

**FILED**

**MAR 14 2008**

Terri A. Lorenzon, Director  
Environmental Quality Council

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

IN RE: THE FINAL DETERMINATION )  
OF REIMBURSEMENT OF FUNDS TO ) Docket No. 07-3216  
LINCOLN COUNTY LANDFILLS )

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
RESPONSE TO LINCOLN COUNTY'S MOTION FOR SUMMARY JUDGMENT

Respondent Wyoming Department of Environmental Quality (DEQ), pursuant to the Wyoming Environmental Quality Council's (EQC) January 24, 2008 Status Conference Order, hereby responds to Lincoln County's motion and memorandum for summary judgment in the above-captioned matter.

***Grounds for Lincoln County's Motion for Summary Judgment***

Petitioner Lincoln County's motion asks for summary judgment directing the DEQ to "compensate the Lincoln County Landfill for the Kemmerer and Cokeville well projects in the sum of \$1,053.90," because WYO. STAT. ANN. § 35-11-522 "require[s]" the Director of the DEQ "to approve the grant to Lincoln County once the [Advisory] Board had approved it." Pet'r's Mot. at 3. Lincoln County identifies the grounds for its motion to be that the statutory language in WYO. STAT. ANN. § 35-11-522 which "mandate[s]" the DEQ Director to make grants "in consideration of the recommendations provided by the water and waste advisory board . . . . appears to make the grant decision non-discretionary for the director and the Department." Pet'r's Mot. at 2.

Where there are no genuine issues of material fact, summary judgment concerns strictly application of the law. *Board of County Comm'rs of County of Laramie v. City of Cheyenne*, 2004 WY 16, ¶8; 85 P.3d 999, 1002 (Wyo. 2004). Respondent DEQ does not dispute that as a matter of law WYO. STAT. ANN. § 35-11-522(c) authorizes the Water and Waste Advisory Board (Advisory Board) to "provide recommendations for grant awards to the director" of the DEQ, or the facts that:

- the Advisory Board provided a recommendation that Lincoln County be awarded grants for "the Kemmerer and Cokeville well projects in the sum of \$1,053.90;" and
- the DEQ Director made a final decision that the referenced projects were not eligible for such grants.

Respondent DEQ disputes Lincoln County's contention of law that statutory language in WYO. STAT. ANN. § 35-11-522 "require[s]" the DEQ Director "to approve the grant to Lincoln County once the [Advisory] Board had approved it." Pet'r's Mot. at 3. DEQ's Response incorporates the discussion regarding statutory construction in the Memorandum in Support of DEQ's Motion for Summary Judgment (pp.5-6, 8-9).

#### ***Statutory Role of the Water and Waste Advisory Board***

Whereas the EQC was created as an independent, "separate operating agency of state government" (WYO. STAT. ANN. § 35-11-111(a)), the Advisory Board was created "within the [DEQ]." WYO. STAT. ANN. § 35-11-113(a). The general powers and duties of the Advisory Board are all recommendatory and advisory. WYO. STAT. ANN. § 35-11-114. With respect to the municipal landfill monitoring grant program at issue here, the role of the Advisory Board is also recommendatory. WYO. STAT. ANN. § 35-11-522(c).

The Legislature describes the respective roles of the DEQ, the Advisory Board, and the DEQ Director in the “three-step process” (Pet’r’s Mem. at 2) for awarding grant funding. The DEQ shall “*provide recommendations* for grant funding to the [Advisory Board].” WYO. STAT. ANN. § 35-11-522(b) (*emphasis added*). The Advisory Board shall “*provide recommendations* for grant awards to the director” of DEQ. WYO. STAT. ANN. § 35-11-522(c) (*emphasis added*). The Director shall “award grants in consideration of recommendations provided by the [Advisory Board].” WYO. STAT. ANN. § 35-11-522(d).

Although the statute describes the nature of both the DEQ’s role and the Advisory Board’s role as being to “provide recommendations,” Lincoln County argues that “the [Advisory] Board is not bound by the recommendations of the Department,” and that the recommendations of the Advisory Board are “mandate[s]” to the Director. Pet’r’s Mot. at 2. Lincoln County construes these statutory terms to mean that “[a]s a matter of law, if the [Advisory] Board recommends the grant, the Department was required to award it.”<sup>1</sup> Pet’r’s Mem. at 1-2, 9.

Lincoln County’s interpretation of WYO. STAT. ANN. §§ 35-11-522(c) and (d) is not consistent with the plain language in the statutes. As used in the context of WYO. STAT. ANN. § 35-11-522(c), the term “recommendation” means “an action which is advisory in nature rather than one having any binding effect.” Black’s Law Dictionary 1143-1144 (5th Ed.1979). The unambiguous language in WYO. STAT. ANN. § 35-11-522(c) thus limits the Advisory Board’s role to making non-binding recommendations for grant awards to the DEQ Director. If the

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<sup>1</sup> Lincoln County refers alternately to the “Department” and the Director in discussing WYO. STAT. ANN. § 35-11-522(d) (Pet’r’s Mem. at 2), but that subsection specifically refers only to the DEQ Director.

Legislature had intended for the Advisory Board to “mandate” or make decisions on, rather than “provide recommendations for,” grant awards, then WYO. STAT. ANN. § 522(c) would say so.

As used in the context of WYO. STAT. ANN. § 35-11-522(d), the term “consideration” means “taking into account.” *Webster’s Third New International Dictionary* 484 (1986). The plain language in WYO. STAT. ANN. § 35-11-522(d) merely requires the DEQ Director to take the Advisory Board’s recommendation into account when awarding a grant, but does not require the DEQ Director to award a grant solely because the Advisory Board has recommended that he do so.

Viewed together, WYO. STAT. ANN. §§ 35-11-522(c) and (d) clearly define the roles of the Advisory Board and the DEQ Director in the grant award process. Nothing in the language of either subsection requires the DEQ Director to automatically approve the Advisory Board’s grant recommendations. Accordingly, Lincoln County’s argument on this issue is not sustainable as a matter of law.

Lincoln County further argues that the phrase “in consideration of” is an idiom meaning “in view of, on account of” or “in return for,” but because there is no exchange between the DEQ Director and the Advisory Board, “the second meaning is obviously incorrect.” Pet’r’s Mem. at 4. Lincoln County relies on four cases for that conclusion. *Id.* at 4-6.

The first case Lincoln County cites (*Id.* at 4-5) involves the State of Wyoming’s issuance of a patent conveying property to another party “in consideration of full payment,” which in that context means “in return for” (the “obviously incorrect” second meaning). *Bentley v. Director of Office State Lands and Investments*, 2007 WY 94, ¶ 10, 160 P.3d 1109, 1113 (Wyo. 2007). The second case cited (Pet’r’s Mem. at 5) involves the grant of an open space easement “in exchange

for" specified "consideration," in which context "in consideration of" again means "in return for." *Wilson v. Board of County Comm'rs of Teton County*, 2007 WY 42, ¶¶ 20-21, 153 P.3d 917, 923 (Wyo. 2007). In the third case (Pet'r's Mem. at 5), the court used the phrase "in consideration of" in explaining why certain circumstances in addition to Amoco's failure to present cogent argument or cite pertinent authority were factors in the court's decision on a particular issue. *BP America Production Co. v. Dep't of Revenue*, 2006 WY 27, ¶ 24, 130 P.3d 438, 466 (Wyo. 2006). In the fourth case (Pet'r's Mem. at 5), the court quotes a letter from the Wyoming Public Service Commission (Commission) to Basin Electric Power Cooperative (Basin), in which the Commission uses the phrase "in consideration of" to paraphrase the question on which Basin was seeking the Commission's opinion. *Bridle Bit Ranch Co. v. Basin Elec. Power Co-op.*, 2005 WY 108, ¶ 10, 118 P.3d 996, 1001 (Wyo. 2005). The 4 cases Lincoln County cites (Pet'r's Mem. at 4-6) do not compel construing the words "in consideration of" in WYO. STAT. ANN. § 35-11-522(d) to mean the Advisory Board's "recommendation" is a mandatory directive that is binding on the Director.

#### *Advisory Board Hearing Not a Contested Case*

Lincoln County claims that the "public hearing" before the Advisory Board referred to in WYO. STAT. ANN. § 35-11-522(c) is an evidentiary hearing subject to the contested case rules under WYO. STAT. ANN. § 16-3-107 of the Wyoming Administrative Procedure Act (WAPA), from which the DEQ "can appeal [under] W.S. 16-3-114." Pet'r's Mem. at 6-7. That claim is not accurate. A "hearing" is a contested case under the WAPA only "if a *trial type* hearing is 'required by law.'" (*Emphasis added.*) *In re Board of County Comm'rs, Sublette County v. State Board of Equalization*, 2001 WY 91, ¶13, 33 P.3d 107, 112 (Wyo. 2001).

Where the statute expressly provides that the contested case procedures of the WAPA are required for proceedings under one section, but makes no such reference in another section, the requirement for a contested case hearing cannot be read into the latter. *Sublette County*, 2001 WY 91 at ¶15, 33 P.3d at 113. The Wyoming Environmental Quality Act (WEQA) expressly requires a contested case hearing “conducted in accordance with the Wyoming Administrative Procedure Act” for certain matters before the EQC. WYO. STAT. ANN. § 35-11-112(a)(iii),(iv),(vi) and (f). The WEQA contains no requirements for WAPA contested case procedures in a “public hearing” preceding grant award recommendations by the Advisory Board under WYO. STAT. ANN. § 35-11-522(c).

Unlike the legislation that created the EQC, there is nothing in the legislation that created the Advisory Boards which indicates a role for them as the hearing body in contested cases or expressly references the WAPA. WYO. STAT. ANN. §§ 35-11-112(a),(f), 35-11-114. The DEQ, which as an “agency” is not a “person” as defined in WYO. STAT. ANN. § 16-3-101(b)(i) and (vii), is not a “person” entitled to judicial review under WYO. STAT. ANN. § 16-3-114(a). *Sublette County*, 2001 WY 91 at ¶9, FN4, 33 P.3d at 111 FN4; *Brandt v. TCI Cablevision of Wyoming*, 873 P.2d 595, 597 (Wyo. 1994). If, as Lincoln County claims, the Advisory Board conducts a contested case hearing on a DEQ grant recommendation, which is then subject to “appeal” (*judicial review*) under WYO. STAT. ANN. § 16-3-114 (Pet’r’s Mem. at 7), there would be no place in the process for review by the EQC.

***Grant Eligibility Under WYO. STAT. ANN. §35-11-521(b)(iii)***

Lincoln County’s contention (Pet’r’s Mem. at 8-9) that adding wells to upgrade existing monitor systems which already meet standards established by the DEQ are eligible for grant

funding under Wyo. Stat. Ann. § 35-11-521(b)(iii) is wrong as a matter of law. Lincoln County does not dispute that, as acknowledged in WYO. STAT. ANN. § 35-11-521(b)(iii), the DEQ is authorized to establish such standards, but argues that because the statute says “to meet standards,” not *minimum* standards, landfills are eligible for grants “to meet more than the Department’s minimum standards.” *Id.* at 8.

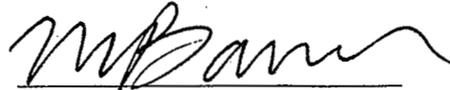
Lincoln County objects that the DEQ is reading the word “minimum” into the statute. *Id.* at 8. As a practical matter, violation of a standard means failure to meet the minimum standard that applies. Compliance with a standard requires meeting the minimum standard that applies. For example, “[t]o be in compliance with state and federal water-quality laws” requires “meet[ing] certain *minimum-quality standards*.” (*Emphasis added.*) *Thayer v. City of Rawlins*, 594 P.2d 951, 952 (Wyo. 1979). Lincoln County itself is reading the words “more than” into the statute by arguing that the language in WYO. STAT. ANN. § 35-11-521(b)(iii) allows *grants* to upgrade existing landfill monitor systems to more than “meet” standards established by DEQ. *Id.* at 8.

Adding wells does not constitute “upgrading existing monitor systems *to meet* standards,” if the existing monitor systems *already meet* standards. (*Emphasis added.*) The Advisory Boards do have a role in *recommending* standards under WYO. STAT. ANN. § 35-11-114(b) (*Id.* at 8), but final adoption of such standards is the role of the EQC (WYO. STAT. ANN. § 112(a)(i)&(ii)), and determinations about what does or does not meet those standards are made by the DEQ pursuant to WYO. STAT. ANN. § 35-11-501(b), and not by the Advisory Boards. This issue is addressed further in Respondent’s Memorandum in Support of DEQ’s Motion for Summary Judgment (pp.6-9).

*Conclusion*

For the reasons set forth above, although there are no genuine issues of material fact, Petitioner Lincoln County is not entitled to summary judgment as a matter of law.

DATED this 14th day of March, 2008.



Mike Barrash  
Sr. Assistant Attorney General  
123 Capitol Building  
Cheyenne, Wyoming 82002  
(307) 777-6946

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSE TO LINCOLN COUNTY'S MOTION FOR SUMMARY JUDGMENT was served by United States mail, first class postage prepaid, and by email or facsimile transmission this 14th day of March, 2008, addressed as follows:

Mr. Eric Phillips  
Mr. Joseph Cole  
Lincoln County Attorney  
421 Jefferson St., Suite 201  
Afton, Wyoming 83110  
Phone: 307-885-0164  
[ephillips@lcwy.org](mailto:ephillips@lcwy.org)  
[jcole@lcwy.org](mailto:jcole@lcwy.org)



Wyoming Attorney General's Office