

**FILED**

**JAN 16 2018**

Jim Ruby, Executive Secretary  
Environmental Quality Council

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

|                                |   |                            |
|--------------------------------|---|----------------------------|
|                                | ) | <b>DOCKET 17-5801</b>      |
| IN RE HOPPER DISPOSAL FACILITY | ) |                            |
| PERMIT APPLICATION             | ) | <b>FINDINGS OF FACT,</b>   |
|                                | ) | <b>CONCLUSIONS OF LAW,</b> |
|                                | ) | <b>AND ORDER</b>           |

**I. APPEARANCES**

The final contested case hearing in this matter occurred before the Environmental Quality Council on November 9, 2017, in Lander, Wyoming.

Present for the Council were Council member and Hearing Officer Dr. David Bagley, Chairman Meghan Lally, and Council member Tim Flitner. Council members Rich Fairservis, Nick Agopian, and Deborah Baumer were not in attendance, however, following the hearing, they listened to all the testimony and considered all the evidence, by either watching the video recording of the hearing or reading the transcript, and considering all the exhibits.

Present at the hearing for Hopper Disposal was its president, Mike Dimick. Present at the hearing for the Wyoming Department of Environmental Quality (DEQ) was James LaRock from the Wyoming Attorney General's Office.

Appearing at the hearing for the Fremont County Commissioners was Jodi A. Darrough from the Fremont County Attorney's Office. Present at the hearing for the Fremont County Solid Waste Disposal District (District) was Rick L. Sollars, attorney at law. Appearing at the hearing for Wyoming Waste Systems was Bruce Leven. Present at the hearing for certain interested adjacent landowners and tenants (*see* WES Exh. 21) was Scott G. McFarland. (The Fremont County Commissioners, the District, Wyoming Waste Systems, and the adjacent landowners and tenants may be collectively referred to as "the objectors").

Testifying on behalf of the DEQ was Patrick J. Troxel. Testifying for the District was Charles A. Plymale and Andrew D. Frey. Testifying on behalf of the adjacent landowners and tenants was Scott G. McFarland. Testifying on behalf of Hopper Disposal was Mike Dimick.

The following exhibits were admitted into evidence: DEQ - DEQ exhibits 1 through 4; Hopper Disposal – DIM exhibit 1; and Fremont County Solid Waste Disposal District - WES exhibits 1 through 21.

The Council, having heard and considered all the evidence in this case and being fully advised, pursuant to the Wyoming Administrative Procedure Act, Wyo. Stat. Ann. § 16-3-110, unanimously (6-0)<sup>1</sup> finds and concludes as follows:

## **II. JURISDICTION**

This case arises from filed written objections to the DEQ's proposed permit issued to Hopper Disposal to operate a low hazard/low volume transfer, treatment, and storage facility in Fremont County. Under Wyoming Statute § 35-11-502(k) and (m), if substantial written objections to a proposed permit are filed, a contested case hearing before the Council is required. In this case, substantial written objections to the issuance of the proposed permit were filed by several interested persons necessitating a contested case before the Council.

## **III. STATEMENT OF THE CASE/ISSUES AND CONTENTIONS**

On March 3, 2017, Hopper Disposal applied to the DEQ for a permit to operate a low hazard/low volume transfer, treatment, and storage facility located in Fremont County. After reviewing the application and subsequent submissions and revisions from Hopper Disposal, the

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<sup>1</sup> During the contested case and deliberations, the Council only had six members because it had one vacancy.

DEQ, in July 2017, issued to Hopper Disposal a proposed permit to operate a low hazard/low volume facility concluding that the permit application complied with the Environmental Quality Act and the DEQ's Solid Waste Management rules. Following public notice of the proposed permit, the DEQ received substantial written objections contesting the issuance of the proposed permit. The issue before the Council is whether the objectors have met their burden of proof by presenting sufficient evidence to justify reversal of the issuance of the proposed permit.

#### IV. FINDINGS OF FACT

1. In May 2016, Hopper Disposal first approached the DEQ about the possibility of applying for a permit to operate a low hazard/low volume facility in Fremont County. *Transcript – Troxel testimony, pp. 34, 41.*

2. Hopper Disposal subsequently submitted its initial permit application to the DEQ to operate a low hazard/low volume facility on March 3, 2017. *Transcript – Troxel testimony, p. 34; DEQ Exh. 1-003 -014.* The application was signed by both the operator, Mike Dimick for Hopper Disposal, and the landowner, David Long. *DEQ Exh. 1-003 -004.*

3. The DEQ requires an applicant for a low hazard/low volume facility permit to complete a permit application form and provide a location map and an adequate financial assurance. *Transcript – Troxel testimony, p. 32; DEQ Exh. 3-003 -014.*

4. Low hazard/low volume facility permit applications are bare bones compared to other types of facility permit applications because low hazard/low volume facilities are very small in nature and because they have less potential for adverse impacts. *Transcript – Troxel testimony, p. 32.*

5. After receiving the initial application, the DEQ determined that issues existed with the application because certain things were incomplete. *Transcript – Troxel testimony, p. 34.*

6. Initially, the application stated that the total acreage for the proposed facility was twenty acres making it too large to qualify for a low hazard/low volume permit. *Transcript – Troxel testimony, pp. 34-35; DEQ Exh. 1-003.*

7. The DEQ eventually worked through its issues with Hopper Disposal. *Transcript – Troxel testimony, p. 35; DEQ Exh. 3-001 -002.* As a result, Hopper Disposal provided DEQ with revisions and additions which were received around June 17, 2017. *DEQ Exh. 3-001.*

8. In July 2017, the DEQ completed its review of the application and subsequent submissions. Based upon its review, the DEQ determined that the application was technically adequate and complete. *DEQ Exh. 3-003 -009; WES Exhs. 06 & 07.*

9. Following the DEQ's review of the permit application, the DEQ issued a draft proposed permit. *Transcript – Troxel testimony, p. 40; DEQ Exh. 3-006 -009; WES Exh. 07.*

10. The proposed permit contained six conditions. *Transcript – Troxel testimony, pp. 44-46; DEQ Exh. 3-007 -008.* The conditions require Hopper Disposal to locate, design, construct, operate, and close its low hazard/low volume facility in accordance with chapter 6 of the DEQ's Solid Waste Management rules. *DEQ Exh. 3-007.* The proposed permit also listed the types and quantities of allowable wastes and specified that the "on-site septic system shall not be used to receive wash down water from the facility floor or from the wash down of any equipment. The septic system must be properly permitted by Wyoming's DEQ Water Quality Division." *DEQ Exh. 03-007 -008.*

11. On August 11, 2017, the DEQ sent a letter to Hopper Disposal explaining that certain tasks needed to be completed before the final permit could be issued. The DEQ required that Hopper Disposal submit a new updated permit application clarifying that the facility size would be seven acres instead of twenty acres as stated in the initial application. The DEQ also required that Hopper Disposal comply with the necessary public notice requirements. *DEQ Exh. 3-001 -002.*

12. Following the DEQ's August letter, Hopper Disposal complied with the required public notice requirements. *DEQ Exh. 4.*

13. On September 11, 2017, the DEQ received from Hopper Disposal a revised low hazard/low volume permit application. The revised application stated that the facility size would be seven acres. *DEQ Ex. 1-001 -002; WES Exh. 01.*

14. As part of its application, Hopper Disposal submitted a financial assurance that was on the letterhead of Dave's Asphalt, Co. *Transcript – Troxel testimony, p. 35; DEQ Exh. 1-007 -014.*

15. Hopper Disposal submitted the financial assurance in the form a cash bond in the amount of \$11,350. The cash bond was accepted by the DEQ director. *Transcript – Troxel testimony, p. 37; DEQ Exhs. 1-007 -008 & 2-001; WES Exh. 05.*

16. The purpose of a financial assurance is to assure that the DEQ has the funds to properly clean up the facility if the operator went out of business and failed to properly clean up the site. *Transcript – Troxel testimony, pp. 35-37.*

17. As part of its financial assurance, Hopper Disposal assumed that the District would accept its recycling matter at no charge, however, the District will not. *Transcript – Troxel*

*testimony, p. 51; Frey testimony, p. 125.* The District will also not accept certain commodities such as used motor oil and antifreeze. Further, the District would only accept electronic and CRT waste with District board approval. *Transcript - Frey testimony, pp. 125 - 126.*

18. As a result, the financial assurance is inaccurate. *Transcript – Troxel testimony, p. 51.*

19. A financial assurance must also contain a 15% contingency fee. *Transcript – Troxel testimony, p. 52.*

20. Hopper Disposal's financial assurance did not contain a 15% contingency fee line item. The financial assurance contained a line item titled "Mobilization/Demobilization/Variables – Variance Cost of Expenditures - \$1,000.00." It is unknown if this line item represents a contingency fee. *DEQ Ex. 1-007 -008; Transcript – Troxel testimony, pp. 52 – 53.*

21. If the \$1,000.00 line item represents a contingency fee, it is less than 15% of the total costs—it is short by \$552.50. *Transcript – Troxel testimony, p. 53.* A 15% contingency fee of the total costs would be \$1,552.50.

22. As part of its application, Hopper Disposal also submitted maps of the proposed location—the maps were from Google Earth. *DEQ Exh. 1-005 -006; WES Exh. 02.* The maps were not USGS map as required by the DEQ's Solid Waste Management rules. *Transcript – Troxel testimony, p. 55.*

23. The DEQ does not require USGS maps because it is more common for applicants to use Google Earth and because Google Earth maps are better to provide the DEQ with the location of a facility. It is very common for the DEQ to accept alternative maps in place of USGS

maps as long as the alternative maps provide the kind of detail that the DEQ needs to identify the location of the proposed facility. *Transcript – Troxel testimony, pp. 75-76.*

24. No site inspection was performed prior to issuance of the proposed permit to Hopper Disposal. *Transcript – Troxel testimony, p. 59.* Typically, the DEQ does not perform a site visit prior to acting on a low hazard/low volume permit application. *Transcript – Troxel testimony, p. 43.*

25. Low hazard/low volume permit applications do not require an applicant to submit design and construction standards, operator standards, or operating plans. *Transcript – Troxel testimony, p. 86.*

26. The mechanism for making sure that a permittee is following the standards in the DEQ's Solid Waste Management rules is through the inspection and enforcement mechanism following the issuance of the permit. *Transcript – Troxel testimony, pp. 78, 82.*

27. A notice of violation (NOV) was issued to Mike Dimick and Hopper Metals regarding the Hopper Metals facility in Shoshoni on January 20, 2017. *WES Exh. 12.* Mike Dimick is the president of Hopper Metals. *Transcript - Dimick testimony, p. 162.* In the NOV, the DEQ alleged that Hopper Metals had violated portions of the Environmental Quality Act and DEQ's rules for collecting municipal solid waste without a permit, dumping it into a large tank, and burning it to reduce its weight. *WES Exh. 12.* The NOV is pending and has been referred to the Attorney General's office. *Transcript - Plymale testimony, pp. 92 - 94, 115, 117.*

28. An NOV was issued against Mike Dimick and Hopper Disposal on November 7, 2017, for allegedly beginning construction of his Hopper Disposal facility by pouring concrete prior to issuance of the permit. *Transcript - Plymale testimony, pp. 94 - 97, 115; WES Exh. 20.* A

follow up inspection revealed that no further construction had occurred at the facility. *WES Exh.*

20. This NOV is pending. *Transcript - Plymale testimony, p. 117.*

29. When reviewing an application for adequacy and completeness, the DEQ staff does not consider past noncompliance. *Transcript – Troxel testimony, p. 37.*

## V. CONCLUSIONS OF LAW

### A. Principles of Law

30. Paragraphs 1 through 29 of the findings of fact are fully incorporated herein.

31. Wyoming Statute § 35-11-502 states, in part:

(k) Any interested person has the right to file written objections to the proposed permit with the director within thirty (30) days after the last publication of the notice given pursuant to subsection (j) of this section. If substantial written objections are filed, a public hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is deemed necessary by the council. The council or director shall publish notice of the time, date and location of the hearing in a newspaper of general circulation in the county where the applicant plans to locate the facility once a week for two (2) consecutive weeks immediately prior to the hearing. The hearing shall be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act, and right of judicial review shall be afforded as provided in that act.

(m) The director shall render a decision on the proposed permit within thirty (30) days after completion of the notice period if no hearing is requested. If a hearing is held, the council shall issue findings of fact and a decision on the proposed permit within thirty (30) days after the final hearing. The director shall issue or deny the permit no later than fifteen (15) days from receipt of any findings of fact and decision of the environmental quality council.

(n) Notwithstanding the requirements of subsections (l) through (m) of this section, the council shall promulgate rules to establish an alternate permitting procedure for low volume or low hazard solid waste treatment, transfer, processing and storage facilities. The rules shall identify classes or categories of solid waste treatment, transfer, processing and storage facilities which may be permitted using the alternate permitting procedure. The alternate procedure may provide, as determined by the council:



(i) For a single public notice by the applicant, unless the application or permit is contested. If the application or permit is contested the provisions of the Wyoming Administrative Procedure Act regarding public notice shall control;

(ii) That public notice shall be limited to notification of interested parties within the area served by the facility or the area where the facility is located;

(iii) For a single review by the department to determine completeness and technical adequacy, which shall be completed by the department within thirty (30) days of receipt of an initial or revised application; and

(iv) For issuance of a final permit upon completion of all alternate procedure notice and review requirements, provided that any such permit shall be subject to appeal under the provisions of this act.

Wyo. Stat. Ann. § 35-11-502(k) through – (n).

32. Chapter 6 of DEQ's Solid Waste Management rules state, in part:

(c) Permit application requirements for low hazard and low volume transfer, treatment and storage facilities, excluding mobile transfer, treatment and storage facilities:

(i) The permit application shall contain a completed permit application form. All permit application forms shall be signed by the operator, the landowner and any real property lien holder of public record. All applications shall be signed by the operator under oath subject to penalty of perjury. All persons signing the application shall be duly authorized agents. The following persons are considered duly authorized agents:

(A) For a municipality, state, federal or other public agency, by the head of the agency or ranking elected official;

(B) For corporations, at least two principal officers;

(C) For a sole proprietorship or partnership, a proprietor or general partner, respectively;

(ii) Reserved;

(iii) Reserved;

(iv) An original USGS map identifying the location of the facility. If the facility is located within a city or town, a map of the city or town may be used in lieu of an original USGS map;

(v) Reserved;

(vi) Reserved;

(vii) Reserved;

(viii) The information to verify compliance with Chapter 7, Financial Assurance, including an estimate of 3rd-party costs associated with facility closure tasks, and an appropriate financial assurance mechanism.

DEQ's Solid Waste Management rules, Chapter 6, Section 2(c).

33. Chapter 7 of DEQ's Solid Waste Management rules state, in part:

(d) Financial assurance: In order to assure that the costs associated with protecting the public health and safety from the consequences of an abandonment, or a failure to properly execute closure, post-closure care or required corrective action and cleanup of a regulated facility are recovered from the operator of such a facility, the operator shall provide financial assurance in one, or a combination of the forms described in this chapter including a self bond, a surety bond, a federally insured certificate of deposit, government-backed securities, an irrevocable letter of credit, or cash. Such financial assurance shall be in the amount calculated as the cost estimate using the procedures set forth in Sections 3(e)(i), 3(e)(ii) and 3(e)(iii) of this chapter. Evidence of the selected forms of financial assurance shall be filed with the director as part of the permit application procedures and prior to the issuance of an operating permit. The director may reject the proposed forms of assurance of financial responsibility if the evidence submitted does not adequately assure that funds will be available as required by these rules. The operator shall be notified in writing within sixty (60) days of receipt of the evidence of financial assurance of the decision to accept or reject the proposed forms of financial assurance.

(e) Cost estimates:

(i) Cost estimate for facility closure:

(A) In submitting a closure plan as required by these regulations, the operator of a regulated facility shall include therein an itemized written estimate of the cost of closing the facility. The estimated closing cost shall be determined by the director on a case-by-case basis, considering information supplied by the operator. Such costs shall be based on the work required for a third party contractor. If written bids are used to estimate costs, the director may obtain additional bids to substantiate the accuracy of the estimated costs.

(B) The estimated closing cost shall be based on the work required for a third party contractor to effect proper closure at the most expensive point in the life of the facility. Those factors to be considered in estimating the closure cost shall include:

(I) The size and topography of the site.

(II) The daily or weekly volume of waste to be received at the site.

(III) Availability of cover and fill material needed for site grading.

(IV) The type of waste to be received at the site.

(V) Disposal method and sequential disposal plan.

(VI) The location of the site and the character of the surrounding area.

(VII) Requirements for surface drainage.

(VIII) Operation and maintenance of the leachate collection and treatment system, and the off-site disposal of leachate.

(IX) Environmental quality monitoring system.

(X) Structures and other improvements to be dismantled and removed. Salvage values cannot be used to offset demolition costs.

(XI) Site storage capacity for solid waste, incinerator residue and compost material.

(XII) Off-site disposal requirements.

(XIII) Vector control requirements.

(XIV) A minimum of fifteen percent (15%) variable contingency fee to cover other closure costs as determined appropriate by the director.

(XV) Other site specific factors.

DEQ's Solid Waste Management rules, Chapter 7, Sections 3(d), (e)(i).

34. When analyzing the language of a statute, the "paramount consideration is the legislature's intent as reflected in the plain and ordinary meaning of the words used in the statute." *Horse Creek Conservation Dist. v. State ex rel. Wyo. Att'y Gen.*, 2009 WY 143, ¶ 14, 221 P.3d 306, 312 (Wyo. 2009) (citing *Krenning v. Heart Mountain Irrigation Dist.*, 2009 WY 11, ¶ 9, 200 P.3d 774, 778 (Wyo. 2009)). "A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability." *Id.* "When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction." *Cheyenne Newspapers, Inc. v. Building Code Bd. of App. of City of Cheyenne*, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010) (quoting *BP Am. Prod. Co. v. Dep't of Revenue*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005)).

35. Courts interpret rules in the same manner as statutes, looking first to the plain language. *RME Petroleum Co. v. Wyoming Department of Revenue*, 2007 WY 16, ¶ 44, 150 P.3d 673, 688 (Wyo. 2007). An agency's interpretation of its own rules and regulations is entitled to

deference “unless that interpretation is clearly erroneous or inconsistent with the plain language of the rules.” *Office of State Lands & Invs. v. Mule Shoe Ranch, Inc.*, 252 P.3d 951, 954 (Wyo. 2011)(citing *Powder River Basin Res. Council v. Wyo. Dep’t of Env’tl. Quality*, 226 P.3d 809, 813 (Wyo. 2010)).

36. Before the Council, the objectors are responsible for producing evidence that the DEQ’s decision to issue the proposed permit is incorrect. “The burden of proving arbitrary, illegal or fraudulent administrative action is on the complainant, and this burden includes not only the clear presentation of the question, but also placement of evidence in the record to sustain the complainant’s position.” *Knight v. Env’tl. Quality Council*, 805 P.2d 268, 273 (Wyo. 1991)(quoting *Wyo. Bancorporation v. Bonham*, 527 P.2d 432 (Wyo. 1974)).

#### **B. Applications of Principles of Law**

37. The Council finds and concludes that it has jurisdiction over this matter under Wyo. Stat. Ann. § 35-11-502(k) and (m).

38. As part of this case, the Council is required to determine whether the objectors have proved by the preponderance of the evidence that the low hazard/low volume permit should not be issued to Hopper Disposal.

39. The Council finds and concludes that based upon the testimony and exhibits provided during the contested case, the objectors have failed to meet their burden of proof. The issuance of the proposed permit was in accordance with law and was not arbitrary or capricious.

40. The Council finds and concludes that the proposed permit was properly issued because the permit application contained all the legal and necessary requirements. Further, any inadequacies in the permit application may be remedied by conditions attached to the permit.

41. First, the permit application contained a completed permit application form as required by DEQ.

42. The application form was signed by the operator, Mike Dimick for Hopper Disposal, and the landowner, David Long. Further, Mike Dimick signed it under oath subject to penalty of perjury.

43. The application contained Google Earth maps showing the location of the proposed facility. Although the maps are not USGS maps, the Council agrees with the DEQ that the Google Earth maps attached to the application comply with the purpose and spirit of the map requirement in the DEQ's rules by sufficiently identifying the location of the facility.

44. Next, the application contained a financial assurance. Although the financial assurance was inaccurate because it did not take into account the unavailability of free recycling at the District facility and failed to include a fifteen percent contingency fee, those inaccuracies may be remedied by conditioning the permit issuance on the financial assurance being revised so those inaccuracies are corrected. The Council chooses to condition the permit on these inaccuracies being fixed rather than conclude that the permit should be denied.

45. There was discussion by the objectors that the proposed permit should not be issued because the application failed to include location, design, construction, operating, and other standards required in Chapter 6 of the DEQ's Solid Waste Management rules. However, it is clear that those requirements (sections 3, 4, 5, 6, and 7) are not required at this stage for a permit to be issued for a low hazard/low volume facility.

46. Section 2(b) in Chapter 6 which governs permit application requirements for non-low hazard/low volume facilities require that a written report be submitted with the application

that contains a demonstration that the facility meets the location standards, detailed description of the design, construction, and operating procedures, detailed description of the environmental monitoring program, and a description of how the facility will be closed.

47. Conversely, the permit application requirements for low hazard/low volume facilities are different and do not specifically contain the same requirements. Section 2(c), which governs low hazard/low volume facilities, only states that the application form be completed and signed, an original USGS map identifying the location of the facility be attached, and the information to verify compliance with the financial assurances outlined in Chapter 7 be provided. The rule outlining low hazard/low volume application requirements is silent on location, design, construction, operating, monitoring, and closure standards—those requirements are not listed in the application requirements for low hazard/low volume facilities. Courts interpret rules in the same manner as statutes, looking first to the plain language. *RME Petroleum Co. v. Wyoming Department of Revenue*, 2007 WY 16, ¶ 44, 150 P.3d 673, 688 (Wyo. 2007). Omission of words from a rule is considered to be an intentional act and the Council will not read words into a rule when the agency has chosen not to include them. *See Merrill v. Jansma*, 2004 WY 26, ¶ 29, 86 P.3d 270, 285 (Wyo. 2004).

48. The Council agrees with the DEQ that those standards listed in Chapter 6 are not considered at this time but are enforced as part of the permit. If a permittee, such as Hopper Disposal, fails to comply with those standards, the DEQ may proceed to revoke the permit but those standards are not examined at this stage of the process.

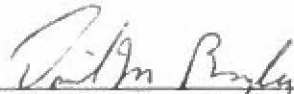
49. Last, there was discussion that because there is a pending NOV issued to Mike Dimick and Hopper Metals for his facility in Shoshoni and a pending NOV for the Hopper Disposal proposed facility, the Council must reverse the issuance of the permit. However, the Council finds that those two NOVs are irrelevant to its decision. First, the NOVs are pending and have not been adjudicated. Next, the Council does not believe that the existence of two pending NOVs proves that the permit should not be issued. Last, the Council refuses to prejudge those pending NOVs in this proceeding.

#### **VI. ORDER AND DECISION**

**IT IS HEREBY ORDERED** that the DEQ's decision to issue the proposed low hazard/low volume facility permit to Hopper Disposal is affirmed, however, prior to the Director's issuance of the final permit, Hopper Disposal must submit a new financial assurance estimate, subject to the DEQ's sole review and approval, that takes into account the unavailability of free recycling and disposal at the District facilities and the failure to include the required contingency fee.

**IT IS FURTHER ORDERED** that if the DEQ does not approve the new financial assurance estimate, the permit shall not be issued.

**ENTERED** this 16 day of January, 2018.

  
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Dr. David Bagley, Hearing Officer  
Environmental Quality Council



## CERTIFICATE OF SERVICE

I, Joe Girardin, certify that at Cheyenne, Wyoming, on the 16<sup>th</sup> day of January 2018, I served a copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by electronic mail to the following:

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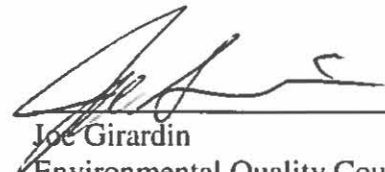
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