases is established in the Act and Wyoming Supreme Court case law. The Council can hear evidence presented by the parties on property ownership and decide whether or not it establishes a genuine issue as to the ownership of the property in dispute. If the Council determines

that there is a genuine issue, one alternative would be to remand the permit decision to DEQ with instructions to deny the permit until the property issues are resolved between the parties.

DATED this 12th day of January, 2010.

A handwritten signature in blue ink, appearing to be 'M. Barrash', written over a horizontal line.

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CERTIFICATE OF SERVICE

This certifies that true and correct copies of the foregoing WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S BRIEF IN SUPPORT OF JURISDICTION FOR THE COUNCIL OVER THE PROPERTY BOUNDARY DISPUTE were served this 10th day of January, 2010 by hand delivery or United States mail, first class postage prepaid, addressed as follows:

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A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to be 'A. Davison'.