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

**IN RE HOPPER DISPOSAL FACILITY            )  
PERMIT APPLICATION                        )     Docket 17-5801  
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**DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
CLOSING ARGUMENT**

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The State of Wyoming, Department of Environmental Quality ("Department"), Solid and Hazardous Waste Division ("Division"), through its undersigned counsel, hereby files this closing argument.

**I. Introduction**

This contested case arises from substantial written objections submitted on Hopper Disposal's application for a low-volume, low-hazard solid waste transfer, treatment, and storage facility (referred to herein as a "LH/LV transfer station"). Wyo. Stat. Ann. § 35-11-502(k) through (n); Wyo. Solid Waste Rules & Regulations (Solid Waste Rules), ch. 1, § 2(j)(v). LH/LV transfer station permit applications contain only three parts: an application form, a map, and a financial assurance estimate. Solid Waste Rules, ch. 6, § 2(c). Under the Wyoming Environmental Quality Act (the Act), when the Department receives substantial written objections on an application for a LH/LV transfer station permit, the Environmental Quality Council (the Council) must hold a

public hearing, conducted as a contested case hearing, and issue findings of fact and a decision on the proposed permit. Wyo. Stat. Ann. § 35-11-502 (k) through (n). This hearing revealed that the Department accepted a financial assurance estimate that failed to include a required contingency fee. It also relied on the District's website's statements concerning the availability of free recycling that the Department discovered for the first time at this hearing would not actually be available. These missteps may be easily corrected. The Department asks that the Council find that the Department did not act arbitrarily or capriciously and that the permit application is technically adequate, except that the permit should not issue without a condition requiring an immediate bond review to allow the Department to correct the erroneous financial assurance estimate.

## **II. Relevant Evidence**

At this hearing, District Supervisor Patrick Troxel testified for the Department to explain the LH/LV transfer station application process and to discuss the Hopper Disposal permit application. (Tr. at 30-85). Mr. Troxel explained that LH/LV transfer station applications are bare-bones because the facilities themselves are very small and narrowly defined. (Tr. at 32; Tr. at 70-74).

Mr. Troxel noted that Wyoming solid waste regulations technically require LH/LV transfer station applications to include a "USGS map," but explained that he has not seen USGS maps in permit applications "for a very long time." (Tr. at 75-76). He stated that other map sources, such as Google Earth, are "quite frankly, better maps to show us where something is than a USGS map." (*Id.*). Mr. Troxel explained that alternative maps are acceptable "provided they give [the Department] the kind of detail that" it needs to determine exactly where the facility is. (Tr. at 76).

Mr. Troxel also discussed the financial assurance requirements for LH/LV transfer stations, explaining that financial assurance is meant to allow the Department to "clean up a facility at ...

the worst-case scenario.” (Tr. at 35-36). Mr. Troxel explained that Hopper Disposal’s financial assurance estimate assumed that several waste streams could be recycled for free at Fremont County Solid Waste Disposal District (“District”) facilities under their recycling program, and that he checked the District website to confirm that assumption. (Tr. at 51). In response to questions from the Council, Mr. Troxel readily agreed that the Department would not “have any problem” amending the financial assurance estimate to correct any errors with the estimate, assuming the Council found the rest of the application to be adequate. (Tr. at 69).

District Superintendent Andrew Frey testified about the president of Hopper Disposal’s past business and his concerns with the permit application’s financial assurance estimates. (Tr. at 120-36). Mr. Frey testified that even though the District’s website indicates that the District accepts certain waste streams for free for recycling purposes, it has been the District’s “practice” not to accept such waste streams from commercial generators. (Tr. at 125-26). That practice was not apparent or known to the Department prior to Mr. Frey’s testimony at this hearing.

Scott McFarland testified about his concerns, and the concerns of nearby landowners, regarding Hopper Disposal’s ability to safely operate the facility. (Tr. at 137-56). The Department appreciates hearing the concerns of nearby landowners, but these concerns are not relevant to the specific requirements of the permit application or the issues the Council must consider. Thus, the Department will not discuss these concerns here, except to reiterate that LH/LV transfer stations are narrowly defined and the Department has the authority to enforce violations of the Act, including revoking permits for continual noncompliance. Solid Waste Rules, ch. 1, § 4(b).

### **III. Argument**

The Council has the necessary information before it to decide that the permit should be issued with an additional condition concerning financial assurance. The objections raised by the parties do not justify denying the permit application.

LH/LV transfer station applications contain only three parts. Solid Waste Rules ch. 6, § 2(c). First, a person with authority to bind the applicant must submit a signed permit application form. *Id.* § 2(c)(i). Second, the applicant must submit a map identifying the facility's location. *Id.* § 2(c)(iv). Finally, the applicant must submit information verifying that the applicant will comply with financial assurance requirements. *Id.* § 2(c)(viii); *see also* Solid Waste Rules ch. 7.

No party argued that the permit application form required by the Solid Waste Rules was inaccurate or incomplete. DEQ Exh. 1. The Fremont County Commissioners argued that Hopper Disposal submitted a non-USGS map, and both the Fremont County Commissioners and the District argued that the financial assurance estimate Hopper Disposal submitted was insufficient because the estimate relied on assumptions about the District's recycling policy that were incorrect. (Tr. at 54–56; Tr. at 51–54). Neither of these arguments prevents the Council from issuing the permit application with an appropriate condition.

First, it is true that the map Hopper Disposal submitted was not a USGS map, as specifically spelled out in the Solid Waste Rules. DEQ Exh. 2; (Tr. at 54–56); Solid Waste Rules ch. 6, § 2(c)(iv). As an aside, while the Council's questions implied that the rules require a USGS *topographic* map, the rule merely requires a "USGS map." (Tr. at 75); Solid Waste Rules ch. 6, § 2(c)(iv). In any event, the Department has long permitted applicants to use alternative maps which are easier for the applicant, the Department, and the public to acquire and use. (Tr. at 75–76). This practice ensures that the policy behind the regulation is met in a manner that is more efficient for the applicant and the Department. No concern was raised at the hearing that the map

was inaccurate. Indeed, as counsel for the Fremont County Commissioners conceded in a question to Mr. Troxel, this violation is merely “technical.” (Tr. at 55). The Department agrees that accepting a non-USGS map does not comply with the regulation, but doing so was not arbitrary or capricious.

Generally speaking, Wyoming agencies must follow their own rules and regulations. *Northfork Citizens for Responsible Development v. Bd. of County Comm’rs*, 2010 WY 41, ¶ 27, 228 P.3d 838, 848 (Wyo. 2010). However, federal courts, applying the analogous federal Administrative Procedure Act (APA), have recognized that agencies may deviate from their own regulations, procedures, and precedents if they “provide a rational explanation for their departures” such that the agency action is not arbitrary or capricious. *City of Colo. Springs v. Solis*, 589 F.3d 1121, 1132 (10th Cir. 2009); *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1169 (10th Cir. 1986). “In situations where the Wyoming Administrative Procedure Act (WAPA) contains provisions similar to those of the federal Administrative Procedure Act,” the Wyoming Supreme Court has deemed federal caselaw to be persuasive authority. *Mountain Reg’l Servs. v. State ex rel. Dep’t of Health*, 2014 WY 69 ¶ 9 n.2, 326 P.3d 182, 184 n.2 (Wyo. 2014). Here, both the WAPA and the APA provide judicial review of arbitrary and capricious agency action. 5 U.S.C. § 706(2)(A); Wyo. Stat. Ann. § 16-3-114(c)(ii)(A). Both the Wyoming Supreme Court and the federal courts have interpreted that to mean that agencies must follow their own regulations. *Northfork Citizens for Responsible Development*, 2010 WY 41, ¶ 27; *City of Colo. Springs*, 589 F.3d at 1132. The Wyoming Supreme Court has not yet squarely ruled on the issue of whether an agency may provide a common-sense, rational explanation for its departure from its own regulation. But in this case, where the deviation affects no party’s rights, the Wyoming Supreme Court would likely look to

persuasive federal authority and hold that it was not arbitrary or capricious for the Department to accept a better, more convenient map.

The Department's deviation from the regulation is rational. The requirement that applicants provide a map of the proposed facility to the Department exists, quite simply, to ensure that the Department knows where the facility will be located. (Tr. at 76). As Mr. Troxel explained, other map sources, such as Google maps, are just as capable as USGS maps in providing the Department with that information. (Tr. at 75-76). Accepting an alternative map that provides the same information as the map specified by the Department's regulation was not arbitrary or capricious.

Second, all parties agree that the financial estimate Hopper Disposal submitted was inaccurate and must be adjusted. DEQ Exh. 3. Mr. Troxel relied on statements on the District's website which described a recycling program for e-waste, used motor oil, and used antifreeze and which would theoretically take any such waste from the Hopper Disposal facility for free. (Tr. at 51). The District's Superintendent, Mr. Andrew Frey, testified that as "a practice," the District would not accept such commodities from commercial operators such as Hopper Disposal. (Tr. at 124-26). Furthermore, the Department neglected to ensure that the financial assurance estimate included a 15% contingency fee. (Tr. at 52-54). The Solid Waste Rules require that financial assurance for solid waste facilities include a 15% contingency fee to cover closure costs. Solid Waste Rules ch. 7, § 3(e)(i)(B)(XIV). Thus, before work may begin, Hopper Disposal must adjust the financial assurance estimate it submitted to the Department and increase the amount of the bond the Department has already approved.

This miscalculation is not a fatal error, and can be easily corrected. The Council may correct the financial assurance issue by making an immediate bond review a condition of the permit. The Solid Waste Rules provide that operators must provide the Department with revised

closure cost estimates every four years. Solid Waste Rules ch. 7, § (3)(e)(i)(C)(II). As part of a decision to grant the permit application, the Council may decide to start this process immediately. The Council may order Hopper Disposal to submit a new financial assurance estimate, taking into account the unavailability of free recycling at District facilities, and subject to the Department's review. Hopper Disposal and the Department acted in good faith in relying on available public information, and should not be forced to start this process over.

As a final matter, the Fremont County Commissioners argued that the application was insufficient because it did not contain enough information to ensure that the facility would comply with location standards. (Tr. at 11–12). LH/LV transfer stations are subject to specific location standards. Solid Waste Rules ch. 6, § 3(b). However, the Department's regulations do not require applicants seeking a LH/LV transfer station permit to submit information necessary to verify that the proposed facility will comply with those location standards. *See id.* § 2(c). Therefore, the Council should not consider the Solid Waste Rules' location standards in its decision. By asking this Council to do so, the Fremont County Commissioners would have the Council consider an analysis of location standards at an inappropriate stage of the process. The permit application process only expressly requires three pieces of information, and nothing more.

In the context of LH/LV transfer stations, these two analyses are independent. Because of the narrow definition of LH/LV transfer stations and sparse requirements for LH/LV transfer station permit applications, the Department must consider location standards independently, after a permit is issued. As Mr. Troxel testified, the Department specifically informs applicants that the location standards exist and that a permit does not allow a facility to operate in spite of the location standards. (Tr. at 45–46; 81–83.) The Department inspects facilities to ensure that they comply with location standards and other requirements both as a matter of course and in response to

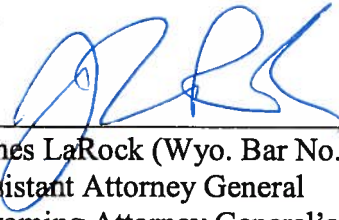
complaints. Indeed, the Department responded to a complaint that Hopper Disposal was beginning construction before receiving a permit at this very site and ensured that Hopper Disposal ceased construction. (Tr. at 94–96); WES Exh. 20. Before Hopper Disposal will be permitted to operate this facility, it must comply with the location standards. This will include, among other factors, screening the facility from view.

#### **IV. Conclusion**

Applications for LH/LV transfer stations are bare-bones—as the Legislature intended when it specifically separated LH/LV facilities from other types of facilities. Applicants need only submit a form, a map, and a financial assurance calculation. In this case, the Department did not err in accepting Hopper Disposal’s form, map, or financial assurance calculation, though the financial assurance calculation contains an error that needs to be corrected. The Department reviewed the financial assurance estimate and confirmed assumptions made about the availability of free recycling in the estimate by referring to the District’s website. The Department only discovered at this hearing that those assumptions do not reflect the District’s “practice,” and it would be unfair to force the applicant and the Department to start over when this error can be easily corrected through a permit condition. The Department asks that the Council find that the Department did not act arbitrarily or capriciously and that the permit application is technically adequate, except that the permit should not issue without a condition requiring an immediate bond review to allow the Department to correct the erroneous financial assurance estimate.



Dated this 29th day of November, 2017.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of November, 2017, a copy of the foregoing document and the attachments thereto was served electronically on the following:

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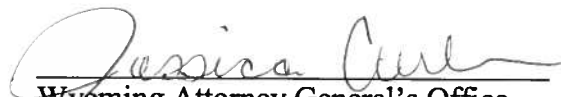
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