

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

IN THE MATTER OF THE NOTICES OF)	
VIOLATION AND ORDERS ISSUED)	DOCKET NO. 99-3204
TO GRAND TETON NATIONAL PARK,)	DOCKET NO. 99-3205
DEQ DOCKET NOS. 3045-99 & 3046-99)	
)	
IN THE MATTER OF THE NOTICES OF)	
VIOLATION AND ORDERS ISSUED)	DOCKET NO. 99-3206
TO YELLOWSTONE NATIONAL PARK,)	DOCKET NO. 99-3207
DEQ DOCKET NOS. 3047-99 & 3048-99)	

ORDER

This matter came before the Environmental Quality Council on a petition for hearing filed by the National Park Service (referred to as the NPS or the Park Service), an agency of the United States Government. Albert A. Kashinski represented the Park Service and the State of Wyoming, Department of Environmental Quality; Water Quality Division (DEQ) was represented by Magdalene M. Allely, Assistant Attorney General.

On July 22, 1999, the Environmental Quality Council (EQC) issued a Notice of Hearing and Order. This order joined docket numbers, 99-3204, 99-3205, 99-3206, and 99-3207 for hearing before the EQC. The parties stipulated to the facts and submitted the case on briefs.

This matter came before the EQC for a decision at a public meeting held on October 23, 2000 in Cheyenne, Wyoming. EQC members present were Wendy Hutchinson, John N. Morris, Stephen E. Williams, Nick J. Bettas, Thomas Dunn, and Robert Rawlings. Terri A. Lorenzon, attorney for the EQC was also present. Having reviewed the stipulation of facts and the legal arguments, and being fully advised, the EQC hereby issues the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The NPS is responsible for administering Grand Teton National Park and Yellowstone National Park under applicable Federal laws, regulations, and policies.
2. Hydrocarbon contamination was found at two underground storage tank (UST) sites in Grand Teton National Park (Grand Teton) and at two UST sites in Yellowstone National Park (Yellowstone) as early as 1990. The NPS assumed the responsibility for and the costs necessary for site cleanup in order to ensure that all abatement measures were promptly taken for any release from these USTs.
3. The Wyoming DEQ is authorized to implement the UST program that is required by federal law. Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §6991c(d)(2) (1999). As part of the UST program, Wyo. Stat. § 35-11-1425 directs the DEQ to collect an annual fee of two hundred dollars (\$200) per underground tank from all owners and/or operators. The DEQ uses the fees to administer the Wyoming storage tank program, under which DEQ pays for the regulation and inspection of underground tanks. In addition, the fees are used to fund corrective actions and to provide financial assurance for the small businessperson.
4. On January 26, 1999, the DEQ issued Notices of Violation and Orders, Docket Numbers 3045-99 and 3046-99, to the NPS for Grand Teton and Notices of Violation and Orders, Docket Numbers 3047-99 and 3048-99, to the NPS for Yellowstone for failure to pay the fees required under Wyo. Stat. § 35-11-1425.
5. The NPS filed appeals to the two orders issued to Grand Teton on February 8, 1999, and filed appeals to the two orders issued to Yellowstone on February 12, 1999.
6. The DEQ and the NPS stipulated to all pertinent facts related to the Orders. The only legal dispute before the Council is the NPS claim that it is immune from payment of the tank fees. The NPS believes the fees are an unreasonable service charge and the fees are in reality a tax that is being assessed against a federal agency. DEQ counters that the fees are reasonable and the federal government has waived immunity in RCRA, 42 U.S.C.A. § 6991f(a) (1992). The NPS states that §6991f(a) does not apply in this circumstance. RCRA states:

Each department, agency, and instrumentality of the executive . . . branch [] of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all . . . State . . . requirements, applicable to such tank, both substantive and procedural, in the same manner and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges . . .

7. The U.S. Supreme Court has addressed the question whether a fee can be assessed against the federal government. In *Massachusetts v. United States*, 435 U.S. 444 (1978), the court used a three-prong test to determine if a fee is a reasonable service charge. A fee is valid if it is non-discriminatory; if it is based on a fair approximation of the costs of the services provided; and if it is not excessive in relation to the benefits provided.
8. Wyo. Stat. 35-11-1425 directs DEQ to collect tank fees on all underground tanks with no exception for any tank owners or operators, including those who conduct their own remediation. It states:

On or before July 1 of each year either the owner or the operator of a tank shall pay a fee to the department of two hundred dollars (\$200.00) per tank owned or operated . . .

9. DEQ collects approximately \$104,000 annually from UST fees and it spends approximately eight million dollars annually for the remediation and administration of Wyoming's UST program. The two hundred dollar tank fee is a reasonable service charge and is not excessive in relation to the services provided.
10. In a more recent case the 8th Circuit Court of Appeals used a broader test to determine if a fee is a reasonable service charge. To determine if a fee was reasonable the Court examined all of the facts and the circumstances of the fee and compared them against the economic circumstances of the case, *U.S. v. City of Columbia*, 914 F.2d 1007 (8th Cir. 1990). Applying this test, it is clear that the services provided by the state, including clean up of a contaminated site, cost the State a great deal of money while the tank owners contribute a mere \$200 per tank per year. The NPS argues that the lopsided nature of this equation makes the fee unreasonable because it is too low and contaminated sites are therefore addressed on a priority basis. This is not the proper application of the case law as the courts clearly find that an unreasonable fee is one that is high when compared to the services rendered. The fact that the least contaminated sites are addressed after those sites that pose a greater public health risk does not make the fee unreasonable. The economic circumstances in the state, including the number of contractors available, mandate a priority system in order to get a considerable number of contaminated sites remediated.

CONCLUSIONS OF LAW

1. The Environmental Quality Council has jurisdiction over the parties to and the subject matter of this proceeding. Wyo. Stat. § 35-11-112.
2. The annual tank fee charged by DEQ for underground storage tanks is non-discriminatory as it is charged to all tank owners equally.

3. The total amount of UST fees collected is only a fraction of the amount spent yearly, and based on the services provided by the State, the UST fees are not excessive or unreasonable when compared to the benefits rendered.
4. The fee charged is a fair approximation of the services provided over time.
5. The UST fees collected are a reasonable service charge and the National Park Service is not exempt from payment of these fees by virtue of sovereign immunity.
6. The orders issued by DEQ should be affirmed.

ORDER

IT IS HEREBY ORDERED that the Notice of Violations and Orders, DEQ Docket Numbers 3045-99, 3046-99, 3047-99, and 3047-99 are hereby AFFIRMED.

DATED this 7th day of June 2001.
FILED JUNE 13, 2001.

Wendy Hutchinson, Chair
Environmental Quality Council
Herschler Building, Room 1714
122 West 25th Street
Cheyenne, WY 82002
Tel: (307) 777-7170
FAX: 307-777-6134