

**Maki latridis**

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**From:** Howard Kenison [hkenison@lindquist.com]  
**Sent:** Thursday, April 26, 2007 9:16 AM  
**To:** Maki latridis  
**Subject:** Clean Harbors v. ADCO  
**Attachments:** 07 04 25 Order.pdf

Attached is ruling dismissing CH's Dec J action which it filed last September.

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<p>DISTRICT COURT, ADAMS COUNTY, COLORADO Court Address: 1100 Judicial Center Drive, Brighton, CO 80601 Phone Number: (303) 654-3260</p> <p><b>CLEAN HARBORS DEER TRAIL, LLC, a Delaware limited liability company, Plaintiff,</b></p> <p><b>BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ADAMS, STATE OF COLORADO, Defendant.</b></p>	<p>FILED IN ADAMS COUNTY COMBINED COURT APR 25 2007</p> <p><b>E-FILE</b></p>
	<p>Case No. 06 CV 1172 Div. C. Ctrm. 504</p>
<p><b>ORDER</b></p>	

This matter comes on for entry of Findings and Orders on the following issue:

1. Defendant's Motion to Dismiss under C.R.C.P. 12(b)(1)

The Court having reviewed the file, all submitted pleadings and arguments of Counsel and therefore being advised enters the following Findings and Orders.

**FACTUAL RECITATION**

On September 1, 2006 Plaintiff filed a Complaint for a Declaratory Judgment and a Motion for Preliminary Injunction.<sup>1</sup> In its Complaint for declaratory relief filed under C.R.S. 13-51-101 and C.R.C.P. 57, Clean Harbors requests that the Court: 1) interpret the Certificate of Designation (hereinafter CD) as written and declare that it incorporates the terms of Clean Harbors' hazardous waste permit regarding the materials that may be disposed of at its waste disposal facility; and 2) alternatively, to construe the County's Resolutions and declare that the disposal of NORM and TENORM does not violate the CD, and that NORM, TENORM and Denver Radium are not "Radioactive" or "Radioactive Waste" as defined under the Colorado Radiation Controls Act.

<sup>1</sup> Clean Harbors has also filed a Motion for Temporary Restraining Order that is pending at the time of the issuance of this Order.

The gravaman of Defendant's Motion to Dismiss is premised on two considerations:

1. Under the doctrine of separation of powers, the Court lacks jurisdiction to enjoin Adams County;
2. Plaintiff Clean Harbors' failure to seek judicial review under C.R.S. 25-15-207(1) and/or C.R.C.P. 106 within the prescribed time limits precludes its Declaratory Judgment Claim.

Clean Harbors asserts under the rationale of *State v. Golden's Concrete Co.*, 962 P.2d 919 (Colo. 1998) and *Collopy v. Wildlife Comm'n*, 625 P.2d 994 (Colo. 1981) that Clean Harbors is not required to exhaust its administrative remedies because:

1. Interpretation of Clean Harbors' CD presents questions of law, which BOCC does not have the expertise or authority to resolve;
2. The State of Colorado and not the BOCC has the authority to determine what materials may be accepted, treated and disposed of under the CD; and
3. Pursuing administrative remedies under the circumstances herein is futile because the BOCC has already publicly stated its final position on this matter.

Further, Clean Harbors asserts that the statutory time limit for judicial review is not applicable since at the time of the issuance of the CD in June, 2004, Clean Harbors had no reason to challenge the issuance, and that Clean Harbors is not challenging the issuance of the CD but the BOCC's present interpretation.

Plaintiff Clean Harbors' failure to seek judicial review under C.R.S. 25-15-207(1) and or C.R.C.P. 106 within the prescribed time limits precludes its Declaratory Judgment Claim.

Defendant Board of County Commissioner of the County of Adams (BOCC), asserts that Clean Harbors' failure to seek judicial review under C.R.S. 25-15-207(1) precludes the Court's consideration of Clean Harbors' Complaint under C.R.C.P. 57.

C.R.S. 25-15-207(1) provides in pertinent part, "The award, denial, or suspension of a certificate of designation [CD] by the board of county commissioners...shall be subject to judicial review in the district court...Any request for such judicial review must be made within thirty days of such award, denial revocation or suspension."

In the case of *Berry Properties v. City of Commerce City, et al.*, 667 P.2d 247 (Colo. App. 1983) the court specifically held that where a statute creates a substantive procedure for review it "preempts the Rules of Civil Procedure insofar as they are inconsistent with the statute, C.R.C.P. 81(a)... [T]herefore, the parties may not proceed under C.R.C.P. 57 when they would otherwise be precluded from doing so by statute."

Clean Harbors asserts, however, that C.R.S. 25-15-207 is not applicable in that Clean Harbors is not claiming error as to any award, denial, revocation, or suspension of the CD, but the BOCC's present interpretation. Further, under *Collopy, supra*. Clean Harbors need not need risk criminal or civil penalties in order to test the legality of a regulation.

The Court finds *Collopy, supra*. is not dispositive of the presented issues. Specifically, *Collopy*. dealt, in part, with the unconstitutionality of the applicable regulations and a taking of Collopy's protected property rights without compensation under Art. II, Sec. 15 of the Colorado Constitution.

The Court Finds and Concludes under the rationale *Berry Properties, supra*. that C.R.S. 25-15-207 provides the specific statutory scheme for review. Further, that under the rubric of C.R.C.P. 57 the Court is asked to rule on the interpretation provided by the BOCC without a specific final action being taken by the BOCC.

The Court Finds and Concludes that Clean Harbors has not exercised its right of review in a timely manner and therefore under *Berry Properties, supra*, the Court Grants Defendant's Motion to Dismiss under C.R.C.P. 12(b)(1).

The Court notes this Order is dispositive and therefore the Court declines to enter further findings as to the claims set forth by either Plaintiff or Defendant.

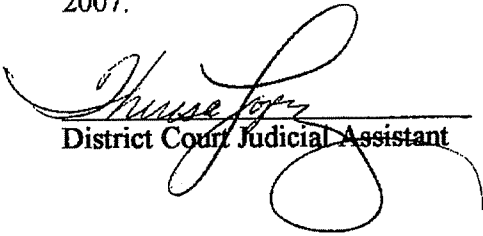
DONE AND SIGNED, this 25<sup>th</sup> day of April, 2007.

BY THE COURT:

  
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District Court Judge

CERTIFICATE OF SERVICE

A copy of the within Order was e-filed to counsel of record on this 25<sup>th</sup> day of April, 2007.

  
District Court Judicial Assistant