

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

DEC 14 2011

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)

FCSWDD'S REPLY TO DEQ'S OBJECTIONS TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW the Fremont County Solid Waste Disposal District (FCSWDD), by and through its undersigned counsel, and hereby files its reply to DEQ's Objections to Proposed Findings of Fact and Conclusions of Law. In doing so, FCSWDD shall only reply to the items that were objected to or commented on by the DEQ.

FINDINGS OF FACT

14. Well R-8 was pumped and recharged to approximately 2 feet of the risen level, but has since steadily decreased without further recharge.

Objection: DEQ objects to this finding on two bases. First, the claim that R-8 "has since steadily decreased" is not supported in the record. The District's own witnesses testified that R-8 water levels are flat, not decreasing. See Hr'g Tr. 177, Nov. 16, 2011 (with respect to groundwater levels, Donald Siegel stated: "they're flat even in R-8."); Hr'g Tr. 231 (Dale Groutage, discussing R-8 water levels, stated: "... we were flat for 20 years prior, flat for 20 years later..."). Second, DEQ objects to the statement as incomplete. R-8 was not merely pumped, but pumped "almost completely dry." Hr'g Tr. 31.

Reply: The FCSWDD does not contest the second objection and would agree to add the words “almost completely dry” in reference to well R-8 being pumped. With regards to the first objection, the FCSWDD does not agree with the DEQ and believes that the statement as presented is accurate. Hr’g T. 273-274 (Howard Johnson discussing well R-8 “Like I said, with R-8 we could not come up with an explanation why we were getting those spikes in the field like that, and then trailing off again.”). Additionally, SD Exhibit 31 contains two graphs, one of which was a blow up used at the hearing that indicate that the water level in R-8 is not flat, but is in fact trailing off.

16. Isotopes, tritium data and carbon-14 age dating indicate that the groundwater under the facility has not recharged since the facility was opened.

Objection: DEQ objects to this finding on two bases. First, this finding is legally irrelevant, because Wyoming law protects all groundwater equally, regardless of when it entered the subsurface. Second, the Council made no finding with respect to whether the groundwater has recharged since the facility opened.

Reply: This finding is legally relevant. The DEQ Rules and Regulations prohibit a facility from altering the groundwater quality. If there is no recharge, then there is no alteration. Secondly, this matter was discussed extensively in the hearing. Hr’g Tr. 172-177 (Dr. Donald Siegel testimony on Tritium and Carbon-14 dating).

30. The baler system reduced the landfill spaced used by 50%, allowed for

a more orderly and stable method for vertical expansion and provided a method that was less permeable to precipitation.

Objection: DEQ objects to this finding on two grounds. First, the Council did not render any decision on (i) the extent to which baler systems reduce space used, (ii) whether a baler system is more orderly and stable, and (iii) whether it is less permeable to precipitation. Second, this finding is not a relevant basis for the Council's decision.

Reply: As to the Second objection, this fact is very relevant to the Council's decision. The Council ruled that permit condition was arbitrary and capricious in setting a date of December 31, 2018 for closure of the 80 acres if the demonstration was not met. It was determined to be arbitrary and capricious, in part because it relied upon a 2003 letter when the FCSWDD was using loose fill. As to the first objection, Hr'g Tr. 254-255 (Howard Johnson testimony regarding these issues and confirming that using a baler system accomplishes the 3 matters objected to by the DEQ).

55. Since the submission of the permit renewal application there have been 6 additional detections of VOCs in monitor wells. Of those 6 detections, 5 were below the MCL level and were merely estimates.

Objection: DEQ objects to this finding because it is inaccurate. The finding should state that detections were "below the reporting limit," not "below the MCL level...".

Reply: The FCSWDD would agree with the DEQ and acknowledges

that this working should be changed as proposed by the DEQ.

56. The one detection of a VOC above the detection level, was submitted in a split sample, with one sample indicating the VOC and the other not detecting it.

Objection: DEQ objects to this finding because it is inaccurate. The finding should state “above the reporting level,” not “above the detection level...”.

Reply: The FCSWDD would agree with the DEQ and acknowledges that this working should be changed as proposed by the DEQ.

64. Pursuant to Chapter 2, Section 4(j) an engineered containment system is not applicable to vertical expansion.

Objection: DEQ objects to this finding on three grounds. First, this statement is inaccurate. Solid Waste Rules and Regulations Ch. 2, Section 4(j) does not state that engineered containment systems are not applicable to vertical expansion. Rather, Section 4(j) is silent as to its applicability to vertical expansion. Second, this is a legal conclusion, not a finding of fact. Third, the Council did not render a decision on this issue.

Reply: With regards to the first objection, the objection is contrary to the testimony of the DEQ’s own witness. Hr’g Tr. 83 (Patrick Troxel testified as follows: Q. So it’s your testimony, then, that the engineered containment system liner is not applicable to a vertical expansion. A. Yes). This is a factual finding. Mr. Troxel was not designated as an expert, and no objection was raised as to his testifying as to this fact. This was a matter before the Council.

79. The application was stamped, signed and dated by Ken Schreuder, a Wyoming registered professional engineer and professional geologist.

Objection: This finding is incomplete, because it fails to state that Mr. Schreuder only partially certified the application, such that appendices V and Y were excluded from the certification. See Hr'g Tr. 51, 333.

Reply: The FCSWDD would agree that the finding should include the limitation on the exclusion placed on the application by Mr. Schreuder, such that it should include a second sentence that would read "The certification by Mr. Schreuder included the clause that this certification is limited to work completed by Tryhydro corporation. However, the objection does not reflect the decision of the Council or the testimony that appendices V and Y were excluded from the certification. The decision and testimony was that the data, lab tests and facts in the appendices V and Y were relied upon and covered by the certification, but not the opinions of Dr. Donald Siegel contained therein. Hr'g Tr. 400 (statement by Council Member Coverdale).

86. The DEQ has not classified the groundwater at the Sand Draw facility nor set Groundwater Protection Standards for the facility and has only committed to do so prior to January 1, 2013.

Objection: DEQ objects to this finding because the term "only" is unnecessarily argumentative, and implies that the DEQ could have made a greater commitment, which is not supported in the record or the law.

Reply: The FCSWDD in fact does believe that the groundwater

could be classified and groundwater protection standards set sooner than 18 months. However, the decision of the Council was to delete Permit Condition #3 in its entirety and therefore the FCSWDD does not object to the removal of the word “only” from this finding of fact.

89. The permit condition #3 requires a demonstration that the facility will not alter the groundwater, as opposed to the Rules and Regulations requirement that there be an evaluation of the potential to impact groundwater quality.

Objection: DEQ objects to this finding because it is a conclusion of law, not a finding of fact.

Reply: The FCSWDD does not agree with the objection of the DEQ. It is a finding of fact as to what the permit condition #3 language is, what the language of the Rules and Regulations is, and that the two are not the same.

91. The portion of permit condition #3 pertaining to the showing that the facility will not alter the groundwater is not in accordance with the Solid Waste Rules and Regulations.

Objection: DEQ objects to this finding because it is a conclusion of law, not a finding of fact.

Reply: The FCSWDD does not agree with the objection of the DEQ. It is a finding of fact as to what the permit condition #3 language is, what the language of the Rules and Regulations is, and that the two are not the same.

93. There was no stated basis or rationale for the October 1, 2013 date that the demonstration in permit condition #3 must be completed.

Objection: DEQ objects to this finding because it is not supported in the record. Evidence was introduced to establish the basis for the October 1, 2013 demonstration date. See Hr'g Tr. 121 (Carl Anderson testifying that "We use[d] that date in anticipation of the submittal of the next renewal application ... So we thought that if the District made the demonstration in 2013, that would give us time to review that demonstration prior to submittal of the next renewal application.")

Reply: The FCSWDD would propose to change the language of the finding of fact to read "There was no scientific basis or rational for the October 1, 2013 date that the demonstration in permit condition #3 must be completed".

104. Bale filled systems, in comparison to loose fill systems, allows for over 50% more capacity in the same waste due to compaction, allows for more stable placement of bales, thus increasing the potential vertical capacity, and is less permeable than loose filled waste.

Objection: DEQ objects to this finding on two grounds. First, the Council did not render any decision on (i) the extent to which baler systems reduce space used, (ii) whether a baler system is more orderly and stable, and (iii) whether it is less permeable to precipitation. Second, this finding is not a relevant basis for the Council's decision.

Reply: As to the Second objection, this fact is very relevant to the Council's decision. The Council ruled that permit condition was arbitrary and capricious in setting a date of December 31, 2018 for closure of the 80 acres if

the demonstration was not met. It was determined to be arbitrary and capricious, in part because it relied upon a 2003 letter when the FCSWDD was using loose fill. As to the first objection, Hr'g Tr. 254-255 (Howard Johnson testimony regarding these issues and confirming that using a baler system accomplishes the 3 matters objected to by the DEQ).

107. A closure date of 2037 will maximize the capacity of the original eighty (80) acres.

Objection: DEQ objects to this finding because it is unsupported in the record, the Council did not render any decision on what closure date will maximize capacity of the original 80 acres, and maximizing capacity is not a relevant basis for the Council's decision.

Reply: This finding of fact, in fact, is supported by the record. See SD Exhibit 10 (deposition of Patrick Troxel) Pages 37-43. Additionally, by deleting permit condition #3, the permit application date for closure of 2037 would therefore become operative.

CONCLUSIONS OF LAW

6. Permit condition #3 is not in accordance with the law in requiring a demonstration that the facility will not alter the groundwater, in that Chapter 2, Section 2(b)(x)(3) requires an evaluation of the facility's potential to impact the surface and groundwater quality.

Objection: DEQ objects to this conclusion because it does not accurately characterize the basis for the Council's decision. Condition #3 was

unlawful because it required a demonstration in relation to groundwater, not groundwater quality. The cited regulation is separate and distinct from the regulation prohibiting the alteration of groundwater quality, and therefore does not provide a basis for this conclusion.

Reply: The DEQ neglects to recognize that the FCSWDD had numerous objections to permit condition #3. One objection was that it required a demonstration that the facility was not altering groundwater, when the regulations dealt with alteration of groundwater quality. However, another objection to the permit condition was that it also required a demonstration that the facility would not alter groundwater quality. The cited Regulation of the DEQ requires that the permit application provide an evaluation of the facility's potential to impact the surface and groundwater quality. Therefore the cited regulation is directly applicable to the required demonstration in permit condition #3, the permit condition is not in accordance with the regulation and is a conclusion of law directly at issue in this matter.

7. There is no basis for the date of October 1, 2013 to make the demonstration and as such the same is arbitrary, capricious and an abuse of discretion.

Objection: DEQ objects to this conclusion because it is not supported by the record. Evidence was introduced to establish the basis for the October 1, 2013 demonstration date. See Hr'g Tr. 121 (Carl Anderson testifying that "We use[d] that date in anticipation of the submittal of the next renewal

application ... So we thought that if the District made the demonstration in 2013, that would give us time to review that demonstration prior to submittal of the next renewal application.”) Accordingly, substantial evidence does not exist to support the claim that the 2013 date was arbitrary, capricious, or an abuse of discretion.

Reply: The FCSWDD would propose to change the language of the conclusion of law to read “There was no scientific basis for the date of October 1, 2013 to make the demonstration and as such the same is arbitrary, capricious and an abuse of discretion.

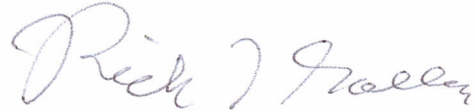
9. While the procedure for the renewal permit application comments could have been better handled following the final review, the procedures as stated in the Solid Waste Rules and Regulations were nonetheless followed and were in accordance with the law.

Objection: DEQ objects to this conclusion because is not supported by the record or the law, and because the Council rendered no opinion on whether “permit application comments could have been better handled...”

Reply: On the basis of Council Member Coverdale’s comments at the conclusion of the presentation of evidence, the FCSWDD does not contest this objection and would propose to remove it from the conclusions of law. Hr’g Tr. 400-401.

Dated this 12th day of December, 2011.

Fremont County Solid Waste
Disposal District, Petitioner



Rick L. Sollars, WSB # 5-2394
Attorney for Petitioner
Western Law Associates, P.C.
277 Lincoln Street
Lander, WY 82520
(307) 332-4331

CERTIFICATE OF SERVICE

I certify that on the 12th day of December, 2011, a true and correct copy of the foregoing FCSWDD's reply to DEQ's Objection to proposed findings of fact and conclusions of law 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
123 Capitol Building
Cheyenne, WY 82002



Rick L. Sollars