

BEFORE THE HEARINGS OFFICER OF KLAMATH COUNTY, OREGON

In The Matter of the Request)	No. 68-89
for a Determination of Use)	FINDINGS OF FACT,
Classification for BIO-WASTE)	CONCLUSIONS OF LAW AND
MANAGEMENT CORPORATION.)	DECISION

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This matter came before Richard C. Whitlock, Hearings Officer for Klamath County, Oregon on November 3, 1989, in the Klamath County Commissioner's hearing Room. The Hearing was held pursuant to notice given in conformity with the Klamath County Land Development Code and related ordinances. Edwin S. Mundy, who owns the Applicant Corporation and is an authorized agent thereof, appeared on behalf of the Applicant and testified at the hearing. The Klamath County Planning Department was represented by J. Kim Lundahl and the Recording Secretary was Leanne Mitchel. Numerous witnesses were allowed to testify in opposition to the Applicant and other persons were prohibited from testifying by the Hearings Officer due to lack of standing. Decisions as to standing of certain other persons was taken under advisement by the Hearings Officer. Numerous exhibits were also offered, some of which were received into the record at the hearing. The admissibility of certain exhibits was taken under advisement by the Hearings Officer. The County Hearings Officer, after reviewing all the evidence presented, makes the following Findings of Fact, Conclusions of Law and Decision:

STANDING ISSUES:

1. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. The Applicant has applied for a Determination of Use Classification pursuant to Land Development Code Section 90.005 for the biomedical waste incinerator facility located on an approximately 30 acre site near Worden, particularly described as Klamath County Tax Account No. 4008-34CB-300.

B. There is no substantial evidence in the record establishing that the emissions from the facility would have any impact whatever outside the immediate vicinity of the facility. Specifically, there are no emissions studies, prevailing wind studies or other data or statistics in the record which would support allegations by several witnesses attempting to establish standing that the facility was affecting the air they breathe. Further, none of the witnesses attempting to establish standing was able to enumerate any specific medical deficiencies or injuries which could be specifically attributed to the facility emissions.

C. The testimony of Dr. Paul Connett, Ph.D., as to possible adverse effects, is not convincing as to this facility for the following reasons:

(1) The information and conclusions of Dr. Connett are not site-specific to this application. Specifically, the testimony contains no reference to the specific local emissions, or to scrubber systems utilized at this facility, no information as to the specific composition of the biomedical

waste being incinerated at this facility (e.g. percentage or volume of plastics or metals) and no information as to weather patterns, prevailing winds or other factors which might affect the spread of emissions from this facility.

(2) The testimony of Dr. Connett gives no indication of any specific negative impact which a bio-waste incineration facility of this size might have. For example, the situation in Holland as testified to by Dr. Connett (pp. 22 et seq.) examines a facility handling approximately 2,000 tons of waste per day (which is over 180 times the maximum capacity of this facility) and there is no information as to the area affected in Holland, the prevailing weather patterns near the Holland facility or any other information which would make that example useful to the Hearings Officer in making this local use determination.

D. Oregon Electric Sign Association vs.

Beaverton, 6 Or LUBA 462, LUBA NO. 81-135

(1982), holds there is a two-part test to determine whether a person's interests are "adversely affected":

"(1) Whether a petitioner may be impacted by the decision, and

"(2) Whether the alleged injury resulting from the impact is reasonably likely to in fact occur (pp. 464-465).

E. This Determination of Use Hearing is quasi-judicial in nature and, therefore, the decision of the Hearings Officer is limited to this application only and does not affect any future application to place another biomedical waste facility under the Klamath County Land Development Code. Therefore, this decision will not allow or disallow the placement of other biomedical waste incinerators in Klamath County as that is a legislative determination which must be made by the Klamath County Commissioners.

2. STANDING DECISIONS:

A. The following persons have established standing and their testimony is incorporated into the record as evidence:

(1) Duncan Michael Wells, Attorney at Law, as a representative of the heirs of Lydia Gay Gentry, whose estate owns land near the facility, and on behalf of the following persons who submitted written testimony as part of Exhibit J:

- (a) Kathleen L. Bessey (works nearby);
- (b) Dean and Laura Olsen (live nearby);
- (c) Merwin Arnett (works nearby);
- (d) Henry Heryford (lives nearby);
- (e) Ronald Heryford (lives nearby);
- (f) Joseph M. Kingsbury (nearby business owner);
- (g) Francis J. Flowers (lives nearby).

(2) Wayne Lalloda

(3) Bob Flowers
(4) Lewis Furber
(5) James Flowers as Legislative Chairman for the Midland Grange #781 and as an officer of Flowers Ranches which owns land nearby.

(6) Sam Henzel

(7) Oregon Department of Fish and Wildlife (appearance by Ralph Opp to establish standing only).

B. Based upon the foregoing Findings of Fact and Conclusions of Law, the following persons are denied standing and their testimony is not a part of the record:

(1) Carol Gay
(2) Nancy R. Roeder
(3) Andrew R. Gigler
(4) Duncan Michael Wells, Attorney at Law, on behalf of Klamath Quality Living, an organization, and on behalf of the following persons who submitted written testimony:

(a) Murel and Barbara Long (residence location unclear);

(b) Scott Stewart (dairy location unclear);

(c) Lawrence D. Cheyne (residence location unclear);

(d) Mike and Kathy Young (residence location unclear);

(e) Mavis McCormick (residence location unclear).

- (5) Daryl Kollman
- (6) Scott Flowers (declined to testify)
- (7) Anita Ward
- (8) Paul L. Cupp (not present to testify)
- (9) Martin Johnson
- (10) Glenn Chamberlin
- (11) Ken Wright (not present to testify)
- (12) Sandra and Diane Cheyne (appeared by letter)
- (13) Leonard Fore (appeared by letter)
- (14) Fairisine Fore (appeared by letter)
- (15) Charles Eridges (declined to testify)

EVIDENTIARY ISSUES:

1. The following exhibits are excluded from the record based upon the foregoing standing rulings:

- A. Exhibit I (letter from Carol Gay)
- B. Exhibit J-3 (letter from Murel and Barbara Long)
- C. Exhibit J-5 (letter from Scott Stewart)
- D. Exhibit J-9 (letter from Lawrence Cheyne)
- E. Exhibit J-10 (letter from Mike and Kathy Young)
- F. Exhibit J-12 (letter from Mavis McCormick)
- G. Exhibit Q (letter from Sandra and Diane Cheyne)
- H. Exhibit R (letter from Leonard Fore)

- I. Exhibit S (letter from Fairisine Fore)
2. The following exhibits are received into the record as evidence:

- A. Exhibits A through H from the Planning Department file.
- B. Exhibit J-1 (letter from Kathleen Bessey)
- C. Exhibit J-2 (letter from Dean and Laura Olsen)
- D. Exhibit J-4 (letter from Merwin Arnett)
- E. Exhibit J-6 (letter from Henry Heryford)
- F. Exhibit J-7 (letter from Ronald Heryford)
- G. Exhibit J-8 (letter from Joseph Kingsbury)
- H. Exhibit J-11 (letter from Francis Flowers)
- I. Exhibit K (letter from D. Michael Wells, Atty)
- J. Exhibit L (transcript of Dr. Paul Connett, Ph.D.)
- K. Exhibit M (Letter from Bob Flowers)
- L. Exhibit N (a magazine article entitled "Farmland Going to Waste," Farm Journal (Nov. 1989 pp. 24-25)
- M. Exhibit O (letter from Lewis Furber)
- N. Exhibit P (letter from Midland Grange)

FINDINGS OF FACT:

1. The Applicant has applied for a Determination of Use Classification pursuant to Land Development Code Section 90.005 for the biomedical waste incinerator facility located on an approximately 30 acre site near Worden, particularly described as Klamath County Tax Account No. 4008-34CB-300.
2. The Applicant is now operating a biomedical waste

incinerator at the site which is zoned Heavy Industrial (IH).

3. The annual incineration capacity of the facility is approximately 3,500 tons of waste consisting of the following:

- Biological cultures and other contaminated laboratory waste;
- Pathological (tissue) waste;
- Blood and blood products;
- Sharp waste such as needles, syringes and blades;
- Isolation room waste;
- Chemotherapy waste;
- Paper and plastic.

4. The emission control system includes an afterburner, venturi scrubber (for particulate control) and packed tower scrubber (for gaseous chloride control).

5. Complete combustion of the waste is achieved in the 1800 degree F incinerator afterburner (secondary chamber). According to the Oregon Department of Environmental Quality (DEQ), that temperature, plus the one second holding of the gases, will completely destroy any toxins or disease. The DEQ further opines that burning biomedical waste is the safest disposal method.

6. Once incinerated, the ash is packaged and later removed from the site for disposal elsewhere and is not reused or recycled in any manner.

7. The incinerator will operate a maximum of 22 hours daily, 50 weeks yearly and at maximum capacity will burn approximately 11 tons of biomedical waste per day.

8. The biomedical waste is transported to the facility from Oregon medical facilities only (i.e. no out of state waste is accepted).

9. The facility is owned and operated by a private, for-profit corporation, and only receives biomedical waste from other commercial medical enterprises by contract and does not receive waste from the general public nor is the facility open to the general public.

10. Regarding the testimony of Dr. Paul Connett, Ph.D., the findings and conclusions set forth in the standing portion of this Order (I.C.) are incorporated herein by this reference. As a further consideration, Dr. Connett's opinion as to whether the facility is "scrap operations" within the Land development Code is a conclusion reached without the benefit of all KLDC provisions.

11. Almost all witnesses who testified expressed their fear that this facility is or might be dangerous. That conclusion is not supported by any substantial or convincing evidence in the present record. Other witnesses were simply angry that they had no opportunity for hearing and input prior to installation of this facility. These witnesses feared possible future consequences and requested further studies, but the Hearings Officer is without authority to require these studies, without power to "turn back the clock" to allow input prior to placement of the facility, and is required to render a decision within fifteen (15) days of the hearing based upon ONLY the record presented at the hearing.

KLAMATH COUNTY LAND DEVELOPMENT CODE CRITERIA:

1. Code Section 90.005 provides in pertinent part:

"If a use is not clearly within the definition of that use as contained in this code, and if the classification of such use is not mandated by any other portion of this code, the determination of use shall be made by the Hearings Officer***. The Hearings Officer shall consider the functional, product or compatability characteristics of the proposed use and shall classify the use in the use type which contains uses which have characteristics most like those of the proposed use. The Hearings Officer shall also enter findings setting out what use most closely resembles the proposed use."

2. The Use Classifications are generally divided into six use categories in Section 90.002 as follows:

- A. Residential (Article 91)
- B. Civic (Article 92)
- C. Commercial (Article 93)
- D. Industrial (Article 94)
- E. Agricultural (Article 95)
- F. Extractive (Article 96)

3. Code Section 90.003 B. requires that if the use "appears" to fit more than one use category, the use shall be classified under each appropriate category.

4. Code Section 90.003 C. requires that a use "shall be classified in the use type whose description most closely portrays the overall nature of such uses.*** If the principle

uses resemble more than one of the use types on the list, the uses shall be classified in the most appropriate use type, except that any commercial uses shall be classified within the scrap operations use type if they have any of its characteristics." (emphasis added)

5. Article 11 contains many pertinent definitions.

6. Code Section 92.009 defines "Extensive Impact Services and Utilities" use.

7. Code Section 93.024 defines "Scrap Operations" use.

8. Code Section 94.001 generally defines "Industrial Use Types" and 94.003 defines "General Industrial" use.

CONCLUSIONS OF LAW:

1. The facility is NOT a Residential, Agricultural or Extractive use and no witnesses or participants are arguing that position.

2. The facility is NOT "Extensive Impact Services and Utilities" use as defined in KLDC 92.009 for the following reasons:

A. There is not substantial evidence in the record that the biomedical waste incinerator has "substantial impact on surrounding land uses."

B. The biomedical waste incinerator is not a "public utility" as defined in Article 11. The "disposal of sewage" is not equivalent to the incineration of waste as urged by one witness.

C. The biomedical waste incinerator is not a "public service". This facility is a private

business which contracts with commercial biomedical waste producers and is not open to the general public. Each of the example uses listed in KLDC 92.009 involve general public use even though in some cases, the segment of the public served may be limited by user fees or membership restrictions.

D. Prior Planning Department staff conclusions or errors as to how this facility fits into the KLDC are not binding upon the Hearings Officer.

3. The Code mandates a conclusion that the biomedical incinerator facility IS "Scrap Operations" as presently defined in KLDC 93.024 for the following reasons:

A. KLDC 90.003 C. requires that if a use has any of the characteristics of "scrap operations" the use "shall" be classified within "scrap operations".

B. "Scrap Operations" is defined in 93.024 as businesses "engaged in storage, dismantling or other processing of used or waste materials which are intended for reuse in their original form." (emphasis added)

C. The biomedical waste incinerator facility is clearly a business engaged in storage and other processing of waste materials. It is equally as clear that the facility does not reuse any of its waste.

D. Because the facility has some of the "scrap operations" characteristics, KLDC 90.003 C. requires the use be classified as "Scrap Operations".

4. The biomedical incinerator facility IS "General Industrial" as defined in KLDC 94.003 for the following reasons:

A. KLDC 94.003 defines "General Industrial" use type as:

"***Industrial plants primarily engaged in manufacturing, compounding, processing, assembling, packaging, treatment or fabrication of materials and property."

B. According to the Webster's New World Dictionary (2nd College Edition, 1988, Simon & Schuster) the following definitions will apply:

(1) Packaging - to wrap or box, as for transporting

(2) Processing - to prepare something by a particular method involving several steps or operations

C. According to Dr. Connett, Ph.D., burning is a "chemical process" (p. 4).

D. The incineration facility clearly is engaged in the processing, packaging and treatment of materials which is three of the seven listed activities. Burning is the chemical processing of the waste, burning is the safest way of treating the biomedical waste (per DEQ) and the residue of the waste is packaged for ultimate disposal.

DECISION AND ORDER:

The Bio-Waste Management Corporation biomedical waste

incinerator facility shall be classified as the following uses:

1. General Industrial (KLDC 94.003)
2. Scrap Operations (KLDC 93.024)

DATED this 15th day of November, 1989.

Richard C. Whitlock
 RICHARD C. WHITLOCK
 HEARINGS OFFICER

Klamath County Land Development Code Section 24.007 provides:

"An Order of the Hearings Officer shall be final unless appealed within ten (10) days of its mailing by a party having standing in accordance with the procedures set forth in Chapter 3, Article 33 of this Code."

STATE OF OREGON: COUNTY OF KLAMATH: ss.

Filed for record at request of Klamath County the 17th day
 of Nov. A.D., 19 89 at 9:32 o'clock AM., and duly recorded in Vol. M89,
 of Deeds on Page 22269.

FEE none

Evelyn Biehn - County Clerk

By Paula M. Mulendore

Return: Commissioners Journal