

Attachment #1

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From: Ruby, Jim [mailto:JRUBY@wyo.gov]

Sent: Thursday, February 11, 2010 4:09 PM

To: 'Bill Coburn'

Subject: RE: information needed

Hi Bill:

I want to apologize up front for the length of this response but I wanted to include the statutes of relevance.

To start with Bill here is the statute that sets forth the duties of the Council. I have highlighted the relevant parts.

35-11-112 Powers and duties of the environmental quality council.

Article 1. GENERAL PROVISIONS

(a) The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions. At the council's request the office of administrative hearings may provide a hearing officer for any rulemaking or contested case hearing before the council, and the hearing officer may provide recommendations on procedural matters when requested by the council. Notwithstanding any other provision of this act, including this section, the council shall have no authority to promulgate rules or to hear or determine any case or issue arising under the laws, rules, regulations, standards or orders issued or administered by the industrial siting or abandoned mine land divisions of the department. The council shall:

(i) Promulgate rules and regulations necessary for the administration of this act, after recommendation from the director of the department, the administrators of the various divisions and their respective advisory boards;

(ii) Conduct hearings as required by the Wyoming Administrative Procedure Act for the adoption, amendment or repeal of rules, regulations, standards or orders recommended by the advisory boards through the administrators and the director. The council shall approve all rules, regulations, standards or orders of the department before they become final;

(iii) Conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the department or any division thereof;

(iv) Conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act;

(v) Designate at the earliest date and to the extent possible those areas of the state which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or

(A) Be incompatible with existing state or local land use plans or programs; or

(B) Affect fragile or historic lands in which these operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems; or

(C) Affect renewable resource lands in which these operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and these lands to include aquifers and aquifer recharge areas; or

(D) Affect natural hazard lands in which these operations could substantially endanger life and property; these lands to include areas subject to frequent flooding and areas of unstable geology.

(c) Prior to designating any land areas as unsuitable for surface coal mining operations, the administrator shall prepare a detailed statement on:

(i) The potential coal resources of the area;

(ii) The demand for coal resources; and

(iii) The impact of this designation on the environment, economy and supply of coal.

(d) The above process will include proper notice, opportunities for public and agency participation including land use planning bodies and a public hearing prior to designation or redesignation, pursuant to this section.

(e) Any designation shall not prevent the mineral exploration pursuant to this act of any area so designated.

(f) The requirements of this section shall not apply to lands on which surface coal mining operations were being conducted on August 3, 1977 or under a permit issued pursuant to this act, or where substantial legal and financial commitments in these operations were in existence prior to January 4, 1977.

(g) This section shall not become effective until approval of a state program pursuant to P.L. 95-87.

(h) This section shall operate independently of all other sections of the act except as to the application of the Wyoming Administrative Procedure Act.

With the Statutes out of the way here are my responses to your questions.

1. Does state designation of the Sand Creek area as "Very Rare and Uncommon" prohibit mining from occurring on either Federal or private lands? Please explain in detail.

The relevant statutes are set forth above and include 35-11-112 and 35-11-406.

On its face the statute that requires the Council to designate land as Very Rare or Uncommon does not prohibit mining on designated land. In fact a permit to mine shall not be denied unless the Director finds "The proposed mining operation would irreparably harm, destroy, or materially impair any area that has been designated by the council a rare or uncommon area and having particular historical, archaeological, wildlife, surface geological, botanical or scenic value". Thus if there is a way the mining activity can occur without irreparably harming, destroying or materially impairing the area than the permit must be issued.

2. What is the difference between Rare and Very Rare? The designation is "Very rare and uncommon" Is there a quantifiable test for this evaluation of plant and animal species occurrence.

Neither the Statute nor the rules of the DEQ set forth a definition of Rare or Very Rare. The Supreme Court of Wyoming has not offered any direction in the interpretation of these terms either. Thus, the Council is left to the commonly accepted usage of the terms as would be set forth in a publication such as Webster's Dictionary. The definition of Rare in Webster's New Collegiate Dictionary Copyright 1979 defines Rare as (2)(a) "marked by unusual quality, merit or appeal: DISTINCTIVE (b) superlative or extreme of its kind (3) seldom occurring or found; UNCOMMON.

Very is defined as (1) to a high degree: EXCEEDINGLY (2) in actual fact: TRULY.

The combination of those terms would seem to indicate that the object must be marked by an unusually high degree of quality, merit or appeal.

3. If I understand the process correctly the July hearing is determine whether or not there are grounds for accepting Sand Creek as an area to be studied for "Very Rare and Uncommon". It is not to determine whether it is "Very Rare and Uncommon"

That is correct. The first step in the process when a petition is filed is for the Council to determine by a majority vote as to whether or not the Petition should be accepted for consideration by the Council. If a petition is accepted than the Council, usually, will take a tour of the property and will hold a public hearing to take testimony in support and opposition of the designation.

4. Please explain to me the administrative and legal process a mining company would have to go through to acquire a large scale mining permit on Federal Lands in Sand Creek?

I must apologize for not being able to give you an explanation of the administrative and legal process to acquire a large scale mining permit. I would suggest that you contact the Administrator of the Land Quality Division of the Department of Environmental Quality, Don McKenzie. His number is 307-777-7046. If he cannot give you assistance he should be able to direct you to someone who can.

5. Are you familiar with the federal requirements and process. If so please explain. If not please point me in the direction of someone who could help me.

I am not familiar with the federal requirements and process sufficient to help you to understand them. Again I would urge you to contact Don McKenzie the Administrator of the Land Quality Division. I would also urge you to call the various federal agencies who manage different federal properties in Wyoming. That would be the Fish and Wildlife Service, the Forest Service and the Bureau of Land Management. I don't have their phone numbers or other contact information but if you cannot readily find it please let me know and I will see if I can find some contact information for you. Mr. McKenzie may well have the contact information for those federal agencies.

Bill, I hope this information is helpful. Let me know if you have any other questions.

Sincerely,

Jim Ruby

Exec. Secretary

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