

BEFORE THE
ENVIROMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

MAY 12 2011

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE REVIEW)
OF APPLICATION FOR RENEWAL)
OF PERMIT ISSUED TO:)
)
MIKE MCDONALD, CHAIRMAN)
FREMONT COUNTY SOLID WASTE)
DISPOSAL DISTRICT)
SAND DRAW LANDFILL (10.195))
P.O. BOX 1400)
LANDER, WYOMING 82520)

DOCKET NO. 11-5601

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MOTION TO DISMISS

Respondent Wyoming Department of Environmental Quality (DEQ), pursuant to DEQ Rules of Practice and Procedure (DEQ Rules) Chapter II, Sections 3 and 14 and Wyoming Rule of Civil Procedure 12(b)(1), moves the Wyoming Environmental Quality Council (Council) to dismiss Petitioner Fremont County Solid Waste Disposal District's (District) Petition for Review of Review Determination in docket number 11-5601 for lack of subject matter jurisdiction, as detailed below.

Procedure and Standard of Review

The Wyoming Rules of Civil Procedure apply in proceedings before the Council. DEQ Rules ch. II, § 14(a). The Rules of Civil Procedure provide that a defense of lack of subject matter jurisdiction may be made by motion before filing a responsive pleading. WYO. R. CIV. P. 12(b)(1). DEQ has not filed a responsive

pleading in this matter; therefore, the defense of lack of subject matter jurisdiction is properly raised by this Motion.

When ruling on a motion to dismiss pursuant to Rule 12(b)(1), the petitioner's allegations are accepted as true and considered in a light most favorable to the petitioner. *Cantrell v. Sweetwater County School Dist. No. 2*, 2006 WY 57, ¶ 4, 133 P.3d 983, 984 (Wyo. 2006) (internal citation omitted). Accordingly, the District's allegations are accepted as true for purposes of this Motion. For all other purposes, DEQ neither admits nor denies the truth of the District's allegations.¹

Background

On December 27, 2010, the District applied for renewal of its solid waste disposal permit for the Sand Draw facility located in Fremont County, Wyoming. (Pet. Ex. 1, at 1.) DEQ completed its review of the renewal application on March 28, 2011, a copy of which the District received on March 30, 2011. (Pet. at 1, ¶ 3.) During its review, DEQ "identified several minor deficiencies which will need to be corrected before a renewal permit can be issued." (Pet. Ex. 1 (Cover Letter, p. 1).)²

On April 11, 2011, the District submitted objections to the deficiency findings contained in DEQ's review of the renewal permit application. (Ex. A.) Specifically, the District objected to DEQ's determination that vertical expansion of the facility beyond 2018 constitutes a new cell subject to engineered containment requirements.

¹ Pursuant to Wyo. R. Civ. P. 12(a), this Motion tolls the deadline for DEQ to file a responsive pleading until ten (10) days after notice of the Council's action on this Motion.

² The deficiencies noted during DEQ's review of the application related to (1) inadequate engineer certification, (2) groundwater occurrence and monitoring, and (3) site capacity and life. (See Pet. Ex. 1, at 2, 6-10.)

(*Id.*) The objection letter, which DEQ received on April 13, 2011, included five pages of additional information substantiating the District's objections. (*Id.*) DEQ took that information under advisement pursuant to WYO. STAT. ANN. § 35-11-502(h) (providing DEQ with 30 days to review additional information).

On April 28, 2011, the District filed a Petition for Review of Review Determination with the Council. In its Petition, the District raised the same objections already raised in the District's April 11th letter to DEQ, and requested that the Council "review the permit application review." (Pet. at 1, ¶¶ 7-9; 2.)

Subject Matter Jurisdiction Is Lacking

DEQ has not issued a final decision with respect to the District's renewal permit application. In the absence of a final DEQ decision, the District's Petition is premature, and the Council lacks subject matter jurisdiction to hear the District's Petition under the Wyoming Administrative Procedure Act (WAPA), WYO. STAT. ANN. § 16-3-114, and the Wyoming Environmental Quality Act (Act), WYO. STAT. ANN. § 35-11-112.

The Act empowers the Council to "[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit." WYO. STAT. ANN. § 35-11-112(a)(iv). Such hearings must be conducted in accordance with WAPA. *Id.* § 112(f); *see also* DEQ Rules ch. I, § 3(a). Pursuant to WAPA, a person aggrieved by a final agency decision is entitled to review thereof. WYO. STAT. ANN. § 16-3-114(a); *see also* DEQ Rules ch. I, § 16(a) ("appeals to the Council from *final* actions of the Administrators...") (emphasis added). In contested permit cases

before the Council, the final decision or action subject to review is “the grant, denial, suspension, revocation or renewal of any permit.” WYO. STAT. ANN. § 35-11-112(a)(iv).

Article 5 of the Act sets forth DEQ’s solid waste permit renewal application review procedures. Those review procedures are designed to foster reasoned agency decision-making through information exchanges with permit applicants. Specifically, the Act provides that DEQ must review a permit application and advise the applicant in writing whether (a) a proposed permit is suitable for publication, (b) the application is deficient, or (c) the application is denied. WYO. STAT. ANN. § 35-11-502(h). In this case, DEQ found the District’s permit renewal application to be deficient, and notified the District in writing of the deficiencies. Pet. Ex. 1, at 1.

Pursuant to WYO. STAT. ANN. § 35-11-502(h), the District submitted additional information in response to the deficiency notice. (*See* Ex. A.) DEQ received the additional information on April 13, 2011. (*Id.*) The Act provides DEQ with 30 days to review the additional information submitted by the applicant. WYO. STAT. ANN. § 35-11-502(h). When the District filed its Petition with the Council on April 28, 2011, DEQ’s review of the additional information was still ongoing, and DEQ had not issued a final decision with respect to the District’s permit renewal application.³

³ In accordance with WYO. STAT. ANN. § 35-11-502(h), DEQ will complete its review of additional information by May 13, 2011. A final decision on the application will

A final administrative decision “is ‘one ending the proceedings, leaving nothing further to be accomplished.’” *Bd. of County Comm’rs v. Exxon Mobil Corp.*, 2002 WY 151, ¶ 35, 55 P.3d 714, 723 (Wyo. 2002) (quoting *MGTC, Inc. v. Pub. Svc. Comm’n*, 735 P.2d 103, 106 (Wyo. 1987)); see also *Pub. Svc. Comm’n v. Lower Valley Power & Light, Inc.*, 608 P.2d 660, 661 (Wyo. 1980) (a final decision “determines the merits...and leaves nothing for future consideration”). In contrast, when “the agency retains the matter for further action, the order is not final.” *MGTC, Inc.*, 735 P.2d at 106. Here, DEQ has not ended the proceedings with respect to the District’s permit renewal application. Rather, DEQ is still reviewing the additional information submitted by the District, in accordance with the permit application review procedures set forth in WYO. STAT. ANN. § 35-11-502(h).

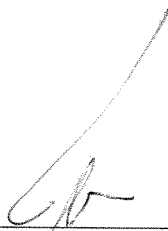
Moreover, the Act is consistent with the WAPA requirement that only a final agency decision is subject to review. The Act does not provide the Council with authority to conduct hearings in cases contesting the *review* of a permit application. See WYO. STAT. ANN. § 35-11-112(a)(iv). Nonetheless, the District requests just that, asking the Council to “review the permit application review.” (Pet. at 2.) Such an interlocutory appeal frustrates DEQ’s ability to meaningfully consider additional information submitted in response to DEQ’s initial application review, which thereby defeats the purpose of the review process set forth in WYO. STAT. ANN. § 35-11-502(h).

follow no later than May 31, 2011, at which point DEQ may move to dismiss the District’s Petition on grounds of mootness.

As the Act makes clear, the Council is empowered to conduct hearings in cases contesting “the grant, denial, suspension, revocation or renewal of any permit.” WYO. STAT. ANN. § 35-11-112(a)(iv). DEQ has not yet granted, denied, suspended, revoked, or renewed the District’s permit application. In lieu of a final decision, the District’s petition is premature, subject matter jurisdiction is lacking, and the District’s Petition must be dismissed.

WHEREFORE, Respondent DEQ requests that the Council grant this Motion to Dismiss the District’s Petition for Review of Review.

DATED this ____ day of May, 2011.




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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of May, 2011, a true and correct copy of *DEQ's Motion to Dismiss* was served by placing the same in the United States mail, postage pre-paid, to the following:

Rick L. Sollars
Western Law Associates, P.C.
277 Lincoln Street
Lander, Wyoming 82520



Wyoming Office of the Attorney General

Superintendent
Donald Connell

FREMONT COUNTY SOLID WASTE DISPOSAL DISTRICT AND HAZARDOUS
WASTE DIVISION

APR 13 2011

P.O. Box 1400
LANDER, WY 82520
telephone 332-7040
fax 332-5013

April 11, 2011

Mr. John Corra, Director
Wyoming Department of Environmental Quality
Herschler Building, 4th Floor
122 West 25th Street
Cheyenne, WY 82002

RE: March 28, 2011 Review of Sand Draw Landfill Renewal Application, SHWD File 10.195

Dear Mr. Corra:

On December 23, 2010, the Fremont County Solid Waste Disposal District (FCSWDD) submitted a permit application for the Sand Draw Landfill, in compliance with the provisions of paragraph IV.C of the September 30, 2010 Consent Decree between the State of Wyoming and the FCSWDD. On March 28, 2011, the Wyoming Department of Environmental Quality (WDEQ), Solid and Hazardous Waste Division (SHWD) issued a review of the Sand Draw Landfill permit application. The FCSWDD received the WDEQ/SHWD's review on March 30, 2011. The purpose of this letter is to inform you that the FCSWDD does not concur with proposed permit limitations identified in the WDEQ/SHWD's review.

The WDEQ/SHWD's review states that a vertical expansion of the existing landfill beyond 2018 constitutes a new cell, and is therefore subject to the engineered containment requirements of Solid Waste Chapter 2, Section 4(j), and the provisions of W.S. 35-11-524, as recently enacted by the Wyoming Legislature. The FCSWDD is not aware of any regulatory or statutory basis for the WDEQ/SHWD's current interpretation that a vertical expansion constitutes a new cell, as described in the attached memorandum.

The FCSWDD respectfully requests and would appreciate your review of the current respective positions/interpretations of the WDEQ/SHWD and the FCSWDD on this matter. The FCSWDD would also appreciate a written response or a meeting in Lander no later than April 22, 2011. Thank you in advance for your time and consideration of these requests.


Sincerely,

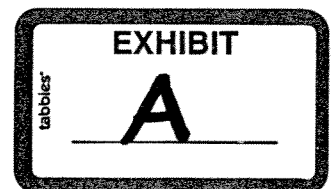


Mike McDonald, Chairman
Fremont County Solid Waste Disposal District



Rick Sollars, Esq.
Western Law Associates, P.C.

cc:  Carl Anderson, WDEQ/SHWD



encl: Review of Statutory and Regulatory Issues – Vertical Expansion of the Sand Draw Landfill
(Trihydro, April 11, 2011)



memorandum

To: Mike McDonald, Chairman, Fremont County SWDD
From: Ken Schreuder, P.E., P.G.
cc: Rick Sollars, Western Law Associates
Date: April 11, 2011
Re: Summary of Statutory and Regulatory Issues - Vertical Expansion of the Sand Draw Landfill

Trihydro Corporation (Trihydro) has prepared this summary of statutory and regulatory issues relative to the vertical expansion of the Original Area at the Sand Draw Landfill to assist the Fremont County Solid Waste Disposal District (FCSWDD). For the purposes of this summary, the portion of the facility referred to as the "Original Area" encompasses approximately 80 acres in Section 26, Township 34 North, Range 96 West, 6th P.M., in Fremont County, Wyoming. The portion of the facility referred to as the "Expansion Area" encompasses approximately 137 acres in Section 26, Township 34 North, Range 96 West, 6th Prime Meridian (P.M.), in Fremont County, Wyoming.

On March 28, 2011 the Wyoming Department of Environmental Quality (WDEQ), Solid and Hazardous Waste Division (SHWD) issued a review of the December 23, 2010 Sand Draw Landfill Permit Application. The WDEQ/SHWD's review indicated that current disposal activities in the Original Area must cease by December 31, 2018, unless the Fremont County Solid Waste Disposal District (FCSWDD) proposes an engineered containment system (ECS) above existing wastes, or provides a performance-based design demonstration that an ECS is not necessary. The WDEQ/SHWD indicated that this determination is based on previous "commitments" between WDEQ/SHWD and the Fremont County Solid Waste Disposal District (FCSWDD) to cease disposal of waste in this area on December 31, 2018, and a determination that an additional vertical expansion in this area would constitute a new cell.

Based upon our review and understanding, it does not appear that there are specific statutory or regulatory provisions which would prevent the FCSWDD from requesting a permit amendment for a vertical expansion at any point in the operating life of an existing landfill. The September 30, 2010 Consent Decree between the State of Wyoming and the FCSWDD is also silent on this matter.

Regulatory Citations

The following regulatory citations from the Wyoming Solid Waste Rules and Regulations (WSWRRs) are relevant to the WDEQ/SHWD's determination on this matter:

- Chapter 1, Section 1(e)(i) provides the following definitions:
 - "Cell" means compacted solid wastes that are enclosed by natural soil or cover material in a land disposal facility.
 - "Existing facility" means any facility that was receiving solid wastes on or before September 13,



1989.

- “Lateral expansion” means the horizontal enlargement of the boundaries of a solid waste management facility.
- “Major change” means a change to any solid waste management facility location, design or construction, or to any operating, monitoring, closure or post-closure activities, involving one or more of the following items:

The total permitted volumetric capacity of the facility is to be increased by more than five percent (5%);

The facility classification will change;

The facility service area or source of waste will change and cause the original daily tonnage of waste received to increase by more than five percent (5%);

The facility may begin to accept for treatment, storage, or disposal one or more of the special wastes regulated under Chapter 8 of these rules and regulations;

The effectiveness of any liner, leachate collection or detection system, gas detection or migration system, or pollution control or treatment system may be changed; or

The facility modification will, in the judgement of the administrator, be likely to alter the fundamental nature of the facility’s activities or cause noncompliance with any applicable facility standard.

- “New facility” means:

Any facility that did not receive solid waste on or before September 13, 1989; or

Any modification or lateral expansion of an original permit boundary for the purpose of increasing capacity and/or site life by more than five percent (5%). An incidental facility boundary enlargement for the development of, but not limited to fire lanes, buffer zones, surface water diversion systems, and monitoring systems which are not in conflict with local zoning, land use, and/or land ownership is not considered to be a new facility.

- “Solid waste management unit” means a contiguous area of land on or in which solid waste is placed, or the largest area in which there is significant likelihood of mixing solid waste constituents in the same area of a solid waste management facility. Examples of solid waste management units include a surface impoundment at a solid waste management facility, a waste pile, a land treatment area, a landfill cell, an incinerator, a tank and its associated piping and underlying containment systems at a solid waste management facility and a container storage



area. A container alone does not constitute a unit; the unit includes containers and the land or pad upon which they are placed.

- The terms identified above are not defined in the EQA, and
- Chapter 2, Section 4(j)(i) states: “Applicability: Effective on the dates specified in paragraph (j)(ii) of this section, new Type I sanitary landfills, new landfill cells at existing Type I sanitary landfills, and horizontal expansions of area fills at existing Type I sanitary landfills must meet the requirements of Sections 4(j) and 4(k) of this chapter, unless the operator demonstrates to the administrator that all of the following conditions are met:”

Statutory Considerations

Senate File 0121, which was enacted by the 61st Legislature of the State of Wyoming, identifies performance based design evaluation criteria for municipal solid waste landfill units. W.S. 35-11-524 states:

- (a) New municipal solid waste landfill units and lateral expansions approved by the administrator under W.S. 35-11-502 and 35-11-523 shall be constructed:
 - (i) In accordance with the performance based design approved by the administrator in a performance based evaluation pursuant to W.S. 35-11-523. Any performance based design approved must ensure that the concentration values for pollutants listed in the Nation Primary Drinking Water Regulation, 40 C.F.R. Part 141, will not be exceeded in the uppermost aquifer at the relevant point of compliance as determined under subsection (c) of this section; or
 - (ii) With an engineered containment system that utilizes a composite liner and leachate collection system that is designed and constructed to maintain less than a thirty (30) centimeter depth of leachate over the liner.

Evaluation of Vertical Expansion Relative to WSWRRs and Wyoming Statutes

Based on the regulatory citations provided above, the following points are provided relative to the WDEQ’s determination that a vertical expansion of the Original Area constitutes a “new cell”:

- The Original Area began receiving wastes in 1982. Based on this fact, the Original Area does not meet the definition of a “new facility”, but it does meet the definition of an “existing facility”.
- Although Chapter 1, Section 1(e)(i) defines a “cell”, it does not define a “new cell”.
- Existing wastes previously disposed below grade and above grade in the Original Area meet the definition of a “cell”. By extension, it is reasonable to conclude that these cells can be considered to be “existing cells”.
- Existing wastes previously disposed below grade and above grade in the Original Area are located



within a contiguous area of land, and therefore also meet the definition of a “solid waste management unit”. By extension, it is reasonable to conclude that these wastes can also be considered to be an “existing solid waste management unit”.

A vertical expansion of the existing cells/solid waste management units in the Original Area (i.e., an existing facility) meets the definition of a “major change” because it increases the total permitted capacity of the facility by more than 5%. The original 1982 permit application document estimated the capacity of the Original Area to be 586,750 cubic yards (CY). In 2001, a vertical expansion adding 540,392 CY of disposal capacity to the Original Area was proposed, and approved by the WDEQ/SHWD on January 18, 2002. Although a permit for the vertical expansion was never issued, the WDEQ/SHWD’s March 28, 2011 correspondence indicates that the WDEQ/SHWD “committed” to the vertical expansion proposed and approved in 2001. The December 2010 permit application includes an additional vertical expansion (which was originally proposed in 2005) to bring the total capacity of the Original Area to approximately 3,050,000 CY. The vertical expansion of the Original Area identified in the December 2010 permit application constitutes an increase of approximately 170% of the capacity defined in 2001 for the Original Area. If the estimated capacity of the Expansion Area is considered (approximately 4,500,000 CY), the vertical expansion of the Original Area identified in the December 2010 permit application constitutes an increase of approximately 25% of the total facility capacity.

Based on definitions provided in Chapter 1, Section 1(c)(i), the additional capacity proposed in the December 2010 permit application can be defined as a vertical expansion to an “existing facility”, an “existing cell”, an “existing solid waste management unit”, or a “major change”. However, no specific statutory or regulatory citation has been identified to support defining the vertical expansion as a “new cell”. It is also noted that the phrase “horizontal expansions of area fills at existing landfills” is included in Section 4(j)(i), but the corollary phrase “vertical expansions of area fills at existing landfills” is not. The omission of the phrase “vertical expansions of area fills at existing landfills” may be interpreted to indicate that such activities are not subject to the ECS requirements. Likewise, recently enacted legislation requiring a performance based design or an engineering containment system is specifically limited to “new municipal solid waste landfill units” and “lateral expansions”. The omission of the terms “existing municipal solid waste landfill units” and “vertical expansion” may be interpreted to indicate that such facilities are not subject to the performance based design or ECS requirements identified in W.S. 35-11-524.

Evaluation of Vertical Expansion Relative to Other Regulatory Programs

The interpretations noted above are supported by information obtained regarding other Resource Conservation and Recovery Act (RCRA) Subtitle D regulatory programs approved by Region 8 of the U.S. Environmental Protection Agency (EPA). Recent inquiries to regulators and operators of existing municipal solid waste landfills (MSWLFs) in both Colorado and South Dakota indicate that their respective state regulatory agencies have approved vertical expansions over existing MSWLFs without imposing ECS requirements. The WDEQ’s blanket determination that vertical expansions over unlined areas are “new cells” and therefore subject to ECS requirements, also appears inconsistent with the



Mike McDonald, FCSWDD

April 11, 2011

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regulatory approach adopted by surrounding states, and the provisions of RCRA Subtitle D, including:

- 40 CFR Part 258.2 Definitions
 - *Existing MSWLF unit* means and municipal solid waste landfill unit that is receiving waste as of the effective date of this part (October 9, 1993).
 - *Lateral expansion* means a horizontal expansion of the waste boundaries of an existing MSWLF.
 - *New MSWLF unit* means any municipal solid waste landfill unit that has not received waste prior to the effective date of this part (October 9, 1993).
- 40 CFR Part 258.40 Design Criteria
 - (a) New MSWLF units and lateral expansions shall be constructed:
 - (2) With a composite liner, as defined in paragraph (b) of this section and a leachate collection system that is designed and constructed to maintain less than a 30-cm depth of leachate over the liner.

As noted previously regarding the regulatory language in Chapters 1 and 2 of the WSWRRs, the ECS requirements of RCRA Subtitle D are also specifically limited to new MSWLFs and horizontal expansions of existing MSWLFs, and do not include vertical expansions of existing MSWLFs.

Precedence in the State of Wyoming

The interpretations noted above are also supported by a recent regulatory determination by the WDEQ/SHWD. In 2008, an existing Type I MSWLF in Wyoming proposed a vertical expansion over existing MSW cells for the disposal of additional MSW. The permit application specifically described the proposal as a “vertical expansion of an existing waste disposal area”, and not “a new cell or a horizontal expansion of an existing area fill”. The permit application did not propose an ECS, or provide a demonstration requesting a waiver of the ECS requirements. The WDEQ/SHWD determined that the permit application was complete and technically adequate, and constituted a “major change” because it increased the permitted capacity of the facility by more than 5%. Upon completion of the public notice and comment requirements for the major change, the WDEQ/SHWD authorized the permit amendment for a vertical expansion over an existing cell, without imposing the ECS requirements. It is also noted groundwater monitoring at the facility referenced above has detected multiple volatile organic compounds above laboratory reporting limits, and near the associated groundwater protection standards (i.e., the same order of magnitude).

Please let us know if you have any questions or need additional information. You can call me on my cell phone (307-330-7737) or send me an email (kschreuder@trihydro.com).