

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

PETITIONER, FREMONT COUNTY SOLID WASTE DISPOSAL DISTRICT'S
MEMORANDUM IN SUPPORT OF ITS OPPOSITION TO
DEQ'S MOTION FOR SUMMARY JUDGMENT

COME NOW Petitioner, Fremont County Solid Waste Disposal District, (FCSWDD) by and through its undersigned counsel, and hereby submits this Memorandum in Support of its opposition to the Motion of the DEQ for Summary Judgment.

INTRODUCTION

The FCSWDD is a Solid Waste Disposal District that was formed in 1979 pursuant to W.S. 18-11-101 et. Seq. It currently operates 3 landfills and 11 transfer stations within Fremont County, Wyoming. This matter involves the Sand Draw Landfill which is located approximately 9 miles southeast of Riverton, Wyoming. The land fill is under a single permit, but consists of two areas. One area is an 80 acre parcel upon which activities began in 1982. The other area is a 137 acre that has not yet had any solid waste disposal activities thereon (except for a small area in which a petroleum-contaminated soil treatment unit was permitted in 2000). The general plan for the Sand Draw Landfill was to commence disposal of waste in the original 80 acre area and once it had reached

capacity to close that area and proceed with solid waste disposal activities in the expansion area.

While the permit application addresses the entire landfill, the expansion area is only addressed in a conceptual manner. The current matter before the Council involves the original 80 acre area and the permit applications plan to utilize vertical expansion in that area for municipal solid waste disposal until the 80 acre parcel reaches its capacity in 2037.

BACKGROUND

In response to the background presented by the DEQ in its Memorandum the FCSWDD would present additional and different facts pertaining to the facility. The Sand Draw Landfill was originally permitted in 1982 and received its last permit in 1995 (Ex. 1). After the permit was issued in 1995 the FCSWDD established a groundwater monitoring system. In 1999 there was an unexpected increase in the water level in the monitor well R-8. As noted in their Memorandum in support of the Motion for Summary Judgment, the DEQ believed that this rise in the water level indicated that groundwater was re-charging. In contrast the FCSWDD did not believe this to be the case and indicated that the rise was unexplained and required further monitoring to determine its significance. (Ex. 6). Following such additional monitoring and investigation the FCSWDD made a determination that it believed that the groundwater was in perched pockets. (Ex. 28). The water level increase in well R-8 caused the DEQ to require that the District ensure protection of the groundwater in the expansion

area before it could place solid waste there. This could be done in either of two manners, either demonstrate that disposal of such waste would not impact the groundwater or install an engineer containment system (ECS) to protect against leachate infiltrations. (See DEQ Memorandum at page 3 and 4). There was no data relied upon to suggest that disposal in the original 80 acres was having any impact on the groundwater, and the issue was simply under what circumstances could the expansion area be utilized, ie: with or without an engineered containment system.

Due to the fact that these investigations and studies would take time and the expenditures of funds to accomplish, the FCSWDD sought and was granted various extensions to the 1995 permit. An additional basis for the request for extensions was the discovery of a cultural site in the expansion area that was then required to be cleared. (Ex. 7). The extension dates and periods are accurately set forth in the DEQ's Memorandum. As part of its actions the FCSWDD sought to obtain additional funds to accomplish the studies, to fund activities at the Sand Draw Landfill and to begin the process of establishing a new landfill. The mechanism of funding that they pursued was to approach the municipalities in Fremont County and the Fremont County Commissioners to have a 1% optional tax placed on the ballot, with the funds to be expended for these purposes. In addition to seeking additional funding the FCSWDD and the DEQ also discussed the use of vertical expansion in the original 80 acre area.

On January 15, 2002 the FCSWDD met with the Fremont County Commissioners regarding placement of the initiative on the ballot. At the hearing Patrick Troxel appeared and made comments. Mr. Troxel was (and is) an employee of the DEQ, and spoke in that capacity as a member of the DEQ, as well as making comments as a member of the public. (Mr. Troxel is also the person from DEQ who reviewed the pending permit). Mr. Troxel commented at the hearing (as a member of the DEQ) and in doing so he stated that:

“At this point it is not a matter of is there going to be vertical expansion, its more of an issue of how far are we going to go, because it has been the department’s recommendation to the board that we **maximize that vertical expansion** as best we can now, and there have been some engineering considerations, some other things taken into consideration on the design aspect that Inberg Miller is working on. So there is a commitment to do that. I don’t think that’s a question. Related to that I think some of the time frames that we hear in the paper and people are using I think that you’ll find that in the near future, those numbers are going, there are going to be a greater life expectancy in the county for solid waste disposal without, then without the vertical expansion. So I think that the numbers definitely are on their way up and is it a matter of 10 to 14 year gain. Emphasis added. (Ex. A, page 2 and 3).

The Fremont County Commissioners elected not to submit the proposition to voters of Fremont County. Therefore, the source of funding for the expansion area or a new landfill was not available. However, from Mr. Troxel’s comments it appeared that the original 80 acre area could be used through vertical expansion at least until the period of 2012 to 2016, with the goal to maximize vertical expansion. In 2003 the FCSWDD submitted a plan to utilize vertical expansion to fill the original 80 acre area with a capacity of the area anticipated to be

reached in 2018. This plan was based upon the method of disposal that the FCSWDD used at the time, which was loose fill of waste (Ex. 16). After 2003 the FCSWDD purchased and installed a baler system. Through compaction more waste capacity could be disposed of in the same area and it also allowed the District to increase the vertical expansion for a longer period of time.

Due to the difference in opinion as to the nature of the water beneath the expansion area, the FCSWDD sought to define the nature of the water and whether it was part of an aquifer or if it was a confined water pocket or perched water. The FCSWDD also continued with its monitoring system and to compile information to determine the maximum extent that vertical expansion could be utilized and the potential to impact the groundwater of the vertical expansion. The **potential to impact groundwater quality in the future** standard is the language that is utilized in the DEQ regulations. (Chapter 2, Section 2 (h)(iii)(A)(x)(3)). (Emphasis added).

In its investigation to answer this inquiry the FCSWDD utilized the services of various consultants. The first consultant from which a proposal was sought was Willowstick. Willowstick responded that it felt there was a groundwater dome under the Sand Draw Landfill and that it was being recharged. Ironically, all reports of Willowstick are not signed by a professional engineer or professional geologist licensed in Wyoming and in fact are signed by Paul Rollins, Business Development Manager. (Ex. 30). This is ironic as Permit Condition #1 requires the removal of material relied upon by a Wyoming

Licensed Engineer and Geologist, but not produced by a Wyoming Licensed Geologist.

FCSWDD then employed Hydrogeophysics, Inc. (HGI) to perform a high resolution resistivity characterization on the Sand Draw Landfill and at the same time was consulting with Donald Siegel, Ph.D on the matter. HGI, following it work, came to the conclusion that:

“Based on Dr. Siegel’s first principals approach, the Sand Draw facility deep water well, Inberg-Miller’s monitoring well program, and the results of this geophysical investigation, it appears that three water zones exist at the Sand Draw Landfill; a deep (>300 feet belowground surface) regional aquifer, a deep perched water bearing unit (roughly 160 feet belowground surface), and a discontinuous near-surface variably saturated zone.” (Ex. Q, Section 6.0 of HGI report).”

The DEQ has not even acknowledged this report in its Motion or Memorandum.

Dr. Siegel, who holds a Ph.D. in Hydrogeology and has testified as an expert witness to the United States Senate (Ex. L) provided analysis on the Sand Draw Landfill and produced a paper that reflected his opinion as to the nature of the water that lies beneath the Sand draw Landfill. Dr. Siegel’s report and paper is titled “compartmentalization of Ground Water In An Intermountain Basin, Implications on Performance Based Landfill Design and Monitoring in the Arid West” set forth his analysis of the groundwater underlying the Sand Draw Landfill.(Ex. R). In doing so he relied upon the data of HGI, Inberg-Miller and others and he also dated the groundwater from samples taken. He also analyzed the chemical makeup of the groundwaters, including performing carbon

dating on the groundwater. Dr. Siegel's conclusion, based upon an interpretation of the data, was that in fact the upper most aquifer of the groundwater underlying the Sand Draw Landfill occurs in perched zones that have not been re-charged for many hundreds to thousands of years. (See Ex. R, Pages 15 through 18). Rather than acknowledge this report and analysis, the DEQ simply chooses to ignore it as it is not signed by a Wyoming licensed Professional Geologist. More importantly, the DEQ further attempts in Permit Condition #1 to prevent the Professional Engineer/Geologist who prepared the permit application from utilizing Dr. Siegel's work. (Ex. 45, Ex. J).

Through the years the FCSWDD continued to conduct studies on the Sand Draw Landfill and to monitor the groundwater through the system it had established. In September of 2009 and January 2010 data from the samples taken from the monitor well R-9D detected very low levels on VOCs. In September of 2009 the sample from well R-9D detected acetone at 25 ug/L and in January 2010 it detected acetone at 140 ug/L. No maximum level is established for acetone, but the drinking water equivalent limits for acetone are 32,800 ug/L. This data is set forth in section 4.8 of the permit application and the consultant rendered the conclusion that "No statistically significant increasing trends have been noted in the concentration of VOCs." (Ex. H).

Following entry of a consent decree in September of 2010 in a legal action filed by the DEQ against the FCSWDD the parties met on October 19, 2010 to discuss continued vertical expansion of baled waste in the original 80 acres. As

a result of the discussions the DEQ sent a letter of its understanding of the discussion to the FCSWDD on October 28, 2010. (Ex. B). The letter indicated that the District was seeking 26 years of vertical expansion (until the end of 2036) and the DEQ had assumed a closure in 6 years (2016). The DEQ on page two of the letter proposed “that the facility be permitted for disposal in the current 80 acres until January 1, 2028”. The District did not agree to this recitation of what the DEQ perceived as an agreement nor to the proposed closure date in 2028. (Ex. C). FCSWDD thereafter filed the current permit which sets forth a closure date in 2037.(Ex. E).

FCSWDD filed the permit application on December 27, 2010. The DEQ performed it's review of the application and on March 25, 2011 and it submitted its first review. That review indicated that the FCSWDD would have to cease receiving waste in the original 80 acre area on December 31, 2018 based upon the 2003 plan when loose waste was being deposited in the area. It also required that during the next renewal in 4 years the District will need to include a performance based design or an engineered containment system design. The basis of this decision was that further vertical expansion of disposal of waste above existing waste constituted a new cell. The District was given an opportunity to respond to the permit review and did so by pointing out that there was no authority that vertical expansion constituted a new cell. When the DEQ did not respond by what the FCSWDD considered its appeal date to the Council, the FCSWDD filed an appeal. Thereafter, the DEQ issued a final review of the

permit application that deleted the new cell finding (Ex. I) and the action was dismissed as moot. However, the DEQ would not commit that vertical expansion did not constitute a new cell. (Ex. M, N and O). Patrick Troxel, the DEQ permit application reviewer, has now conceded that vertical expansion does not constitute a new cell (Ex. P, page 28, line 2 through page 29, Line 14).

The current proposed permit has changed the reasoning for the FCSWDD to cease receiving was in the original 80 acres by December 31, 2018, now stating that rather than a vertical expansion constituting a new they have commented that they feel that the FCSWDD had committed to that date by filing a plan, involving the disposal of loose waste, on March 17, 2003.(Ex. I) However, unlike the first review the DEQ did not allow the FCSWDD to provide comment on the proposed permit and then take the 30 days to respond to the comments, but instead issued a directive to begin publication within 15 days of receipt. (Ex. D). This is contrary to the standard practice and procedure of the DEQ in the permitting process. FCSWDD was therefore forced to publish the proposed permit it objected to, file its comments and objections and request this hearing.

OBJECTIONS TO PERMIT CONDITIONS

The FCSWDD has objected to permit conditions #1 and #3. The basis of the objections is that the DEQ has acted in an arbitrary and capricious manner in setting the permit conditions and that the permit conditions are contrary to the law. There exists material issues of fact in dispute as to whether the DEQ has

acted arbitrarily, capriciously or contrary to the law in setting those Permit Conditions.

STANDARD OF REVIEW

The standard for evaluating a Motion for Summary Judgment has been addressed on numerous occasions by the Wyoming Supreme Court. The Court in the case of Cook v Shoshone First Bank, 126 P.3d 886, 889 (Wyo 2006) set forth the standard as follows:

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A genuine issue of material fact exists when a disputed fact, if proven, would establish or refute an essential element of a cause of action or a defense that a party has asserted... We examine ... the record, in a light most favorable to the party opposing the motion, affording to that party the benefit of all favorable inferences that may be drawn from the record. If upon review of the record, doubt exists about the presence of issues of material fact, that doubt must be resolved against the party seeking summary judgment.

In ruling upon a Motion for Summary Judgment in an administrative contested case this standard must be applied in light of the Administrative Procedures Act and the powers of the Council under that act. W.S. 16-3-114(c) provides that the Council may hold unlawful and set aside action, findings and conclusions found to be: (A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

Therefore, for purposes of the present Motion the Council must determine whether there are any material issues of fact in the context of whether the DEQ

has acted arbitrarily, capriciously or not in accordance with the law in setting permit conditions #1 and #3. FCSWDD would show the court that there is no rational, scientific or technical reason for the date of December 31, 2018 to cease accepting waste in the original 80 acres, absent the demonstration stated in the permit condition, that the date of December 31, 2018 is based upon a 2003 plan for the facility when loose waste, as opposed to baled waste, was disposed of in the 80 acre area, that the stated demonstration that the FCSWDD show it is not altering and will not alter groundwater is contrary to the DEQ regulations and the Statutes, and the requirement that FCSWDD remove appendices V and Y from the permit application due to the fact that they are not signed and stamped by a Wyoming professional engineer or professional geologist is not in accordance with the regulations and statutes. FCSWDD would also show the Council that there exists material issues of fact as to how these determinations were made to include them as permit conditions.

PERMIT CONDITION #1

Permit condition #1 provides that “The operator of this facility shall remove all documents from the permit application, including but not limited to appendices V and Y, which have not been signed and stamped by a Wyoming Professional Engineer (P.E.) or Professional Geologist (P.G.) as required by Chapter 2, Section 2(b)(ii) of the Solid Waste Rules and Regulations.” This requirement is not in accordance with the language of Chapter 2, Section 2(b)(ii), which requires that “All permit applications shall be prepared under the supervision of a

professional engineer registered in the State of Wyoming. All permit application forms shall be stamped, signed and dated by a professional engineer. In addition, all portions of the permit application which require geological services or work shall be stamped, signed and dated by a professional geologist.”

There is no dispute that the permit application was prepared under the supervision of Ken Schreuder a Wyoming licensed Professional Engineer and Geologist. (Exhibit K). The application is also stamped, signed and dated by him. Mr. Schueder, being a licensed professional Geologist, also complies with the last sentence of the required certifications.

Appendices V and Y are materials that Mr. Schueder relied upon.(Ex. J). They are materials that were prepared by Donald Siegel, Ph.D. Dr. Siegel is a professor and has been an expert witness to the United States senate (Ex. L) There is no restriction in the regulations or statutes as to what resources the supervising and signing Professional Engineer or Geologist may rely upon in submitting his report. Yet the DEQ is attempting to limit what Mr. Schueder may rely upon in preparing the permit. Specifically, they desire to remove material that is not favorable to the permit conditions they have attempted to set in the proposed permit. Permit condition #1 is not in accordance with the law or regulations as contained in Chapter 2, Section 2(b)(ii). While Mr. Schueder did add in the certification that “this certification is limited to work complete by Trihydro Corporation” this is routine when historical reports have been generated by other professionals. This is the reason that they are included in the

appendices and the certifying Professional Engineer/Geologist renders his opinion on those matters. Section 4.8 of the permit application (Ex.H) refers to the data of Dr. Sigel and Mr. Schueder's interpretation of that data and is covered by his signature and stamp, even with the limiting language.

It is ironic and arbitrary that the DEQ places reliance upon the report of Willowstick. (P.9 of DEQ Memorandum). The irony is that the DEQ attempts to remove the material prepared by a highly qualified individual that was utilized by the properly licensed preparer of the application, yet itself relies upon material signed by the Business Development Manager of Willowstick, who apparently has no credentials. (Ex. 30).

Permit Condition #1 is an arbitrary and capricious requirement that is not supported by any fact and that is not supported by the law and regulations.

PERMIT CONDITION #3

Permit Condition #3 states "No later than October 1, 2013, the operator of this facility shall demonstrate that the facility is not altering and will not alter groundwater. If the operator fails timely to make such a demonstration, then (i) the original eighty (80) acres shall cease receipt of waste no later than December 31, 2018 and promptly begin closure activities, and (ii) the lifetime renewal permit shall include either a performance based design or an engineered containment system design for all units of the expansion area(s) that will receive waste after December 18, 2018"

The date of December 31, 2018 is an arbitrary and capricious date. The only stated reason for this date was a series of discussions and a plan submitted by the District's consulting engineer in 2003 and the DEQ determination that there was a commitment to that date. (Ex. I). However, the plan in which the date was set forth in was at a time when the FCSWDD disposed of waste in the 80 acre area in loose waste form. (Ex. 16) As a result the stated capacity date was the determination of how high loose waste could be deposited rather than on a capacity basis. The current method of disposal is through the use of baled waste. As a result, the facts, assumptions and engineering underlying the date of December 31, 2018, as stated in 2003, are no longer present.

The stated Permit Condition does also not take into account the phased closure of the original 80 acre area as planned in the application. The permit application sets for a closure plan for the original 80 acre area that will be accomplished in phases. (Ex. S). Some portions of the area will be closed and capped on or about the 2018 date. Other phases will be closed and capped at intervals after that period of time until final closure is reached in 2037. There is a material issue of fact as to how the phased closure will alter the potential to impact the groundwater quality.

This date was also stated some 6 years before the low level VOCs were detected in 2009. However, after those low level VOCs were detected the DEQ, in a letter dated October 28, 2010, proposed a closure date of January 1, 2028. (Ex. B). At other times the DEQ has proposed closure dates of between 2012

and 2016. (Ex. A). There exists a material issue of fact in dispute as to whether closure of the original 80 acres on December 31, 2018 without the stated demonstration is necessary to protect the groundwater quality of the facility. There also exists a material issue of fact in dispute as to whether the stated date of December 31, 2018, the proposed date of January 1, 2028 or the permit application date of 2037 are necessary to fulfill this purpose. Finally, there is a material issue of fact as to what scientific or technical data was relied upon in arriving at the conclusion that the date of December 31, 2018 was necessary to protect the groundwater, rather than some alternate date.

There is also a material issue of fact in dispute as to what date of closure is necessary to protect groundwater quality. This is an issue as the groundwater at the Sand Draw Landfill has never been classified. (Ex. P, Page 61, line 7 through line 24). The DEQ has agreed to classify the groundwater and set the groundwater protection standards for the facility, but has only committed to do so by January 1, 2013. In order to determine whether the facility is or has the potential to alter the groundwater quality, the quality must be established. Until that is done Permit Condition #3 is arbitrary and capricious.

The language of Permit Condition #3 does not conform to the regulatory or statutory language requirements. Chapter 2, Section 2(b)(iii)(A)(X)(3) of the Solid Waste regulations requires permit applicants to provide “an evaluation of the facility’s **potential** to impact surface and groundwater quality based on the facility design and the hydrogeologic information required in subsection

(b)(iii)(A)(X). emphasis added. Permit Condition #3 not only requires a demonstration that the facility is not altering the groundwater, but also that it **will not** alter the groundwater. This language is not in accordance with the regulatory language. Chapter 2, Section 5(X) of the Solid Waste regulations states that Solid waste disposal facilities shall not be allowed to alter groundwater quality, as determined by groundwater monitoring. Chapter 2, Section 2(b)(iii)(A)(X)(3) states that the permit application must provide an evaluation of the facilities potential to impact surface and groundwater quality... Permit condition #3 does not conform to this regulatory language in two instances. First, it does not address the groundwater Quality but rather addresses groundwater. These are substantially different terms. Secondly, it provides that the demonstration must show that use of the facility will not alter groundwater, rather than using the regulatory language of the facilities potential to impact groundwater quality. It would be virtually impossible to demonstrate that the facility will not alter groundwater. Patrick Troxel, in his deposition, acknowledged that the Permit Condition language was not in accordance with the regulatory language. (Ex. P, Page 75, line 22 through Page 80, Line 22). Permit condition #3 is not in accordance with the law in that it requires the FCSWDD to make demonstration of something that is not provided for in the regulations. Even with a liner system in place this could not be shown, as liner systems can fail. (Ex. P, Page 94, line 7 through Page 96, line 3). Due to the impossibility of ever demonstrating that an impact will not occur, the regulations

provide that a showing of the potential is required. The Permit Condition requires something different.

While the data submitted indicates that low level VOCs have been detected on two occasions, the detections are far below the drinking water standards. There is a material issue of fact as to whether the detections of low level VOCs has affected the groundwater Quality. This was the basis for one of the FCSWDD objection. Pages 8 through 13 of the objection address condition #3. It is noted that the data for the up-gradient wells indicate that the groundwater classification for that water is only suitable for industrial use. Id at page 13. The statutory and regulatory language requires that the groundwater quality not be altered. There is a material issue of fact as to whether, based upon the data submitted, there is a potential that the groundwater quality will be altered.

CONCLUSION

Genuine issues of material fact exist as to whether the Permit Conditions #1 and #3 are arbitrary and capricious or if they are supported by some scientific or technical data. Genuine issues of material fact also exist as to whether the Permit Conditions are in accordance with the law. As a result the DEQ is not entitled to Summary Judgment as a matter of law and the Council should deny the DEQ Motion for Summary Judgment.

DATED this _____ day of October, 2011.

Fremont County Solid Waste
Disposal District, Petitioner

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CERTIFICATE OF SERVICE

I certify that on the ____ day of October, 2011, a true and correct copy of the foregoing Petitioner, Fremont County Solid Waste Disposal District, Memorandum in support of its Objection to DEQS Motion for Summary Judgment was served upon Respondent and counsel by depositing the same in the United States mail, postage prepaid, addressed to:

Jeremiah I. Williams
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