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SEP 23 2005

DEQ Hearings Coordinator  
DOCKET NO. \_\_\_\_\_

**BEFORE THE BOARD OF ENVIRONMENTAL QUALITY  
STATE OF IDAHO**

IN THE MATTER OF SIMMONS SANITATION )

\_\_\_\_\_  
KEN JONES,  
Petitioner, )

v. )

IDAHO DEPARTMENT OF  
ENVIRONMENTAL QUALITY,  
Respondent, )

SIMMONS SANITATION,  
Intervenor. )

Docket No. 0106-05-01

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND PRELIMINARY ORDER  
ON MOTION FOR SUMMARY  
JUDGMENT

**I. PROCEDURAL BACKGROUND**

This matter is before the Hearing Officer on a Motion for Summary Judgment filed by the Idaho Department of Environmental Quality (hereinafter DEQ) on July 1, 2005. Intervenor Simmons Sanitation (hereinafter Simmons) filed a Motion to Join in DEQ's Motion for Summary Judgment on August 16, 2005. Simmons' Motion to Join was granted by the Hearing Officer on August 19, 2005.

Oral argument on the Motion for Summary Judgment, as well as on Motions to Strike certain affidavits was heard on August 31, 2005 at DEQ's Lewiston office. Presenting

arguments at the hearing were Garrick Baxter, representing DEQ; Kevin Beaton, representing Simmons, and Ken Jones, pro se.

Petitioner Ken Jones (hereinafter Jones) initiated this contested case proceeding following DEQ's approval of Simmons' application for approval of a proposed non-municipal solid waste landfill near Kamiah, Idaho. After hearing oral argument at the prehearing conference, held telephonically on June 2, 2005, the hearing officer determined that issues under consideration were:

1. Does Simmons Sanitation's siting application satisfy IDAPA 58.01.06.012.02, and if not, what is the appropriate remedy?
2. Does the landfill location described in the November 2004 republication of the notice satisfy IDAPA 58.01.06.032.03b?

## **II. MOTIONS TO STRIKE CERTAIN AFFIDAVITS**

Motions to strike the affidavits of Kenneth Wayne Hagele, Jerry P. Fairley, and Exhibit 2- Brackney letter were filed by Simmons prior to the hearing. Responses to those motions were filed by Jones. Taking the documents filed under consideration, as well as the oral argument presented by the parties, the following determinations are made:

1. The Motion to Strike the Affidavit of Kenneth Hagele is denied. Affidavits filed in support of, or opposition to, motions for summary judgment shall be made based on personal knowledge and shall show that the affiant is competent to testify as to the matters asserted. Idaho Rules of Civil Procedure 56(e). Mr. Hagele has worked on or near the landfill site and is competent to testify to the matters presented in the affidavit, being the presence of ground water seepage on the proposed landfill site and the location of the spring box.

2. The Motion to Strike the Affidavit of Jerry P. Fairley is granted. His statement was conclusory and failed to make the specific, admissible facts that would prevent the entry of summary judgment. Hecla Mining Co. v. Star-Morning Mining Co. 122 Idaho 778 (1992). Mr. Fairley's affidavit fails to assert specific facts showing the basis of the claim he makes that the ground water may be contaminated by the landfill.

3. The Motion to Strike Exhibit 2-Brackney letter is granted. Mr. Brackney's letter is not an affidavit in which he swears that he is competent to testify to the matters he is addressing. Idaho Rules of Civil Procedure 56(e). Nor is the letter attached to an affidavit verifying the item's authenticity. Puckett v. Oakfabco 132 Idaho 816 (1998). There is nothing in the record that shows that Mr. Brackney's letter is authentic.

4. The hearing officer also notes that although the Application submitted by Simmons was attached to the Affidavit of Hudson Mann and mentioned in the Memorandum in Support of Motion for Summary Judgment, no affirmation was made in either document as to the authenticity of the application. *See* Johnson v. City of Homedale 118 Idaho 285 (Ct. App. 1990). The Application is therefore not before the hearing officer as evidence.

### **III. LEGAL STANDARD**

Motions for summary judgment filed under the Rules of Administrative Procedure before the Board of Environmental Quality are governed by Idaho Rules of Civil Procedure. IDAPA 58.01.23.213.02. Rule 56, I.R.C.P. states that summary judgment may be granted if the pleadings, depositions and admissions on file, together with affidavits, establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

#### IV. FINDINGS

The following facts are undisputed:

1. Simmons Sanitation submitted an application for a Tier II Non-Municipal Solid Waste Management Facility (NMSWMF) to DEQ for approval. The application was dated May 5, 2003.

2. Hudson Mann, Air Quality and Waste Regional Manager, DEQ sent a letter of approval of the site application to Simmons Sanitation. The letter was dated November 4, 2003.

3. A professional engineer, Richard Lindsay, certified the application.

4. The Requirements for an application to DEQ for a Tier II Non-Municipal Solid Waste Management Facility are listed in IDAPA 58.01.06.012.02

5. The proposed Simmons NMSWMF application and plan review and approval is governed by IDAPA 58.01.06.032.

6. Simmons first published notice that they had applied to DEQ to construct a NMSWMF on October 1, 2003 in the Idaho County Free Press. That notice described an inaccurate location of the proposed landfill.

6. DEQ required republication of that notice with a correct location listed. Simmons did so on November 10, 2004. The published notice contained a legal description of the entire 250 acre parcel owned by Simmons, with reference to the fact that the landfill will be located on 17.5 acres within the 250 acre parcel.

7. Following the republication of the notice, DEQ issued a new approval of the application on January 5, 2005.

## V. CONCLUSIONS OF LAW

1. DEQ alleges that summary judgment should be granted in their favor as there is no genuine issue of material fact that Simmons' application meets the requirements of IDAPA 58.01.06.012.02. Jones alleges that deficiencies in the application should have prevented the Director from approving the application.

IDAPA 58.01.06.012.02 grants the Director authority to approve an application. An application is to show compliance with the General Siting Requirements listed in IDAPA 58.01.06.012.01. If the application "has been certified by a qualified professional, the Director *shall* approve the siting application unless the Director finds the evidence supports a contrary opinion." IDAPA 58.01.06.012.02 (emphasis mine.) "Qualified professional" is defined as "a licensed, professional geologist or licensed professional engineer, as appropriate, holding current professional registration in good standing and in compliance with the provisions of Chapter 12, Title 54, Idaho Code." IDAPA 58.01.06.005.35. It is undisputed that Richard Lindsay is a licensed professional engineer. Thus, the Director had to approve the application unless he found that the evidence supported a contrary position. As the mission of DEQ is to protect human health and the environment (I.C. 39-102A), it follows that the Director shall approve an application certified by a qualified professional, unless the application shows that human health or the environment will be threatened if the application was approved.

The general siting requirements for a Tier II landfill are listed in IDAPA 58.01.06.012.01. Those general siting requirements concern flood plain restrictions, endangered or threatened species, surface water restrictions and park or scenic restrictions. The pleadings filed and evidence submitted show that Jones does not contend that the

application does not show compliance with the flood plain, endangered species or park or scenic restrictions. Jones does contend that the landfill could contaminate Seven Mile Creek, but has supplied no competent evidence to show that there is an issue of fact on the subject.

Jones also contends that the application does not meet the requirements of IDAPA 58.01.06.012.02. A close reading of that rule, however, indicates that although the information listed in IDAPA 58.01.06.012.02 shall be submitted with the application, the criteria for approval of the application are that the application is certified by a qualified professional and that it meets the general siting requirements. There is no issue of material fact that the general siting requirements have been met, so Simmons' application met the siting requirements of IDAPA 58.01.06.012.02.

Even if the items listed in IDAPA 58.01.06.012.02 to be included in the application were requirements, the application meets the standards. Jones lists six deficiencies in the application:

1. Jones alleges that the former owner of the landfill site is required to grant written permission to the operator. As the owner and operator of the land is now the same, *see Affidavit of Garrick L. Baxter*, the issue is moot. ([A]n issue is moot if it is no longer present. Committee for Rational Predator Management v. Dept. Of Agriculture, State of Idaho 129 Idaho 670, 672 (1997) *citation omitted.*)
2. Jones alleges that a map showing the total acreage of the site must be submitted, and such map was not. As the total acreage of the site was listed in the application *see Jones' Appeal Petition, Exhibit A.* and in the public notice, any person reviewing the application or seeing the notice would have reasonable notice of the size of the landfill.

3. Jones alleges that the landfill could cause contamination of Seven Mile Creek, but supplies no evidence to support that allegation, only conclusory opinions. Nor does Jones provide any reliable evidence as to the source of any possible contamination

4. Jones alleges that Simmons' application did not identify a domestic water supply within 1/4 mile of the landfill property as required by IDAPA 58.01.06.012.02.f. It is undisputed that the spring box exists, that it is within 1/4 mile of the landfill property, and that no reference was made to the spring box in the original application. It is also undisputed that DEQ employees visited the site after becoming aware of its existence. DEQ employees determined that the proposed landfill would not affect the drinking water source and the existence of the spring box did not change the decision to approve the landfill. *See Affidavit of Hudson Mann.* Again, Jones provides no reliable evidence as to the source of any contamination of the spring box.

5. Jones alleges that the Simmons' application did not include a map showing existing fencing, a fact that is undisputed. Jones has failed to produce any evidence that shows that not identifying existing fences will pose any risk to human health or the environment.

6. Jones alleges that the Simmons' application did not show the direction of prevailing winds. It is undisputed that the data does not exist. When reviewing the application, DEQ employee Hudson Mann noted that lack of wind data and made further inquiry. *Affidavit of Hudson Mann.* He did not find that the lack of wind data supported a conclusion other than approval, as was within his discretion. IDAPA 58.01.06.012.02. Jones presents no evidence that shows that the prevailing winds at the landfill site will pose any risk to human health or the environment.

Jones also alleges that his identified deficiencies in the application deprive the public from reviewing an application that satisfies IDAPA 58.01.06.012.02. Those deficiencies did not prevent him from reviewing the application. In fact, those alleged deficiencies caused Jones to make further inquiry to DEQ. The record shows that DEQ made further inquiry after Jones notified them of alleged deficiencies and addressed Jones' concerns about the deficiencies. The process worked as it was intended.

2. DEQ alleges that summary judgment should be granted in their favor as there is no genuine issue of material fact that Simmons provided the public notice required by IDAPA 58.01.06.032.03(b). Jones alleges that the November, 2004 republication of the notice did not include the specific location of the proposed facility. IDAPA 58.01.06.032.03(b) is silent as to how the location of the landfill is to be described in the public notice.

Notice requirements are satisfied if the notice fairly and accurately describes the real property in question. City of Lewiston v. Bergamo 119 Idaho 221, 224 (Ct. App. 1990). Although a general description of the location of the proposed landfill would have probably given the public a better idea of the location than the legal description that was published, adequate information was provided so that an interested member of the public could make further inquiry about the landfill, either by contacting Simmons Sanitation or DEQ. Further, Jones provided no evidence that showed that the notice as published prevented any member of the public from inquiry about the landfill.

Jones also alleges that the notice should have been published in the Kamiah newspaper, *The Clearwater Progress*, but provided no evidence to show that *The Clearwater Progress* has the largest average paid circulation in the county, as required by Idaho Code 31-819.

3. Neither DEQ nor Simmons challenge Jones' legal standing to bring this contested case action. Standing is a prerequisite to invoking jurisdiction. In re Petition/Action to Determine the Constitutionality of the Indian Gaming Initiative Proposition One 137 Idaho 798 (2002). Standing focuses on the party seeking relief and not the issue being considered. Id. citing Miles v. Idaho Power Co. 116 Idaho 635, 641 (1989).

An aggrieved person is entitled to initiate a contested case proceeding. IDAPA 58.01.23.001.03. An aggrieved person is defined as "any person or entity with legal standing to challenge and action or inaction of the Department." IDAPA 58.01.23.010.01

Standing was considered in Solomon v. Idaho Department of Environmental Quality Docket No. 0101-03-01, Order (December 17, 2003). In that Order, The Board of Environmental Quality stated that an individual petitioner must show: (1) an injury in fact which is real, concrete and particularized, and actual or imminent, and not just speculative or hypothetical; (2) a causal connection between the challenged action and the injury; and (3) the likelihood that the injury will be redressed by a favorable decision. Order at 4 citation omitted. At the summary judgment stage, there must be a factual showing of perceptible harm. Order at 6, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1992).

If a citizen is challenging a governmental action, the citizen must show that he has suffered or will suffer a particular injury that is different from the members of the general public. In re Petition/Action to Determine the Constitutionality of the Indian Gaming Initiative citing Selkirk-Priest Basin Ass'n v. State 128 Idaho 831 (1996). Jones has failed to demonstrate how he is injured or will be injured by the approval of the Simmons Application and thus does not have standing to bring this action.

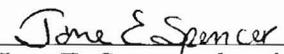
## VI. Preliminary Order

Based on the evidence before the Hearing officer, DEQ and Simmons' Motion for Summary Judgment is granted. Simmons' application for a Tier II Non-Municipal Solid Waste Management Facility met the standards of IDAPA 58.01.06.012.02 and the notice as published on November 10, 2004 met the requirements of IDAPA 58.01.06.032.03b.

I also find that Jones lacked standing to bring this contested case proceeding.

Pursuant to Idaho Code § 67-5245 and IDAPA 58.01.23.730, this is a preliminary order which will become a final order without further notice unless a petition for review by Board of Environmental Quality is filed with the Hearing Coordinator within fourteen (14) days after the service date of this preliminary order. Pursuant to Idaho Code § 67-5245(4), the basis for review must be stated in the petition.

DATED this 14~~th~~ day of September, 2005.

  
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Jane E. Spencer, hearing officer

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) Docket No. 0106-05-01

) CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of September 2005, a true and correct copy of  
the **Findings of Fact, Conclusions of Law, and Preliminary Order on Motion for  
Summary Judgment** was served on the following:

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CERTIFICATE OF SERVICE