

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

MAY 02 2011

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF:)
James Pace)
P.O. Box 575)
Douglas, WY 82633)
)
And)
)
Peter J. Moore & Bonnie Smith-Moore)
103 Hwy. 59)
Douglas, WY 82633)

Docket No. 10-3207A

DEQ'S POSSIBLE OBJECTION TO TERM IN PREHEARING ORDER

The Wyoming Environmental Quality Council's (EQC) April 29, 2011 Prehearing Order, states that "[t]he DEQ bears the burden of proof in this matter" and that the parties are bound by the Order unless a party "objects" to it within three days. Respondent DEQ has a possible objection to the "burden of proof" term in the Order, as explained below.

This case involves Petitioners James and Martha Pace (the Paces) and Peter and Bonnie Smith-Moore (the Moores) separate but related petitions contesting Notice of Violation (NOV) & Order No. 4631-10 issued by the DEQ to secure compliance with state standards and permit requirements pertaining to the water supply system and the sewerage system serving the Grasslands Mobile Home Park (MHP) in Douglas. During the prehearing conference on April 29, 2011, counsel for Petitioners expressed the intent to assert in the hearing that the Grasslands MHP water supply and/or sewerage systems have a "grandfather" exception from having to comply with state standards and permit requirements cited in the NOV & Order. Respondent DEQ does not object to Petitioners' right to assert a "grandfather" exception as an affirmative defense, but DEQ disputes the merits of their assertion and understands it to be Petitioners who bear the burden of proof on the "grandfather" issue if they assert it.



The Wyoming Environmental Quality Act requires a permit from the DEQ to construct, install or modify any sewerage system or public water supply. WYO. STAT. ANN. §35-11-301(a)(iii)&(v). Petitioners' assertion that the water supply system and/or sewerage system serving the Grasslands MHP are exempted or excepted from the statutory requirements based on a "grandfather" status is not supported by any express language in the statute. The burden should be on the Petitioners to prove the specific facts and cite the legal authority for their assertion of a "grandfather" exception, which is in the nature of an affirmative defense.

The party who asserts an exception as an affirmative defense bears the burden of proof on that assertion. *Gonzales v. Personal Collection Service*, 494 P.2d 201, 207 (Wyo. 1972). The party asserting the affirmative of a proposition bears the burden of proving it, and the party disputing that assertion does not have the burden on that issue. *Energy Transportation Systems, Inc. v. Mackey*, 650 P.2d 1152, 1158 (Wyo. 1982); *Castor v. Rice*, 254 P.2d 189, 112 (Wyo. 1953). Even where an exception is claimed based on a "grandfather" clause in a statute, the "grandfather" clause is construed strictly against the party who invokes it. *United States of America v. Allan Drug Corp.*, 357 F.2d 713, 718 (10th Cir. 1966).

If the Order's placement of the burden of proof on the DEQ applies to the issue of a "grandfather" exception asserted by the Petitioners, then Respondent DEQ objects to that particular term for the reasons discussed above.

DATED this 2nd day of May, 2011.



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CERTIFICATE OF SERVICE

This certifies that true and correct copies of the foregoing DEQ'S POSSIBLE OBJECTION TO TERM IN PREHEARING ORDER were served this 2nd day of May, 2011 by United States Mail, first class postage prepaid, and also by facsimile transmission or email addressed as follows:

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A handwritten signature in blue ink, appearing to read "M. B. Am", is written above a horizontal line.