

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

**IN RE HOPPER DISPOSAL FACILITY)
PERMIT APPLICATION) DOCKET 17-5801**

**PETITIONER FREMONT COUNTY SOLID WASTE DISPOSAL DISTRICT
AND
PETITIONER FREMONT COUNTY GOVERNMENT'S
JOINT CLOSING ARGUMENT**

COME NOW, the Fremont County Solid Waste Disposal District (hereinafter "The District") by and through its undersigned counsel, and the Fremont County Government (hereinafter "County"), by and through its undersigned counsel, and hereby submit their closing arguments pursuant to the Council's order of November 15, 2017.

Mike Dimick, dba Hopper Disposal, Inc. filed an application for a Low Hazard Low Volume treatment, processing, storage and transfer facility with the Wyoming Department of Environmental Quality (DEQ). The initial application was filed on March 3, 2017. On July 20, 2017 the DEQ completed its review and determined that the application was complete and technically adequate. (DEQ 3-003). On July 17, 2017 the DEQ notified Mr. Dimick of the review and provided a proposed permit. (DEQ 3-006). Following publication and request for comment, the DEQ received substantial comments in opposition to the issuance of the permit and the matter proceeded to hearing in front of the Council.

APPLICABLE RULES AND REGULATIONS

Chapter 1, Section 1(b)(li) defines what a Low Hazard Low Volume treatment, processing, storage and transfer facility is and sets forth the limits of material that are allowed in such a facility. Subsection (li)(C) also sets forth the site standards for such a facility, including

requirements that it may not occupy any more than 10 acres, it must have a 20-foot buffer zone and must be fenced.

The application process is contained in Chapter 1, Section 2(j) and, pursuant to Chapter 6, Section 2(c), the requirements of the form are that it be signed by the applicant, landowner and any lienholders, that it be accompanied by an original USGS map and contain the information to verify compliance with the Financial Assurance requirements of Chapter 7. This appears to be a conflict in the rules, as site, location and construction standards are required in other sections.

Chapter 6, Section 3(b) includes the location standards for a Low Hazard Low Volume treatment, processing, storage and transfer facility. Subsection (b)(iv) provides that it shall not be located in an area where there is a potential to present a dust or odor problem, subsection (b)(v)(A) prohibits location within 1,000 feet of a dwelling house, unless properly screened, and subsection (C) prohibits location within 1,000 feet of a recreation area unless properly screened.

Chapter 6, Section 4(b) addresses the design and construction standards for a Low Hazard Low Volume treatment, processing, storage and transfer facility. Subsection (iii) requires that there be a minimum of a 10-foot fire lane around the management units and the perimeter. Subsection (iv) requires that all solid waste management units be designed and constructed to contain wastes therein and prevent the migration of contaminants.

Chapter 6, Section 5(b) addresses operating standards for Low Hazard Low Volume facilities. Some of these specifications include confining all wastes to solid waste management units and equipment (subsection (iii)), inclusion of a fire extinguisher and communication system for emergencies (subsection (iv)), an effective litter collection and containment system (subsection (v)), and minimization of dust and odors (subsection (vi)).

Chapter 6, Section 6 speaks to monitoring standards, while Section 7 deals with closure standards.

Chapter 7 addresses the rules and regulations for Financial Assurance. Section 3(e) sets forth the factors to consider in a cost estimate for a third-party contractor to effect proper closure at the most expensive point in the life of the facility. Pertinent to this matter are the following subsections: (I) the size and topography of the site; (V) disposal method and sequential disposal plan; (X) Structures and other improvements to be dismantled and removed; (XII) off-site disposal requirements; and (XIV) a minimum of 15% variable contingent fee.

Finally, Chapter 1, Section 4(a) sets forth the reasons that a permit may be denied. The applicable subsections to this matter are as follows: (i) If issuance would conflict with the policy and purpose of the act; (ii) if the applicant fails to submit the required information; (iii) the facility history indicates continual noncompliance with these rules and regulations; (iv) the application indicates that the facility would not comply with the location, design, construction, operating, monitoring, closure or post-closure standards; and (vii) the applicant, or any partner, executive officers, or corporate directors, has been found civilly or criminally liable for violations of environmental quality or racketeering laws or regulations that constitute evidence that the applicant cannot be relied upon to conduct the operations described in the application in compliance with the act and the rules and regulations.

STANDARD OF REVIEW

This matter is conducted pursuant to the Administrative Procedure Act as a contested case. The standard for review in this case is whether, in issuing the permit, the DEQ acted arbitrarily, capriciously, in a manner that was an abuse of discretion or otherwise not in accordance with the law.

ARGUMENT

The District and County believe that the decision of the DEQ to issue the permit to Mike Dimick dba Hopper Disposal was not in accordance with the law and was arbitrary and capricious and an abuse of discretion. The application and review process were deficient and not in accordance with the legal requirements. Additionally, the DEQ failed to take any steps to ensure compliance with the rules and regulations in that, according to the testimony of Patrick Troxel, he never visited the proposed site and therefore was not knowledgeable as to whether the required location and design standards were being met. Secondly, the financial assurance documentation that was submitted was based upon faulty assumptions by Mr. Dimick, was not verified by Mr. Troxel and did not contain the mandatory minimum variable contingency fee required by the rules and regulations. Finally, the DEQ did not account for any of the applicant's (or applicant's corporate officers') prior violations of the environmental rules when considering the permit.

The timeline of this matter and the testimony at the hearing relating to the same will illustrate that the decision to issue the permit was arbitrary, capricious, an abuse of discretion and not in accordance with the law.

In April of 2016 the EPA investigated the Northern Arapaho Tribe, Mike Dimick, and Hopper Metals for illegal burning and burial of waste on the Wind River Indian Reservation. Mr. Dimick responded to questioning at the hearing by saying that he was not the one that dropped the match. However, he did not deny that he was otherwise involved in the burning and burial of the waste. Mr. Plymale testified that, after that incident, he informed Mr. Dimick that it was illegal to burn municipal solid waste (MSW). The following month Mr. Dimick inquired of

Mr. Troxel about a permit, but did not specify the type and did not file an application at that time.

Later, on November 3, 2016 Mr. Plymale received a complaint of burning of waste at the Hopper Metal facility in Shoshoni. He contacted Mr. Dimick and received permission to enter upon the premises. Mr. Plymale testified that he observed commercially gathered municipal solid waste being collected and burned at the site and photographed the same. (WES 08). Mr. Plymale informed Mr. Dimick of his findings and noted the violations of the rules and regulations. Mr. Dimick testified that Mr. Plymale was granted permission to enter the premises, but now has an unspecified complaint to his doing so on the basis that a violation of the environmental rules was found. On the next day, November 4, 2016, Mr. Dimick contacted Mr. Troxel and indicated that he wished to apply for a permit. He did not specify what he wanted to do, but indicated that he wanted the simplest permit and he wanted to get it as soon as possible. (WES 19). On November 14, 2016 Mr. Plymale conducted a follow-up inspection of the Dimick facility. During the inspection it was observed that there was commercially gathered MSW burning. (WES 10). When alerted to this fact, Mr. Dimick replied that he was burning MSW to reduce the volume to haul and pay for at the disposal site. (WES 10). It was also observed during this inspection that Mr. Dimick had over 1000 tires on the premises. (WES 9).

On December 22, 2016 an additional follow-up inspection was conducted with the Air Quality Division. Evidence of past burning was observed. (WES 11). As a result of these activities a Notice of Violation was issued to Mike Dimick and Hopper Metals. (WES 12). Mr. Dimick was sent a copy of the Notice of Violation. However, Mr. Plymale testified that Mr. Dimick has never submitted a response to the same and a negotiated resolution has not been obtained and the matter has been forwarded to the Attorney General's Office for enforcement.

On March 3, 2017 Mr. Dimick filed his first application for a Low Hazard Low Volume treatment, processing, storage and transfer facility. It only contained the application and a map of the area. Mr. Troxel testified that he reviewed it and responded on March 13, 2017 that it was complete, but corrections needed to be made as it encompassed a 20 acre area and only 10 acres are allowed by the rules. Additionally, he would need to submit documentation for financial assurance.

On March 23, 2017 Mr. Dimick submitted a draft of a financial assurance cost estimate. (WES 4). Thereafter on May 4, 2017 he filed the same financial assurance form with the same information, however it was unsigned, undated and this time it was on the letterhead of Dave's Asphalt, noting Dave Long (the property owner in this matter) as president. (WES 3). This was done to give the impression that Dave's Asphalt, or someone affiliated with them, developed the financial figures. Mr. Dimick testified that he did not personally put it on the letterhead and evaded questioning on what Dave Long did, but ultimately did not dispute that at least the secretary of Dave's Asphalt put the estimate on their letterhead.

There are several deficiencies in the financial estimate submitted. First, it violates the plain and simple mandate of the rules and regulations that there be a 15% variable contingency. Mr. Dimick has placed this under the category of mobilization/demobilization/variables and therefore it is difficult to determine if it is entirely for a contingency. However, in any event it is only a 10% contingency. This is a plain violation of the Chapter 7 rules and regulations.

Additionally, there is faulty information contained in the cost estimate. Mr. Dimick has indicated that there is no charge for disposal of electronic waste, CRT waste, clean wood, acid batteries, used oil and antifreeze. This is based upon the District rules regarding non-commercial disposal of the same. However, Mr. Frey testified that the free disposal is for individuals, and

that commercial operations which gather the recyclable products would be required to dispose of the same on their own and at their own costs. Mr. Frey testified what Hopper Metals would incur recycling costs for the various materials. The actual amounts are in the transcript. The issue is that it would be at a cost to Mr. Dimick (and he testified he agreed with Mr. Frey's cost estimate of the same) and Mr. Dimick has failed to include that in the cost estimate. Therefore, the total amount provided in the cost estimate by Mr. Dimick is not accurate and was never verified by the DEQ.

The Financial Assurance also does not account for demolition and disposal of items as required by the Rules, despite there being buildings located on the Google map. Nonetheless, when Mr. Troxel completed his review, he indicated that the cost estimates were complete and technically adequate. (WES 06). This conclusion is contrary to the law. Based upon this faulty conclusion by Mr. Troxel a bond acceptance was issued by the DEQ. (WES 5).

On August 23, 2017 Mr. Dimick filed what has been labeled as the final application. (WES 1). The application was deemed to be compliant and the advertising period for the permit was commenced. However, the application is deficient and not complete nor in compliance with the rules and regulations. First, as noted above, the Financial Assurance is not accurate nor in compliance with the rules and regulations and their mandates. Secondly, a USGS map is not attached. Instead Mr. Dimick attached a Google map that indicates where materials will be processed and stored, a scale house and a transfer building. While this may seem insignificant, in fact it is material. The map provided does not indicate the terrain nor the topography. These are necessary under Chapter 7 to determine the financial assurance that must be posted.

Additionally, the map does not designate distances to dwelling houses or recreation areas. Therefore, it is impossible to determine whether the location standards will be met. In fact, the

location is within 1,000 feet of dwelling houses and recreation areas. As such, certain requirements must be met, including screening from view. These required items are not reflected on the map provided.

As noted above, the advertisement period was then commenced. On September 23, 2017 Mr. Plymale testified that he received a complaint that Mr. Dimick was starting construction on his site without a permit. He investigated and determined that, in fact, work on the scale had been commenced. He testified that he informed Mr. Dimick that he was not allowed to do so without a permit. He also provided a second Notice of Violation against Mr. Dimick that was issued the day before the hearing in this matter.

Finally, Mr. Frey, the Superintendent of the District testified that Mr. Dimick, and his companies, had violated the District rules and regulations and ethics in government standards. Mr. Frey testified that on December 7, 2015, Mr. Dimick and Hopper Metals had their site access to the Shoshoni landfill revoked for disposing of Municipal Solid Waste at a construction and demolition landfill, failure to pay the fees, and failure to secure his load. (WES 13). He also testified that this was at a time that Mr. Dimick sat on the District Board of Directors and attempted to influence the District workers by his position. On April 19, 2016 the Fremont county Commissioners removed Mr. Dimick from the District Board of Directors for a conflict of interest. (WES 16). His actions also violated the Wyoming Ethics and Disclosure Act, by misusing his position (W.S. § 9-13-103) and participating in decisions in which he had a personal interest (W.S. §9-13-106). On July 6, 2016 Mr. Dimick applied to have his District privileges restored (WES 14) and they were restored on July 18, 2016 (WES 15).

CONCLUSION

(1) NOT IN ACCORDANCE WITH THE LAW

The permit application is not in accordance with the law. Under Chapter 6, Section 2(c)(iv) the application must have attached an original USGS map. The applicant has not done so in this case. He only provided a Google map. The significance is that the information on the required map is absent on the map provided. Secondly, the applicant has not accurately computed the Financial Assurance that is required under Chapter 7. The applicant testified that he developed the cost estimate (not a third party) and then it was placed on a third party's letterhead. Additionally, he has not included any costs for disposal of certain items which he has indicated would be recycled by the District at no cost. In fact, as a commercial facility, this is not the case and the clean-up for which the financial assurance is required will have to pay for the same. The applicant has also failed to include any cost for demolition and disposal of the scale and processing building that are located on the site. Finally, a 15% variable cost contingency is mandated by Chapter 7 and this percentage (even at the amounts calculated by the applicant) is not present. The rules and regulations indicate that this is a must and the administrator is not allowed discretion on this matter.

Additionally, there is no indication in the application of how or if the location and design standards required by the rules and regulations will be met. They are not indicated on the Google map and Mr. Troxel testified that he did not visit the site. Despite the proposed facility being located within 1,000 feet of dwellings and recreation areas, there is no provision for screening. There is also no indication that there will be fire lanes as required by Chapter 6, Section 4(b)(iii). There is no way to determine from the application whether the facility will be designed and constructed to contain wastes within the unit and prevent migration of

contaminants pursuant to Chapter 6, Section 4(b)(iv). There is no indication of whether the solid waste management activities will be conducted in an enclosed building, tank or container, pursuant to Chapter 6, Section 3(b)(v). Finally, absent a visit to the site, the DEQ cannot determine if the proposed facility has the potential to present a dust or odor problem or will constitute a public nuisance. (Chapter 6, Section 3(b)(iv).)

The operating standards contained in Chapter 6, Section 5 were not addressed at all. Applicants are required to plan for solid wastes to be confined to management units and equipment. (Subsection (iii).) A litter collection program must be specified (Subsection (v)) and measures to minimize dust and odors must be outlined. (Subsection (vi).)

Without a site visit, DEQ cannot determine which monitoring standards will apply, pursuant to Chapter 6, Section 6 of the Rules. Without adequate information in the application in addition to a site visit, DEQ cannot make an informed decision to issue a permit in accordance with the law.

As a result, the application is not in compliance with the law. The completeness and technical adequacy review was contrary to the law in the DEQ's determination that the application was complete and technically adequate when the application was neither. The permit form itself does not request adequate information and a site visit is necessary to determine compliance with regulatory requirements. As such, issuance of the permit is not in accordance with the law.

(2) ARBITRARY, CAPRICIOUS AND ABUSE OF DISCRETION

Pursuant to Chapter 1, Section 4, the Director may deny a permit for certain specified reasons. In this case, the Director issued the permit despite ample evidence that it should be denied.

Subsection (a)(ii) of that section provides that a permit can be denied if the applicant fails to submit the required information. As noted above, the application and information submitted with it does not contain all required information.

Subsection (a)(iv) provides that denial is proper if the application indicates that the facility would not comply with the location, design, construction, operating, monitoring, and closure standards as specified in the applicable sections of these regulations. The application does not indicate that the standards will be complied with and most standards are not addressed at all. Despite being within 1,000 feet of dwellings and recreations areas there is no indication of the screening requirement of the rules and regulations. Additionally, despite certain areas being indicated on the Google map, there is no indication of any fire lanes or other site standards required by the rules and regulations. It is arbitrary to approve a permit that does not contain the information required by the Rules and Regulations.

Subsection (a)(vii) indicates that the application can be denied if the applicant, or any partners, executive officers, or corporate directors has been found civilly or criminally liable for violations of environmental quality laws which, in the judgment of the Director, constitute evidence that the applicant cannot be relied upon to conduct the operations described in the application in compliance with the Act and the rules and regulations. Mike Dimick is the president of both Hopper Metals and Hopper Disposal and he signed the application. He has been involved in an EPA investigation on the Wind River Indian Reservation for burning and burial of municipal solid waste. Following the investigation, he was told that MSW cannot be burned. Thereafter, he burned commercially gathered municipal solid waste at his facility in Shoshoni, and continued to do so after being notified again that it was illegal. This resulted in a

Notice of Violation being issued, to which he did not respond, and which is pending in the Office of the Attorney General.

Once the proposed permit was tendered to him and, during the advertisement period of this application, construction was begun on the site. Mr. Dimick has been issued a Notice of Violation for this violation of the rules and regulations. Finally, Mr. Dimick sat on the District Board of Directors. While sitting on the Board he violated the District's own rules and regulations and attempted to influence District staff by his position on the Board. Ultimately, he was removed from the District Board by the Board of County Commissioners for having a conflict of interest. Both of these constitute violations of the Ethics in Government statutes. While there have not been any civil or criminal liabilities determined or levied at this point, there are two pending Notices of Violations that may ultimately result in the levy of fines. Mr. Dimick and his business entities have demonstrated a history of noncompliance, which is strong evidence that he cannot be relied upon to conduct the operation in compliance with the law.

Subsection (a)(i) provides that the Director may deny a permit if issuance would conflict with the policy and purpose of the act. The purpose of the act is to regulate disposal facilities to protect the environment and adjoining landowners. Granting of this application will do the opposite. This is reflected in Mr. Dimick's request for a permit application. He did not say what he wanted to do and inquire of the proper permit. Rather, he e-mailed Mr. Troxel and indicated that he wanted the simplest permit that could be obtained as soon as possible. This is evidence that he did not care what rules may apply to a given permit. Secondly, as provided above he filed the simplest application possible and did not even properly supply the necessary information. His first submittal contained more acreage than allowed. His final application does not contain even the correct map. When he computed his cost estimate for the Financial

Assurance, he did not include all of the costs as specified in the rules and did not even accurately compute a 15% contingency. Additionally, he did not provide information regarding the basic requirements for location standards and design and construction standards.

Finally, as noted above Mr. Dimick has been investigated by the EPA, issued two Notices of Violations from the DEQ, violated the rules of the District, while a Board member, and was ultimately removed from the District Board of Directors for his conduct. Given the above, it is not realistic to anticipate that the applicant will operate the facility in a manner that is consistent with the rules and regulations. This is especially apparent in that the proposed permit provides in condition #1 that he will locate it in compliance with the minimum standards of Chapter 6, Section 3(b), but does not specify what those standards are, that it provided in condition #2 that he will comply with the minimum standards of Chapter 6, Section 4(b), but does not specify what those standards are, and condition #3 provides that he will operate in compliance with the minimum standards of Chapter 6, Section 5(b), but does not specify what those standards are. That the applicant will review and comply with the rules and regulations is unrealistic given his previous actions as set forth herein.

The DEQ cannot properly issue a permit without determining that the requirements of the Rules will be met. This is impossible without a completed application outlining a plan for regulatory compliance, including items such as dust, odor and litter mitigation, and proper operating, screening and fire control measures. It is also impossible without a site visit to determine preliminary compliance with the Rules, as well as a determination of which monitoring standards will be necessary. Issuing a permit without this information is arbitrary and capricious.

WHEREFORE, Objectors, Fremont County Government and Fremont County Solid Waste Disposal District, pray that the Council determine that the decision of the Director was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law in issuance of the permit to the applicant and that the Council remand the matter to the Director with direction to deny the same.

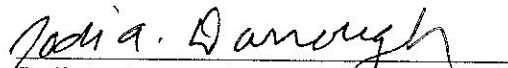
DATED this 28th day of NOVEMBER, 2017.

Fremont County Solid Waste
Disposal District, Objector/Petitioner



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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of November, 2017, I served a copy of the foregoing District's closing argument by electronic mail to the following:

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