

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
FOR THE STATE OF WYOMING

FILED

JUL 13 2012

IN THE MATTER OF THE APPEAL OF)
THE GRANT OF A VARIANCE TO THE)
SHERIDAN LANDFILL, FILE# 10.526)

Docket No. 11-5801
Jim Ruby, Executive Secretary
Environmental Quality Council

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APPEARANCES

Mary A. Throne, Throne Law Office, P.C., for Petitioners Dwight & Betty French, Suzie Puckett, Tom Balding, Wayne & Karen Senff, Glenn Mooney, and Kyle & Julianne Koch.

Mike Barrash, Senior Assistant Attorney General, and Matthias Sayer, Assistant Attorney General, for the Wyoming Department of Environmental Quality (DEQ).

Greg A. Von Krosigk, Pence and MacMillan, LLC, for the City of Sheridan, Wyoming.

JURISDICTION

“The [Environmental Quality Council] shall act as the hearing examiner for the department [of environmental quality] and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” Wyo. Stat. Ann. § 35-11-112(a).

The Director of the Wyoming Department of Environmental Quality (hereinafter referred to as “DEQ” or the “Department”) granted a variance to the City of Sheridan, Wyoming, waiving the statutory requirements that the City’s proposed landfill expansion must be more than a specified distance from city boundaries, from occupied homes, and from water wells. *See* Wyo. Stat. Ann. § 35-11-502(c). Dwight & Betty French, Suzie Puckett, Tom Balding, Wayne & Karen Senff, Glenn Mooney, and Kyle & Julianne Koch (hereinafter the “Petitioners”), who own homes and water wells near the proposed landfill expansion, challenge the Director’s decision to grant a variance. The Environmental Quality Council (also referred to herein as the “Council”) has jurisdiction to hear this appeal pursuant to Wyo. Stat. Ann. § 35-11-112(a)(iv) (“The council shall . . . [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 Environmental Quality Act].”).

The Council held a hearing on this matter on May 10, 2012, in Sheridan, Wyoming. Council Vice Chairman David Searle served as hearing officer. Other council members present

included Chairman Tom Coverdale, Rich Fairservis, Tim Flitner, Dennis Boal and Dr. David Bagley. Council member John Morris was absent.

The Department of Environmental Quality called as its witnesses Dr. Carl Anderson, the Administrator for the Solid and Hazardous Waste Division of the Wyoming Department of Environmental Quality, and Dale Anderson, the DEQ's District 3 Supervisor for Solid Waste Permitting and Corrective Action. The Petitioners presented testimony from Dwight French, Kayleen McKinzie, Jim Koltiska, Suzie Puckett, and Glenn Mooney, who own property in the vicinity of the proposed landfill expansion. The Petitioners also presented testimony by W. Charles Martineau, the Solid Waste Superintendent for the City of Sheridan. The City of Sheridan, in addition to testimony by Mr. Martineau, provided testimony from Brandy Kean, P.E., a representative of the Burns & McDonnell engineering firm. The following Exhibits were offered and received by the Council: DEQ Exs. 1-7 & 9-13; Petitioners Exs. 3, 4, 16, 17 & 26-31; Sheridan Exs. 3, 18 & 25-31. The Final Variance Application from the City of Sheridan was introduced as Common Exhibit 1.

STATEMENT OF THE CASE

The City of Sheridan applied to the Wyoming Department of Environmental Quality for a variance that would permit the City to expand its existing municipal landfill onto an adjacent parcel of land that the City owns. Without such a variance, the City cannot expand its landfill, as Wyoming law prohibits a solid waste management disposal facility within one (1) mile of the City's boundaries, within one (1) mile of an occupied home, or within one-half (1/2) mile of a water well authorized for domestic or stock use. *See* Wyo. Stat. Ann. § 35-11-502(c)(i),(ii) & (iv). After review, the Director of the Department of Environmental Quality exercised his authority to grant a variance and waived these statutory restrictions. Petitioners, who own homes and land within one (1) mile of the proposed landfill expansion, contest the Director's grant of a variance.

FINDINGS OF FACT

1. The City of Sheridan, Wyoming, has operated a solid waste management facility in an area near the City's western boundary since the 1940's. [Transcript at 50]. Currently, this facility – sometimes referred to herein as the Sheridan landfill or the landfill – comprises 120 acres, [Transcript at 45-46], and the current facility will reach its capacity between 2017 and 2020, [Transcript at 195; DEQ Ex. 11].

2. In 2001, the City developed a solid waste management plan with HKM, a local engineering firm. [Transcript at 270-71]. While the City examined several alternatives, the plan concluded that the City should purchase land adjacent to the current landfill for a potential expansion. *Id.*

3. The City hired a different engineering firm in 2009, Burns & McDonnell, to develop another integrated solid waste management plan. That plan again recommended that the

City expand its landfill operation onto adjacent land to meet the waste disposal needs of the City and its surrounding residents. [Transcript at 272; Common Ex. 1 at App. K].

4. In order to expand the Sheridan landfill, the City sought a variance from the location standards in Wyoming law. *See* Wyo. Stat. Ann. § 35-11-502(c). Like the existing landfill, the proposed expansion area is less than one mile from Sheridan's city limits. [Common Ex. 1 at 3.2]. There is one residence within 1,000 feet of the proposed expansion site, and there are numerous residences within one mile. [DEQ Ex. 11]. Altogether, one hundred ninety-eight (198) property owners are within one mile of the expansion, although the majority are screened by the topography of the area. [DEQ Ex. 11]. There are also seven permitted wells within one-half of a mile: one is for drinking water; four are stock wells; and two are used to control dust at a nearby race track. [DEQ Ex. 11]. Without a variance, the City cannot expand its landfill to the adjacent land, and the City would have to utilize a different location or method to dispose of municipally generated waste. Wyo. Stat. Ann. § 35-11-502.

5. The grant of a variance is not the same as the grant of permit to actually expand the Sheridan landfill. [Transcript at 12-13; 20]. It is the DEQ's policy to process a variance application first: an applicant need not pay for the additional studies or other costs related to a solid waste permit if the DEQ Director is unwilling to relax the statutory location standards. [Transcript at 110]. Any final DEQ permit to expand the Sheridan landfill would be appealed to the Council in a subsequent case. [Transcript at 13 & 47-48]. Nor does the grant of a variance mean that the permit requirements for the expansion area will be the same as the requirements imposed on the current landfill. [Transcript at 20].

6. For the DEQ, the ability to grant a variance from the statutory location standards is important because many original city landfills are located close to the communities they serve. [Transcript at 49-50]. When the legislature imposed location standards for solid waste facilities, the original landfills were exempt from the new requirements, but an expansion of an existing site would come under these location standards. *Id.*

7. The City applied for a variance on December 30, 2009. [DEQ Ex. 9]. If granted, the City would use eighty (80) acres for waste disposal, and the remaining twenty (20) acres will be part of the buffer zone between the landfill and neighboring parcels. [Transcript at 46 & 92-93; Common Ex. 1 at 2-2]. As part of the variance review, DEQ asked for additional information and significant revisions to the variance application. [Transcript at 27, 59, 62-72; DEQ Exs. 2-5].

8. On November 30, 2010, DEQ staff reviewed the statutory and regulatory criteria and concluded the variance application was complete and technically adequate, such that the application could be released for public comment. [DEQ Ex. 7 & 9; Transcript at 74-75].

9. After notice, a public hearing was held on the proposed variance on January 25, 2011. [DEQ Ex. 9]. *See* Wyo. Stat. Ann. § 35-11-601(a) (requiring publication of the notice of

hearing for four (4) consecutive weeks in a newspaper of general circulation in the county with the real property subject to the proposed variance).

10. After the January meeting, in response to public concerns raised by individuals near the current landfill, the Department asked the City to determine whether other suitable locations could be found for the City's solid waste needs that would not require a variance. [Transcript at 75-76; DEQ Ex. 9].

11. On July 8, 2011, the City responded. [Sheridan Ex. 18; Common Ex. 1 at App. J]. Using geospatial maps, the City showed that only about 6.5% of the land in Sheridan County would be suitable for landfill siting under the statutory location standards. [Common Ex. 1 at 5.2; Transcript at 239-40]. After ruling out land that did not have suitable soil cover to operate a landfill, the City determined that less than 3% of the land in Sheridan County would be suitable for a landfill, and a significant portion of this land was on the face of the scenic Big Horn Mountains. [Transcript at 240].

12. Because the City's examination of alternative sites was done primarily with geospatial mapping, the City's submission did not seek to identify rural residences, historic sites, specific risks to water quality, or areas within the habitat of endangered species, [Transcript at 242-43], although the City did – at the DEQ's request – exclude land within two miles of an identified Greater Sage-Grouse lek. [Sheridan Ex. 18; DEQ Ex. 9; Transcript at 79-80]. *See* DEQ Regulations, Ch. 2, § 3(a) (containing additional location standards for sanitary landfills).

13. On August 9, 2011, Dr. Carl Anderson, the Administrator of the Solid and Hazardous Waste Division for DEQ, recommended that the DEQ Director approve the City's variance request. [DEQ Ex. 11]. The Director granted the variance, with nine conditions relating to operation of any landfill that might be subsequently permitted at the City's proposed location. [DEQ Ex. 12]. DEQ testified that the conditions were added in response to concerns raised at the January 2011 public hearing, [Transcript at 44], although the conditions do not differ from the concerns typical of any municipal landfill, [Transcript at 45]. Although these conditions were added without a public process, the City does not oppose the additional requirements, believing they will protect neighbors and that many are already practiced by the City. [Transcript at 207].

14. On October 7, 2011, the Petitioners appealed the Director's decision to grant the variance to the Council.

15. Before the Council, the Petitioners argue that the Director erred in granting the variance to the City of Sheridan. The Petitioners object because:

a. A variance from two of the location standards – proximity to occupied dwellings and proximity to water wells – is not required if the landowner or well owner consents to the landfill. *See* Wyo. Stat. Ann. § 35-11-502(c). Petitioners argue that DEQ should have required the City of Sheridan to seek consent from the landowners prior to processing a variance application. [Transcript at 10-11]. They further note that, in a previous variance application in

1996 for the Town of Thermopolis, Wyoming, the DEQ noted that the town had attempted to get consent from all 79 landowners by sending a postcard, and DEQ considered such action as a special or unique circumstance that justified granting the variance. [Pet. Ex. 17 at 17 & Transcript 37-38]. In this case, it is uncontested that the City did not seek consent from all nearby landowners or well owners. [Transcript at 51-52].

b. The DEQ has issued regulations to implement and guide the Director's authority to issue a variance for landfill siting. *See* Wyo. Dep't. of Env'tl. Quality, Solid & Hazardous Waste Div. Regulations, Ch. 1, § 2(i) (hereinafter DEQ Regulations). The Petitioners argue that the variance does not meet the requirements established in these regulations for two reasons. [Transcript at 11].

1. The regulations require that the Director conclude that the operation of the facility will not present a public nuisance by its proximity. DEQ Regulations, Ch. 1, § 2(i)(i)(A)(II). The Petitioners believe that the operation of the facility presents a nuisance. [Transcript at 11].

2. The regulations require that the City demonstrate that "no available alternative locations" within a "reasonable distance" could be used for the solid waste facility without needing a variance from the DEQ. DEQ Regulations, Ch. 1, § 2(i)(ii)(A). The Petitioners do not believe that the City's review of alternative sites, in its original application and as a result of the DEQ's subsequent request, has met this requirement. Specifically, the City did not visit the land that it identified in its mapping exercise, did not attempt to negotiate purchase of this land, and the City erroneously excluded land that did have sufficient soil or that had Sage Grouse leks.

c. The Director, by regulation, considers "[s]pecial or unique conditions or circumstances" that apply and justify a grant of a variance. DEQ Regulations, Ch. 1, § 2(i)(ii)(C). In this case, the Director considered the fact that the landfill was an expansion, not a new site, as a special or unique condition. [DEQ Ex. 11]. Petitioners believe this would apply to any landfill expansion, and this factor is therefore insufficient to provide a basis for the Director's decision. [Transcript at 11].

d. Finally, Petitioners note that the DEQ has never previously authorized a variance where more than one hundred (100) properties are within one mile of the facility. [Transcript at 11].

16. In support of the Petitioner's arguments, several individuals with land near the existing landfill testified about their experience with windblown litter, odor, and pests at the facility. [*E.g.* Transcript at 125-26]. Petitioners are also concerned about the possibility that the landfill, if permitted to expand, could result in contamination of their water wells. *Id.* Petitioners provided testimony about the beauty of the surrounding landscape and that their property values were harmed by the proximity of the existing landfill. [Transcript at 123-192].

17. The Petitioners also argued that the City's search for alternative sites was inadequate. City officials did not actually visit any of the land identified by mapping as a potential alternative site, [Transcript at 199-200], and DEQ staff did not independently investigate alternative sites, [Transcript at 93-94]. Nor did the City investigate the hydrology of the alternative land identified at DEQ's request [Transcript at 39]. In addition, the Petitioners

demonstrated that the land for the proposed expansion had soil that, itself, would not have qualified under the City's review of alternate locations. [Transcript at 95-96]. Moreover, Petitioners argued that the City should not have excluded land near Sage Grouse leks because Sheridan County does not have "Greater Sage-Grouse Core Area" as identified by the Governor's Executive Order. *See* Executive Order 2011-5 (June 2, 2011).

18. While the City and DEQ do not contest the Petitioner's statement that the City did not seek consent from nearby landowners, they believe that any effort would have been futile. [Transcript at 106-07]. Under direct examination, Petitioner Dwight French testified that when he became aware that the City had purchased the expansion area in the early 2000s, he worried about the landfill expanding nearer to his house. He called DEQ staff, learned about the location standards, and he said consent to move closer would "never happen, because we liked where we lived down on the creek bottom." [Transcript at 124-125]. Mr. French was not aware that the law permitted a variance from these location standards, and DEQ staff did not identify this possibility. [Transcript at 138-139]. Petitioner Glenn Mooney, who works for DEQ in his professional capacity, testified that at one point in the early 2000s, he looked at Wyoming law and "found that you can't have a landfill within a mile of the property. I thought no problem. I mean, we're not going to give consent." [Transcript at 184].

19. DEQ concluded that any concerns about nuisance would be addressed in the operational restrictions placed on the variance and the permit. [DEQ Ex. 7 at 2] Moreover, the Department's inspections did not reveal operational concerns, and City and DEQ records did not reveal a history of complaints. [DEQ Ex. 10 at 3; Transcript at 205-206]. The City's supervisor testified an inspection for rodents only identified rabbits and some mice. Other pests were not found. [Transcript at 209].

20. After review, the City and DEQ believe the primary source of odor from the landfill to be a compost facility that will not be affected by the expansion of the landfill: the composting is already authorized under a permit for wastewater management, will not move to the proposed expansion area, and could continue even if the existing landfill were permanently closed. [DEQ Ex. 10 at 3; Transcript at 218-219]. The City also presented evidence that other sources may contribute to the odor identified by Petitioners. An animal shelter is also upwind of the landfill, a stockyard is nearby albeit not upwind, and other landowners have collected manure for their own purposes. [Transcript at 202-03, 210, 212]. Other landowners have excavated recently, and they could also be causing dust. [Transcript at 203].

21. DEQ staff acknowledged that there is always potential for groundwater contamination from a landfill expansion [Transcript at 92], but the Department concluded that of the seven wells at issue in the variance, only three stock wells were actually downgradient from the landfill expansion. [DEQ Ex. 11; Transcript at 46-47]. The City also presented evidence that groundwater in the vicinity of the landfill travels slowly, and the monitoring wells already in place would permit the City to identify and remediate contamination before it caused concern. [Transcript at 248-51].

22. The City agrees with Petitioners that litter does reach the Petitioners' property, although some may be the result of individuals driving their own waste to the landfill without proper covering on their vehicles. [Transcript at 213-214]. The City has already constructed fencing to prevent airborne litter, and the City charges an individual more if waste is not covered when it arrives at the facility. [Transcript at 214-16]. Further improvements are likely during the permitting process. [DEQ Ex. 7 at 2].

23. The City presented evidence that it had examined other alternatives to landfill expansion, and that none of the alternatives were feasible for the City and its ratepayers.

a. The City examined the costs of hauling trash across various distances, accounting for both fuel and fixed costs, such as trucks. [Sheridan Ex. 27]. Using this analysis, the City's consultant from Burns & McDonnell estimated that the cost of hauling trash to any landfill that could – and would – accept the City's waste (such as Casper, Wyoming) would require that the tipping fee for waste in Sheridan more than double by 2015. [Sheridan Ex. 28]. At the current time, the Sheridan landfill charges more than \$90 per ton of waste, which is one of the highest rates in the area. [Transcript at 233; Sheridan Ex. 29]. The cost of transferring waste to another landfill would only increase this disparity. [Transcript at 233; Sheridan Ex. 30].

b. At DEQ's request, the City analyzed Sheridan County to identify possible alternative sites. The City did not pursue the small amount of appropriate land because the land was not near transportation infrastructure, would have potentially required negotiations for travel across third-party land to any potential site, would have needed new utility service to the landfill site, and at least one potential site had coal-bed methane leases that would preclude excavation. [Transcript at 199-200, 244-245]. DEQ agreed that procurement of an alternative site, other than the land that was already city-owned, would be much more expensive and would present traffic issues that would need to be further analyzed. [Transcript at 114-115 & 121]. The City did speak with the State of Wyoming about a parcel of state-owned land, but this parcel would be sold through a public bid process and appraised as a recreational site, not as a potential landfill. [Transcript at 246-247; DEQ Ex. 10 at 3.]

c. At the time the Department asked for additional information on alternative locations in March 2011, the DEQ directed the City to "pay[] close attention to the 2 mile seasonal buffer zone for Greater Sage-Grouse leks." [DEQ Ex. 9 at 2]. None of the parties provided the most recent Executive Order on Greater Sage-Grouse protection, nor the immediately prior version, to the Council for its review. The only copy available in the record was the 2008 version of this order, and it does not appear to preclude the City and DEQ from working together to determine whether a proposed landfill might affect this species. [Common Ex. 1 at App. J].

d. The City's witness testified that the lack of suitable land in Sheridan County for a new landfill was not unusual, and the restrictions imposed for the City's land survey were not excessive when compared to those of other states. [Transcript at 269].

24. While building a landfill farther from the City addresses many of the Petitioner's nuisance concerns, the Administrator of the Solid and Hazardous Waste Division testified that there will always be someone near a landfill with similar concerns. [Transcript at 42].

CONCLUSIONS OF LAW

25. The Environmental Quality Council has previously considered a variance for a landfill expansion, when Wyoming law provided that only the Council could grant variances. [Transcript 13-14; DEQ Ex. 13]. At that time, the Council considered factors similar to those embodied in the DEQ's current regulations. The applicant was required to (a) analyze the potential impacts of increased traffic; (b) demonstrate that the operation of the proposed facility would not present odor, dust, litter, insects, noise, health (human or animal) or aesthetic problems; and (3) design the landfill expansion to prevent methane accumulation. [DEQ Ex. 13].

26. Under Wyoming law, a solid waste management facility must be a distance away from water wells, homes and city boundaries, unless the Director of DEQ determines a variance is appropriate:

(c) After the effective date of this act no person, except upon a variance from paragraphs (i) through (iv) of this subsection granted by the director upon recommendation of the administrator after public hearing and upon written findings that the variance will not injure or threaten to injure the public health, safety or welfare, shall locate or construct a solid waste management disposal facility larger than one (1) acre within:

(i) One (1) mile of the boundaries of an incorporated city or town;

(ii) One (1) mile of a public school except with the written consent of the school district board of trustees or one (1) mile of an occupied dwelling house except with the written consent of the owner;

(iii) One-half (1/2) mile of the center line of the right-of-way of a state or federal highway unless screened from view as approved by the department; or

(iv) One-half (1/2) mile of a water well permitted or certificated for domestic or stock watering purposes except with written consent of the owner of the permit or certificate.

Wyo. Stat. Ann. § 35-11-502(c).

27. Wyoming law does not require that an applicant seek consent from neighboring landowners prior to seeking a variance from the Director of DEQ. Wyo. Stat. Ann. § 35-11-502(c). Moreover, the City of Sheridan was required to seek a variance for the proposed landfill expansion as there is no possibility of consent to avoid the requirement that a solid waste facility be more than one (1) mile from the boundaries of a city or town. Wyo. Stat. Ann. § 35-11-502(c)(i).

28. The Department of Environmental Quality has issued regulations that govern the Director's consideration of a variance application. An applicant has the burden to persuade the Director that a variance is necessary, [Transcript 22-23; DEQ Ex. 13], and the applicant must supply specific information:

(i) For solid waste disposal facilities which do not meet the location standards specified in paragraphs (i) through (iv) of W.S. 35-11-502(c), the applicant may apply to the director for a variance from the standards by submitting a written variance application. The variance application shall contain the following information:

(A) For proposed facilities which do not meet the location standards for proximity to towns, schools or any occupied dwelling house in W.S. 35-11-502(c)(i) or (ii), the applicant shall:

(I) Present an analysis of additional traffic which would result from the proposed facility, and demonstrate that additional traffic caused by operation of a disposal facility will not pose a safety threat to the public;

(II) Demonstrate that the operation of the proposed facility will not present odor, dust, litter, insect, noise, health (human and animal) or aesthetic problems, and will not present a public nuisance by its proximity to the town, schools and/or dwellings. This demonstration may be made through analysis of the facility design and operation practices; and

(III) Provide design features and monitoring specifications used to preclude methane migration from affecting any buildings within one (1) mile of the proposed facility, if the facility is used for the disposal of wastes which may form methane as a decomposition product.

(B) For proposed facilities which do not meet the location standard for proximity to, and visual screening from, state or federal highways in W.S. 35-11-502(c) (iii), the applicant shall provide information describing how the design and operation of the facility will minimize visual impacts to the highway(s).

(C) For proposed facilities, excluding incinerators, which do not meet the location standard for proximity to water wells in W.S. 35-11-502(c)(iv), the applicant shall provide:

(I) A detailed description of the site's geologic and hydrologic characteristics, supported by data from on-site soil borings and groundwater monitoring wells;

(II) A detailed description of the proposed facility's containment system (cap and liner systems) and surface water diversion structures;

(III) A detailed description of the groundwater monitoring program (including location of wells, sampling frequency and sampling parameters) which would be instituted when the facility begins operations; and

(IV) An analysis of the potential for contaminants which may leak from the disposal facility to adversely affect the nearby water well(s). This analysis may be in the form of contaminant transport modeling results, an evaluation of hydrologic conditions or aquifer properties, or other applicable information.

(D) In addition to the other information requested in this subsection, all variance applications made under this subsection shall be accompanied by the following information:

(I) The proposed size of the facility;

(II) The name, address and telephone number of the applicant;

(III) The legal description of the property;

(IV) A detailed description of the facility which includes information on the amount, rate (tons per day), type (including chemical analyses if other than household refuse) and source of incoming wastes, a narrative describing the facility operating procedures, and the estimated site capacity and site life;

(V) The names and addresses of the property owners of all lands within one (1) mile of the proposed facility boundary;

(VI) A USGS topographic map (scale of 1:24,000 or 1: 62,500) which shows the boundaries of the proposed landfill site; and

(VII) Information sufficient to evaluate the conditions specified in paragraph (i)(ii) of this section.

Wyo. Dep't of Env'tl. Quality, Solid and Hazardous Waste Division Regulations, Ch. 1, § 2(i)(i).

29. The Director is required, by regulation, to make certain findings before approving a variance:

(ii) In granting any variance as provided by this paragraph, the director shall issue written findings that the variance will not injure or threaten to injure the public health, safety, or welfare. The director shall only make such a finding if the evidence presented in the application and obtained at a public hearing demonstrates that:

(A) There are no available alternative locations which meet the location standards for a solid waste management disposal facility to meet the disposal needs of the applicant, within a reasonable distance of the boundary of the service area of the facility;

(B) It is not possible for the applicant to use existing, permitted solid waste management disposal facilities owned by another person within a reasonable distance of the boundary of the service area of the facility; and

(C) Special or unique conditions or circumstances apply to the applicant and justify granting the variance.

DEQ Regulations, Ch. 1, § 2(i)(ii).

30. DEQ has interpreted the requirement that there be “no available alternative locations” “within a reasonable distance” to include an assessment of the potential cost of alternative locations. [DEQ Ex. 11; Transcript at 90-91]. The Department believes that if an individual must travel a long distance to dispose of waste or pay high fees, illegal dumping is more likely. [DEQ Ex. 11]. An agency’s interpretation of its own rules and regulations is entitled to deference “unless that interpretation is clearly erroneous or inconsistent with the plain language of the rules.” *Office of State Lands & Invs. v. Mule Shoe Ranch, Inc.*, 252 P.3d 951, 954 (Wyo. 2011) (citing *Powder River Basin Res. Council v. Wyo. Dep’t of Env’tl. Quality*, 226 P.3d 809, 813 (Wyo. 2010)).

31. Before the Council, the Petitioners are responsible for producing evidence that the Director’s decision to grant the variance is incorrect. “The burden of proving arbitrary, illegal or fraudulent administrative action is on the complainant, and this burden includes not only the clear presentation of the question, but also placement of evidence in the record to sustain the complainant’s position.” *Knight v. Env’tl. Quality Council*, 805 P.2d 268, 273 (Wyo. 1991) (quoting *Wyo. Bancorporation v. Bonham*, 527 P.2d 432 (Wyo. 1974)).

DECISION

32. The Council has jurisdiction over the parties and the subject matter of this proceeding pursuant to Wyo. Stat. Ann. § 35-11-112(a)(iv) and Wyo. Stat. Ann. § 35-11-502(k). *Findings of Fact* ¶¶ 13, 14.

33. All notice requirements have been met. *Findings of Fact* ¶ 9.

34. The Petitioners have failed to provide sufficient evidence to justify reversal of the DEQ Director's grant of a variance to the City of Sheridan. *Conclusions of Law* ¶ 31.

35. The Petitioners did not present evidence that the City's variance application was incomplete. Rather, the Petitioners argue that the Director's application of various factors was erroneous in specific ways. Therefore, the Council need not review the other elements of the variance application that were not the subject of Petitioners' specific objections. These include the City's traffic analysis and methane abatement plan. *Findings of Fact* ¶ 15.

36. Wyoming law does not require that a variance be sought only as a last resort, as Petitioners claim. First, there is no provision for consent when the proposed landfill is near a town or a state or federal right-of-way, so in those circumstances a variance proceeding is mandatory. Wyo. Stat. Ann. § 35-11-502(c)(i) & (iii). Moreover, the variance statute has already provided a safeguard should the solid waste operator decline to seek consent: a public hearing. As an alternative to consent, a public hearing requirement protects landowners who would be affected. *See Kroenlein v. Eddington*, 35 P.2d 1207, 1214 (Wyo. 2001). Here, the Petitioners believe a personal attempt to contact affected landowners would better protect their interests. While this may be true, the Legislature has described how the Department should provide nearby landowners with input on a variance, and Petitioners have not provided a rationale for imposing additional requirements beyond those in statute.

37. Not only is a requirement for seeking landowner consent arguably foreclosed by the statute, but the Petitioners' testimony demonstrates the futility of such a requirement. Two of the Petitioners testified, on direct examination, that they do not want the Sheridan landfill to continue in its present location – or expand – and they would not have consented even if asked. *Findings of Fact* ¶ 18.

38. Petitioners presented evidence that the landfill affects their property, but this is not sufficient evidence that the variance will “injure or threaten to injure the public health, safety or welfare.” Wyo. Stat. Ann. § 35-11-502(c). On some issues, such as odor and water quality, the Petitioners failed to demonstrate that the grant of the variance with conditions, as opposed to the continued operation of the existing landfill, will have an effect. As to the Petitioners' concerns about litter, they presented insufficient evidence that DEQ's future permit requirements, when combined with the safeguards discussed at the hearing, will not address these concerns to the extent possible. Indeed, many of the concerns raised by the petitioners are issues that will also be addressed in the permitting process. While these processes do overlap,

the overriding concern of the variance statute is the question of whether granting the variance itself creates a situation that will injure or threaten to injure the public health, safety and welfare. *Findings of Fact* ¶¶ 5, 13, 16, 19-22.

39. Nor do we find that the Department erred when it concluded that no alternative locations were available within a reasonable distance. As interpreted by the Department, this factor envisions some analysis of cost, and the Petitioners did not dispute that hauling waste to Casper, Wyoming, or building a new landfill in eastern Sheridan County on land the City does not own would also be more expensive than expanding near the existing landfill and its infrastructure. While this is not required, it is notable that Petitioners did not attempt to identify an alternative location that would actually address the need for solid waste disposal in Sheridan County. In light of the extensive analysis performed by the City and the Department, the Council declines to hold that the Director's grant of a variance was unreasonable. *Findings of Fact* ¶¶ 11, 12, 17, 19, 23; *Conclusions of Law* ¶¶ 29, 30.

40. Although Petitioners demonstrated that there are no Greater Sage-Grouse Core Areas in Sheridan County, we do not hold the decision to examine this issue to be reversible error. None of the parties provided the most recent Executive Order on Greater Sage-Grouse protection, nor the immediately prior version, to the Council for its review. The only copy available in the record was the 2008 version of this order, and it does not appear to preclude the City and DEQ from working together to determine whether a proposed landfill might affect this species. *Findings of Fact* ¶¶ 12, 17, 23.

41. Special or unique conditions or circumstances apply to the applicant and justify granting a variance. The City's solid waste management facility has been located in this area since the 1940's. The City has already installed groundwater monitoring, and the City has worked to understand the hydrology and geology in the current location. A new site would require that the City rediscover what it already knows. *Findings of Fact* ¶¶ 1, 6, 21.

42. Finally, Petitioners object that more than 100 residences would be affected by the proposed variance. Many of the residences, however, are screened from its effects by the topography. The City has owned the land subject to the variance since about 2002. There will not be any increase in the amount of traffic on the roads leading to the area to be permitted if the variance is granted. Under the circumstances presented, the number of properties affected does not preclude the Director's decision to grant a variance. *Findings of Fact* ¶¶ 1, 4, 24.

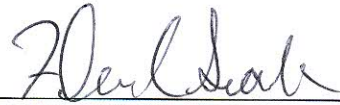
ORDER

THEREFORE, the Director's Decision to Grant a Variance to Sheridan, Wyoming, is AFFIRMED.

It is FURTHER ORDERED PURSUANT TO Chapter 1, Section 2(iii) of the Regulations of the Solid and Hazardous Waste Division of the Department of Environmental Quality that any

change to the facility size, type or source of waste, rate at which waste is received, or any other aspect of the facility as described in the Variance Application shall render the variance invalid.

DATED this 13th day of July, 2012



F. David Searle, Presiding Officer
Environmental Quality Council

CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 17th day of July, 2012, I served a copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by electronic mail to the following:

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