

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

APR 05 2012

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE OBJECTION)
TO THE PROPOSED RENEWAL PERMIT) Docket No. 11-5602
SAND DRAW LANDFILL, SHWD FILE #10-195)

FREMONT COUNTY SOLID WASTE DISPOSAL DISTRICT RESPONSE
TO DEQ'S OPPOSITION TO PETITION FOR AWARD OF COSTS AND
EXPENSES

COMES NOW the Fremont County Solid Waste Disposal District
(FCSWDD), by and through its undersigned attorney, and in response to the
DEQ's opposition to Petition for award of costs and expenses states as follows:

The DEQ has filed an opposition to the Petition of the District for the award
of fees and costs. The basis for the opposition is that there is no authority for the
award of fees. Specifically, the DEQ cites Rule 54 W.R.C.P. for the authority that
fees and costs can only be awarded against the State of Wyoming to the extent
permitted by law and that no such law exists. They further indicate that chapter
V of the DEQ Rules of Practice and Procedure is inapplicable to the present case
as that Chapter allows fees and costs to be awarded in the case of surface coal
mine enforcement action and this is not that type of action.

The District does not disagree with the above two arguments of counsel for
the DEQ nor with the authority they have cited for those propositions. However,
pursuant to Wyoming Statute 35-11-112(a)(vi) the EQC has the power to adopt
and enforce Rule 11 W.R.C.P. in a contested case. In the present case the

requirements for Rule 11 sanctions in the form of an award of attorney fees and costs are present.

Rule 11 W.R.C.P. (a) provides in pertinent part that If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated. (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Pursuant to subdivision (b) a party, in filing a pleading, is certifying that:

(1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.

The DEQ in footnote 1 claims that this Rule does not apply to the DEQ's interpretation and application of regulations (without any authority for such assertion) and even if it does not apply there was not strict adherence to the Rules.

In the present case provisions 1, 2 and 3 of subdivision b mandate the award of fees.

Under provision 2 of Subdivision b there cannot be a showing that condition number 3 of the proposed permit was warranted by the current law or any proposed modification of the same. This permit condition addresses the very rules and regulations that the DEQ has in place and with regards to certain deficiencies there is no interpretation, but the lack of a simple recital of the rules and regulations. Upon submittal of the renewal application the DEQ conducted its first review and determined that vertical expansion would constitute a new cell and thus an engineered containment system over the existing waste was necessary for vertical expansion. Yet Patrick Troxel, the DEQ employee in charge of the review has testified both at deposition and at trial that the DEQ rules on Engineered Containment systems do not apply to vertical expansion. Thus this determination was not supported by the current law (the DEQ's own rules and regulations). A subsequent and final review was then conducted in which it was then determined that the land fill has been/ is altering groundwater

and the same permit condition number 3 was present. (FOF 69). This determination was made without any scientific basis (FOF 70). The EQC further found that permit condition 3 pertaining to altering groundwater is not in accordance with the Solid Waste Rules and Regulations (FOF 87 and 91). In essence what was found is that the requirements set forth by the DEQ in the permit were not in fact the same as contained in their own Rules and Regulations, ie. They were not supported by the current law.(COL 4, 5 and 6). This permit condition is not warranted by the current law, as contained in the DEQ Solid Waste Rules and Regulations.

Under provision 3 of subdivision b there was no evidentiary support for the contentions of the DEQ in permit condition 3. Specifically, the deposition and hearing testimony of Patrick Troxel admits that the language in permit condition 3 did not adhere to DEQ Rules and Regulations. Specifically, the permit condition requires a showing that the vertical expansion will not impact the groundwater and the rules and regulations require only a showing of the potential impact to the groundwater. Mr. Troxel admitted that there never could be a showing that there never would be an impact to the groundwater.

Under provision 1 of subdivision b there was an improper purpose I permit condition 3. Throughout the years the DEQ set various, inconsistent dates of closure for the original 80 acres at the Sand Draw Landfill. (FOF 95, 96, 97, 98 and 100). These varying dates were found by the EQC to be without a logical basis and arbitrary, capricious and an abuse of discretion. (COL 7). As the EQC

noted, the Sand Draw Landfill has had a long and tortuous history with conflicts between the DEQ and the District. At various times the District has questioned the DEQ's rules. Most notably the district submitted extensive comment after the first review and disputed that vertical expansion over existing waste constituted a new cell. While the DEQ removed that rationale from the permit review comments it replaced them with a basis that was not supported by any scientific basis. (FOF 69). More importantly after the final review the District then requested an opportunity to submit additional information or an amended permit application to the DEQ (FOF 72), but the DEQ disallowed the request and ordered the District to publish the proposed permit (FOF 73) and to submit information through that process and requested the hearing in this matter. The result is that if the DEQ had allowed further comment the District would have noted how permit condition 3 did not adhere to the DEQ rules and regulations. By not being allowed that opportunity it needlessly increased the costs of litigation to the District and caused unnecessary delays in the permit process.

The District submits that 3 of the 4 certifications contained in Rule 11(b) could not be made by the DEQ. The DEQ also alleges in footnote 1 that the procedures for seeking an award or fees and costs were not followed. While the specific procedures not followed are not set forth, the District presumes that the DEQ is referring to the requirement in the Rule that (Subsection (C)(1)(A) that the Motion be served upon the other party at least 21 days prior to filing the Motion with the Court. The basis of this requirement is to allow the challenged paper,

claim, defense, contention, allegation, or denials to be withdrawn or corrected. While the District admits that the pending petition was not sent to the DEQ 21 days prior to filing with the EQC, doing so would have been a moot act, as the DEQ had already issued its final review, the District requested an opportunity to submit additional information, and that request was denied by the DEQ. In the public comment period the District submitted comments and placed the DEQ on notice that its permit conditions were arbitrary, capricious and not in accordance with the law (DEQ Ex. 7), and the DEQ seemed to ignore the comments and elected to proceed to hearing. As a result the District had no option but to appeal the final review. At that point the final review had been issued, the DEQ had denied further opportunity to submit additional information or comments and ordered that the permit be published. To then do a Motion to allow the DEQ to withdraw the permit conditions would have been fruitless. This is evidenced by the fact that it was not withdrawn upon the submittal of comments by the District prior to scheduling the current hearing with the EQC. Providing the 21 day per-filing period for the DEQ to withdraw the pleading (the proposed permit) prior to filing the Motion for award of fees and costs with the EQC would not have allowed the requirements and purpose of the Rule to be accomplished, as the DEQ could not have withdrawn the proposed permit at that point without further litigation, as the litigation had already occurred.

WHEREFORE, the FCSWDD requests that the Environmental Quality Council award fees and expenses in their favor and against the DEQ in the

amount of \$68,921.36.

DATED this 3rd day of April, 2012.

Fremont County Solid Waste
Disposal District, Petitioner



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CERTIFICATE OF SERVICE

I certify that on the 3rd day of April, 2012, a true and correct copy of the Response to the DEQ's Opposition for Award of Costs and Expenses was served upon Respondent and counsel by depositing the same in the United States mail, postage prepaid, addressed to:

Jeremiah I. Williamson
Luke J. Esch
Wyoming Attorney General's Office
132 Capitol Building
Cheyenne, WY 82002



Rick L. Sollars