

**FILED**

**MAR 14 2008**

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL**

**STATE OF WYOMING**

Terri A. Lorenzon, Director  
Environmental Quality Council

IN RE: TO THE FINAL DETERMINATION )  
OF REIMBURSEMENT OF FUNDS )  
LINCOLN COUNTY LANDFILLS )

Docket No. 07-3216

**LINCOLN COUNTY LANDFILL'S RESPONSE TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION FOR SUMMARY JUDGEMENT**

COMES NOW, the Lincoln County Landfill, by and through Joseph Cole, Deputy Lincoln County and Prosecuting Attorney, and requests the Council deny the Motion for Summary Judgment made by the Department of Environmental Quality. In support of its request, Lincoln County informs the Council as follows:

1. On February 25, 2008, the Department of Environmental Quality (the DEQ) filed a motion for summary judgment in the above captioned case. The motion should be denied because the DEQ fails to state grounds on which it should prevail as a matter of law. The DEQ frames the issues as whether the cost of preparing plans for installing additional wells to upgrade existing monitor well systems are eligible for reimbursement grants under W.S. 35-11-521, even if the existing monitoring system meets DEQ standards; and whether the current monitor wells do meet established DEQ standards. The DEQ's motion should be denied on two grounds. First, the DEQ fails to show that grants under W.S. 35-11-521 can only be used to raise landfills to minimum DEQ standards. Second, the DEQ fails to show that its action, in refusing the grants approved by the Water and Waste Advisory Board, was authorized by the Statute. The

statutes, W.S. 35-11-521 and 35-11-522 do not grant the DEQ that authority.

2. Lincoln County does concede that the DEQ's second point is factually correct. The monitoring wells at the Kemmerer and Cokeville landfills do meet DEQ minimum requirements prior to the planned upgrade. That is not sufficient, however, to support the DEQ's motion for summary judgment.

3. The fundamental error lies in the DEQ's interpretation of the scope of W.S.s 35-11-521 and -522. First, the DEQ argues that the because W.S. 35-11-521(b)(iii) makes grants available for, "Installing new monitor systems or upgrading existing monitor systems to meet standards for the systems established by the department under this article," that only landfills not currently meeting the minimum standards established by the DEQ are eligible for such grants.

5. Grant proposals may fall into six different categories. First, a landfill may be substandard and the proposal would improve its situation but not raise it to DEQ standards. Second, a landfill may be substandard and the proposal would improve its situation to DEQ standards. Third, a landfill may be substandard and the proposal would improve its situation to a desirable level in excess of DEQ minimum standards. Fourth, a landfill may be minimally adequate by DEQ standards, but the proposal would be a desirable improvement because of local conditions. Fifth, a landfill may be minimally adequate by DEQ standards and the proposal is for a clearly unnecessary upgrade of its system. Call this option extravagance. Sixth, the proposal may not accomplish anything allowed by the statute. This is irrelevance. Under the DEQ's analysis, only grant proposals in the second category would be eligible. The plain



language of W.S. 35-11-521 does not support this.

6. One of the rules of statutory construction is that omission of words from a statute must be considered intentional. *Basin Elec. Power Co-op v. Bowen*, 979 P.2d 503, 509 (Wyo. 1999) quoting *Carroll By and Through Miller v. Wyoming Production Credit Ass'n*, 755 P.2d 869, 873 (Wyo.1988). The statute does not say grants are only available to bring landfills up to DEQ **minimum** standards. In the absence of that limitation, the DEQ interpretation is clearly wrong.

7. As the DEQ noted, another rule of statutory construction is that statutes are construed as a whole. *V-1 Oil Co. v. State*, 934 P.2d 740, 745 (Wyo. 1997). W.S. 35-11-521, the authorization of grants, must be read in conjunction with W.S. 35-11-522, which is the procedure for making those grants. W.S. 35-11-522 vests discretion for making grants, and thus for interpreting W.S. 35-11-521, in the Water and Waste Advisory Board and not in the DEQ. The steps in the grant process are clearly laid out. First, the Water and Waste Advisory Board (the Board) was to hold a hearing on criteria for the grants, which the DEQ was to adopt. *W.S. 35-11-522(a)*. That means the criteria were not fixed by W.S. 35-11-521, but were to be adopted by the DEQ after hearing before the Board. As was argued in Lincoln County's memorandum of law, "shall" is mandatory, so the DEQ had to adopt the criteria resulting from the hearing. Next funds must be available or no grant applications are processed. *W.S. 35-11-522(b)*. If funds are available, then the DEQ accepts applications in the form set by the DEQ. *W.S. 35-11-522(b)*. The DEQ does not decide on rejecting or funding grants. Instead, it reviews the applications, determines their eligibility, then forwards the

applications, along with its recommendations, to the Board. *W.S. 35-11-522(b)*. The Board holds a public hearing, then provides its recommendations to the director of the DEQ. *W.S. 35-11-522(c)*. These recommendations are binding. The director shall award grants "in consideration of recommendations" provided by the Board. *W.S. 35-11-522(d)*. As argued in Lincoln County's memorandum of Law, "in consideration of" is a phrase best interpreted as "because of". Thus, the director is not given the authority to reconsider the recommendations of the Board, nor is he to decide on awards after reviewing the Board's recommendations. Instead, when the Board recommends a grant, the director must award it.

8. This is not contradicted by the requirement in *W.S. 35-11-522(e)* that the DEQ provide a report on groundwater pollution due to landfills and a remediation estimate. Indeed, the requirement that the DEQ use "all available groundwater monitor data" does not imply that monitoring systems must meet no more than the minimum standard set by the DEQ. On the contrary, the requirement that the DEQ provide a remediation estimate implies that the DEQ should collect the best feasibly available data. In some areas, logically, monitor system that are more than minimally adequate may be desirable. The discretion to take that into account is vested in the Water and Waste Advisory Board, not the DEQ.

9. If the DEQ disagrees with the recommendations of the Board, their option is not to deny the grant, but to appeal the recommendation of the Board to the Environmental Quality Council per *W.S. 35-11-112(a)(ii)*. The usual standard would be that the DEQ would have to show the Board had abused its discretion in recommending

a particular grant, that it exceeded its authority, violated proper procedures in making the grant, or acted without adequate evidence. See *W.S. 16-3-114(c)*. The DEQ has not appealed the recommendation of the Board, so the merits of that recommendation are not before the Council. Nothing in *W.S.s 35-11-521* and *-522*, as written, give the DEQ independent authority to reject grant applications.

WHEREFORE the motion for summary judgment of the DEQ should be denied because the DEQ has not show it should be be granted summary judgment as a matter of law.

DATED: This 14th day of March, 2008.



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**CERTIFICATE OF SERVICE**

I Joseph Cole, hereby certify that on the 14th day of March, 2008, I caused a true and correct copy of Lincoln County Landfill's Response to be served on the Department of Environmental Quality by placing same in the United States mail, postage pre-paid at Afton, Wyoming and addressed as follows:

Michael Barrash  
Office of the Attorney General  
123 State Capitol  
Cheyenne, WY 82002

And by Fax to:

307-777-3542



JOSEPH COLE