

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

FILED

APR 06 2009

*Jim Ruby, Executive Secretary
Environmental Quality Council*

In The Matter of Permit No. CT-7066,) **DOCKET NO. 08-2801
Touchstone Materials, LLC, and)
Tom Berry and Susie Berry,)
Protestants.)**

FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

This matter came before the Environmental Quality Council (Council) on the Department of Environmental Quality's (DEQ) Motion to Dismiss at a public meeting held on February 10, 2009, at the Campbell County Public Library, 2101 S. 4J Road, in Gillette, Wyoming. Council members present at the meeting were Dennis M. Boal (Chairman), F. David Searle (Presiding Officer), Tim Flitner, John N. Morris, and Dr. Fred Ogden. Also present were Marion Yoder, Senior Assistant Attorney General, attorney for the Council; John S. Burbridge, Senior Assistant Attorney General, attorney for the Department of Environmental Quality/Air Quality Division (Division); Greg L. Goddard, attorney for Tom and Susie Berry (Protestants); and Tom C. Toner, attorney for Touchstone Materials, LLC (Touchstone) Intervenor. After hearing argument of the parties and the council being fully informed in the premises, the Council reached a decision in this matter on a vote of 5-0. It hereby issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On June 2, 2008, the Division took final action by issuing its decision on Air Quality Permit No. CT-7066, approving Touchstone's gravel screening, exposed acreage, and haul road activity.

2. Protestant participated in the public process during Touchstone's permit application and their counsel, Mr. Goddard received notice of the Division's action on June 17, 2008.

3. The sixty (60) day deadline as established by the Department of Environmental Quality Rules of Practice and Procedure, Chapter 1, § 16(a) for appeal and review of Permit No. CT-7066 ended on Friday, August 1, 2008.

4. Protestant's Notice of Appeal/Request for Review (Petition) was not received and file stamped by the EQC until August 4, 2008, sixty three (63) days after the Division's final action on June 2, 2008.

5. On September 8, 2008, the Division filed a Motion to Dismiss Protestant's Petition stating that the Department of Environmental Quality Rules of Practice and Procedure, Chapter 1, §§ 3(b) and 16(a) require that petitions/appeals of an agency action to the Council must be received, and file stamped, in the Council's office, within sixty (60) days of final agency action, and that Protestant's Petition was filed late.

6. On October 17, 2008, Protestant's responded to the Division's Motion to Dismiss stating that Wyoming Rule of Civil Procedure 6(d) applied and that additional time (three days) is always allowed when a notice or paper which requires a response or action is served and/or received by mail.

7. The applicable rule of practice and procedure in this case provides; “[u]nless otherwise provided by these Rules or the Environmental Quality Act, all appeals to Council from final actions of the Administrators or Director shall be made within sixty (60) days of such action.” Department of Environmental Quality Rules of Practice and Procedure, Chapter 1, § 16(a).

CONCLUSIONS OF LAW

1. The Council is governed by WYO. STAT. ANN. §§ 35-11-101 through 35-11-1904 (West 2008), and the Department of Environmental Quality Rules of Practice and Procedure.

2. The date of the agency action is the date when the time period begins to run for computing when a notice of appeal must be received and file stamped with the Council. Department of Environmental Quality Rules of Practice and Procedure, Chapter 1, § 16(a).

3. A document is filed with the Council when it is received in the Council’s office. The applicable procedural rules require petitioners, protestants and/or objectors to timely file and serve such petitions and requests.

4. It is a Protestant’s responsibility to track and ascertain the status of a permit. *In the Matter of the Objection to NPDES Permit No. WY0041025, and NPDES Permit No. WY004107*, Docket No. 00-3802, Order, May 4, 2001.

5. Timely filing of a request for administrative review of an agency decision is mandatory and jurisdictional, and untimely filing deprives the reviewing body of subject matter jurisdiction over the appeal. *Antelope Valley Improvement v. State Bd. of Equalization*, 992 P.2d 563, 567 (Wyo. 1999), clarified by *Antelope Valley Improvement v. State Bd. of Equalization*, 4 P.3d 876 (Wyo. 2000).

ORDER

1. Protestant's petition having been untimely filed, the Council is without jurisdiction to hear this matter and therefore it should be and is hereby dismissed.

2. Each party shall bear its own costs and attorney fees through the entry of this Order.

DATED this 4 day of ~~March~~, 2009.

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Dennis M. Boal, Chairman

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2009, a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order was served by placing same in the United States Mail, postage pre-paid, addressed to:

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Jim Ruby