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**Jim Ruby, Executive Secretary
Environmental Quality Council**

Attorney for the State of Wyoming,
Department of Environmental Quality

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

In the Matter of the Appeal)
And Petition for Hearing of:)
Croell Redi-Mix, DEQ AQD Permit) Docket No. 10-2803
Application No. AP-9645)
And DEQ AQD Permit No. MD-9645)
Dated March 17, 2010)

**MEMORANDUM IN SUPPORT OF DEQ'S MOTION FOR SUMMARY
JUDGMENT**

The Department of Environmental Quality (DEQ), Air Quality Division (AQD), through the Office of the Attorney General, and pursuant to WYO. R. CIV. P. 56 and Environmental Quality Council (EQC) Rules, Chapter II, Sections 3 and 14, respectfully submit this memorandum in support of its Motion for Summary Judgment.

I. INTRODUCTION AND GROUNDS FOR APPEAL

This case involves a challenge to a DEQ/AQD construction modification permit (MD-9645) issued by the DEQ to Croell Redi-Mix, Inc. (Croell) on March 17, 2010, to modify operations at the Rogers Rock Pit limestone quarry in Crook County, Wyoming.

On May 14, 2010, Petitioner Judith Bush filed a Petition for Hearing Before EQC. (Pet for Hr'g). Petitioner generally alleged the public notice for the proposed permit was

deficient (Pet. for Hr'g at pp. 1-2); the public notice and Permit MD-9645 contained an incorrect legal description for the quarry (Pet. for Hr'g at 2-3); DEQ failed to properly notify commenters of DEQ's March 17, 2010, decision (Pet. for Hr'g at 3-4); and DEQ's legal authority to limit quarry productions was unclear (Pet. for Hr'g at p. 4-5). DEQ/AQD and Croell filed separate Responses generally denying the allegations and asserting that the DEQ complied with the law in issuing Permit MD-9645. (DEQ Resp. and Croell Resp.).

On August 11, 2010, Petitioner filed an Amended Petition for Hearing Before EQC. (Amend. Pet. for Hr'g). Petitioner incorporated her previous allegations and asserted the legal descriptions in AQD permits CT-4526, CT-4527, CT-4089, CT-7113, and MD-8685 issued to Croell and others for equipment and quarry operations since 2007 were incorrect. (Amend. Pet. for Hr'g at pp. 3-9). On August 20, 2010, DEQ/AQD and Croell filed separate Responses generally denying the allegations and asserting that Petitioner's Amended Petition was legally deficient. (DEQ Resp. and Croell Resp. to Amend. Pet. for Hr'g).

Despite Petitioner's allegations to the contrary, DEQ reviewed, analyzed, and issued Permit MD-9645 to Croell for the quarry in accordance with the Wyoming Environmental Quality Act (WEQA) and Wyoming Air Quality Standards and Regulations (WAQSR). Summary judgment is appropriate because Petitioner has failed to provide sufficient evidence to present an issue of material fact regarding the following four issues:

- 1) Whether DEQ/AQD complied with public notice requirements for issuing the permit;
- 2) Whether Croell's application contained a correct legal description of the quarry's location;
- 3) Whether DEQ/AQD has legal authority to limit quarry production and impose Best Available Control Technology (BACT);
- 4) Whether Petitioner has properly raised allegations regarding previously issued DEQ/AQD permits.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WYO. R. CIV. P. 56(c). Rule 56 of the Wyoming Rules of Civil Procedure governs cases before the EQC on a motion for summary judgment. EQC Rules, Ch. 2, § 14; *see also Rollins v. Wyoming Tribune Eagle*, 2007 WY 28, ¶ 6, 152 P.3d 367, 369 (Wyo. 2007). The purpose of summary judgment is to dispose of cases that present no issues of material fact. *Rollins*, 2007 WY 28 at ¶ 6, 152 P.3d at 369.

“The moving party bears the initial burden of establishing a prima facie case for summary judgment. If the movant carries this burden, the opposing party is obligated to demonstrate that a genuine issue of material fact does exist.” *Weber v. McCoy*, 950 P.2d 548, 551 (Wyo. 1997). The evidence offered in support and in opposition to a motion for summary judgment is viewed in a light most favorable to the party opposing the motion. *Long v. Daly*, 2007 WY 69, ¶ 8, 156 P.3d 994, 997 (Wyo. 2007). A fact is material if

proof of that fact would have the effect of establishing or refuting one of the essential elements of the cause of action or defense. *Id.*

III. UNDISPUTED MATERIAL FACTS

On July 6, 2009, the DEQ/AQD received Croell's application (AP-9645) to modify its existing air quality permit for the Rogers Rock Pit limestone quarry, located in Crook County, Wyoming. (Schlichtemeier Aff. at ¶ 13; Ex. 1). The application identified planned equipment and operations for the estimated 500,000 tons per year production site would include limestone crushing, screening, blasting, exposed acreage, stockpiling, haul activity, a hot mix asphalt plant, and a concrete batch plant. *Id.*

The application also provides a legal description for the Quarry location. The legal description indicated on application form AQD-MN1 as NW1/4NE1/4 of Section 25, Township 52 North, Range 62 West, which represents 40 acres. (Ex. 1 at 000001; DEQ Resp. to Int. No. 1). An asterisk by the legal description states, "See attachment for further legal description." (Ex. 1 at 000001; DEQ Resp. to Int. No. 1). The further legal description, representing 600.07 acres is as follow:

A tract of land located in the SE1/4NW/4, that portion of SW/4NW/4 located east of Interstate 90 Right-Of-Way, SW1/4 and SW/4SE/4 of Section 25; that portion of SE/4NE/4 located east of Interstate 90 R-O-W, that portion of SE/4 located east of Interstate 90 R-O-W, and that portion of SE/4SW/4 located east of Interstate 90 R-O-W of Section 26; E/2NE/4, NW/4NE/4, that portion of the N/2NW/4 located east of Interstate 90 R-O-W and the NE/4SE/4 of Section 35, T52N R62W of the Sixth Principal Meridian, Crook County, Wyoming.

(Ex. 1 at 000003; DEQ Resp. to Int. No. 1).

Following receipt of AP-9645, the DEQ/AQD proceeded with a technical review and analysis. (Schlichtemeier Aff. at ¶¶ 15-17; Exs. 2-5). DEQ/AQD determined that fugitive particulate matter (PM) would be the largest source of air pollutant emissions from the quarry. (Ex. 5 at 000027). Through a BACT analysis, the DEQ/AQD determined and proposed that the quarry would be subject to certain work practices and operational standards to control the PM emissions (commonly referred to as dust). *Id.* at 000027-28.

On October 1, 2009, the DEQ/AQD advertised its proposed decision in the Sundance Times and provided an opportunity for public comment through November 2, 2009. (Schlichtemeier Aff. at ¶ 19; Ex. 10). A copy of DEQ's public notice, AP-9645, and DEQ/AQD's Application Analysis was also made available for public inspection at the Crook County Clerk's office. (Schlichtemeier Aff. at ¶ 18; Exs. 7, 9).

During the public comment period, the DEQ/AQD received several comment letters, and a public hearing request. (Schlichtemeier Aff. at ¶¶ 21- 22; Exs. 12- 13). In November, the DEQ/AQD noticed that it would be holding a public hearing on December 14, 2009, regarding its proposed decision to issue an air quality permit to Croell to modify the Rogers Rock Pit. (Schlichtemeier Aff. at ¶¶ 23-26; Exs. 14- 18).

On December 14, 2009, the DEQ/AQD held a public hearing on its proposed decision. (Schlichtemeier Aff. at ¶ 30; Ex. 22). Petitioner's ranch manager, Dewey Turbiville, attended and provided oral comments at the hearing. (Ex. 22 at 000188-89, 000192).

On March 17, 2010, the DEQ/AQD issued its decision, response to comments and Permit MD-9645 to Croell for modification of the Rogers Rock Pit. (Schlichtemeier Aff. at ¶¶ 31- 34; Exs. 23- 28). The DEQ/AQD's decision and permit included revised BACT control requirements for the fugitive PM emissions. (Schlichtemeier Aff. at ¶¶ 40 – 42; Ex. 23 at 000147-158; Ex. 25). Given the utilization of BACT, the DEQ/AQD determined that the quarry operations would not prevent the attainment or maintenance of any ambient air quality standards. (Schlichtemeier Aff. at ¶ 43; Ex. 5 at 000028).

On March 22, 2010, the DEQ/AQD e-mailed a copy of its decision and Permit MD-9645 to Judith Bush. (Schlichtemeier Aff. at ¶ 35; Ex. 29; Pet. for Hr'g at p. 3). By at least April 19, 2010, Ms. Bush had received DEQ/AQD's e-mail and a second copy of the decision and Permit MD-9645 sent by DEQ/AQD on April 19, 2010. (Schlichtemeier Aff. at ¶ 37; Ex. 31).

IV. LEGAL BACKGROUND

A. Clean Air Act

The Clean Air Act's (CAA) goals of protecting and enhancing the nation's air quality and promoting public health, welfare and economic development by preventing and controlling air pollution are achieved through a cooperative federalism approach with states.¹ The CAA provides states with primary regulatory authority over air quality if

¹ See 42 U.S.C. §§ 7401-7671(q) (2010); 40 C.F.R. parts 1 through 789 (2010); 40 C.F.R. part 52, subpart ZZ; WYO. STAT. ANN. §§ 35-11-201 through -214; and WAQSR Chs. 1 – 14.

EPA has approved the state's State Implementation Plan (SIP) specifying the state's strategies for attaining, maintaining and enforcing National Ambient Air Quality Standards (NAAQS). 42 U.S.C. § 7407(a). Wyoming exercises primary air quality regulatory authority through the DEQ with Environmental Protection Agency (EPA) oversight. *See* 40 C.F.R. part 52, subpart ZZ.

B. WEQA

The foundation underlying Wyoming's air quality program is the WEQA which establishes a statutory structure designed in part to enable the State of Wyoming to preserve, protect, use, develop, reclaim and enhance its air resources. *See* WYO. STAT. ANN. § 35-11-102. In enacting the WEQA, "[t]he legislature knew that business and industry, essential to the state's economic health, had to be maintained." *State v. Platte Pipe Line Co.*, 649 P.2d 208, 212 (Wyo. 1982). The DEQ administers and enforces the WEQA and permits issued thereunder. *See* WYO. STAT. ANN. §§ 35-11-104, -109, -110 and -801.

C. Ambient Air Quality Standards and Designations

Ambient air quality standards set the maximum ambient air concentrations for certain "criteria" pollutants at levels sufficient to protect public health (primary standards) and welfare (secondary standards) with a built in safety margin. *See* 42 U.S.C. §§ 7408-7409; 40 C.F.R. pt. 50. "Ambient air" is that portion of the atmosphere to which the general public has access. WAQSR Ch. 2, § 1(a). At the federal level such standards are referred to as "national ambient air quality standards" (NAAQS). Wyoming-specific standards are referred to as "Wyoming ambient air quality standards" (WAAQS) and are

established by the DEQ/AQD. WYO. STAT. ANN. § 35-11-202; *see also* WAQSR Ch. 2, §§ 1-11.

Areas where ambient air quality meets the NAAQS for a particular pollutant are deemed in “attainment;” areas that cannot be classified on the basis of available information are deemed “unclassifiable;” and areas that do not meet the NAAQS are designated as “nonattainment.” *See* 42 U.S.C. § 7407(d)(1)(A). The quarry is located in Crook County which has been designated as unclassifiable or in attainment for all NAAQS. 40 C.F.R. § 81.351.

D. Wyoming’s Air Quality Construction and Permitting Program

Pursuant to the WEQA and WAQSR, an air quality construction permit is required before modifying an existing source which may cause the issuance of air pollution in excess of established standards. WYO. STAT. ANN. § 35-11-801(c); WAQSR Ch. 6, § 2. Permit applicants must demonstrate that the source “will be located in accordance with proper land use planning as determined by the appropriate state or local agency charged with such responsibility.” WAQSR Ch. 6, § 2(c)(iv). Permit applicants must also demonstrate that “the proposed facility will not prevent the attainment or maintenance of any ambient air quality standard.” WAQSR Ch. 6, § 2(c)(ii). Prior to issuing a permit, DEQ/AQD must publically notice its proposed decision and provide an opportunity for public comment. WAQSR Ch. 6, § 2(m). Under this permitting system, the DEQ may impose permit conditions consistent with the WEQA and WAQSR. *See* WYO. STAT. ANN. § 35-11-801(a).

V. ARGUMENTS

A. The DEQ/AQD complied with public notice requirements for issuing Permit MD-9645.

Petitioner generally claims, without citation to any statute or rule, that the public notice for the proposed permit was deficient (Pet. for Hr'g at pp. 1-2). However, DEQ/AQD complied with public notice requirements and is therefore entitled to summary judgment on this issue.

The public notice requirements applicable to DEQ/AQD construction permits are set forth in WAQSR Ch. 6, § 2(m) which provides:

After the Administrator has reached a proposed decision based upon the information presented in the permit application to construct or modify, the Division of Air Quality will advertise such proposed decision in a newspaper of general circulation in the county in which the source is proposed. This advertisement will indicate the general nature of the proposed facility, the proposed approval/disapproval of the permit, and a location in the region where the public might inspect the information submitted in support of the requested permit and the Air Quality Division's analysis of the effect on air quality . . . The public will be afforded a 30-day period in which to make comments and recommendations to the Division of Air Quality. A public hearing may be called if sufficient interest is generated or if any aggrieved party so requests in writing within the 30-day comment period. After considering all comments, including those presented at any hearings held, the Administrator will reach a decision and notify the proposed parties.

WAQSR Ch. 6, § 2(m).

The WAQSR requires DEQ/AQD to advertise its "proposed decision in a newspaper of general circulation in the county in which the source is proposed." *Id.* On October 1, 2009, the DEQ/AQD complied with this requirement when it advertised its proposed decision in the Sundance Times. (Schlichtemeier Aff. at ¶ 19; Ex. 10). The

advertisement, and the public notice posted at the Crook County Clerk's office, generally described the nature of the proposed quarry operations and equipment, stated that DEQ/AQD proposed to approve Croell's application, explained that a copy of the application and DEQ/AQD's analysis was available at the Crook County Clerk's office, and allowed for public comment through November 2, 2009. (Schlichtemeier Aff. at ¶¶ 18-19; Exs. 9-10). Accordingly, the undisputed evidence demonstrates that DEQ/AQD complied with the public notice requirements of WAQSR Ch. 6, § 2(m).

The WAQSR also provides that DEQ/AQD may hold a public hearing on its proposed decision. WAQSR Ch. 6, § 2(m). During the public comment period, the DEQ/AQD received a public hearing request. (Schlichtemeier Aff. at ¶ 21; Ex. 12). In response, the DEQ/AQD noticed and held a public hearing on December 14, 2009 regarding its proposed decision. (Schlichtemeier Aff. at ¶¶ 23-26, 30; Exs. 14- 18, 22). Petitioner's ranch manager, Dewey Turbiville, attended and provided oral comments at the hearing. (Ex. 22 at 000188-89, 000192). Thus, the undisputed evidence also demonstrates that the DEQ/AQD complied with the public hearing requirements in WAQSR Ch. 6, § 2(m).

After the DEQ/AQD issued permit MD-9645 to Croell on March 17, 2010, the DEQ/AQD sent copies of the permit and decision document to the commenters, including an e-mail copy sent to Petitioner on March 22, 2010. (Schlichtemeier Aff. at ¶¶ 32 - 35; Exs. 25 - 29). Petitioner admits that DEQ/AQD e-mailed a copy of the decision to her, but she would have preferred it to have been sent via registered mail. (Pet. for Hr'g at pp. 3-4). One month later, on April 19, 2010, DEQ/AQD sent an additional copy to

Petitioner and was notified by Petitioner that she had received both copies. (Schlichtemeier Aff. at ¶ 37; Ex. 31).

Petitioner has failed to bring forth any facts or law to support her allegations that DEQ/AQD's initial public notice, comment period, or public hearing were deficient, or that DEQ/AQD's post-permit issuance correspondence to commenters was legally deficient. Petitioner submitted comments to the DEQ on the proposed permit in writing and through her ranch manager at the public hearing. The DEQ/AQD complied with the public notice requirements of Ch. 6, § 2(m) of the WAQSR. Therefore, DEQ/AQD is entitled to summary judgment on this issue.

B. Croell's application contained a correct legal description of the quarry's location.

Petitioner generally claims that permit MD-9645 is deficient because she alleges the quarry location is incorrectly described in the introductory paragraph as being located in the NW1/4NE1/4 of Section 25, T52N, R62W. (Pet. for Hr'g at pp. 2-3). However, the full legal description set forth in Croell's application, which Petitioner acknowledges is correct, is incorporated in condition no. 2 of permit MD-9645. Because the full legal description set forth in Croell's application is correct, DEQ is entitled to summary judgment on this issue.

Croell's application included a written legal description and a map of the Quarry's location. (DEQ Resp. at ¶ 2; Croell Resp. at ¶ 2; DEQ Resp. to Amend. Pet. at ¶ 10; Ex. 1 at 000001, 000003, 000022; DEQ Resp. to Int. Nos. 1, 2). The DEQ explained that the purpose for including a legal description in the application is to provide the basis for

including a general location and approximate distance to the nearest town in the permit. (DEQ Resp. to Int. No. 1). Condition no. 2 of permit MD-9645 provides that all permit application descriptions are incorporated and enforceable permit conditions. (Ex. 25 at 000167). Petitioner also acknowledges that the aerial map in Croell's application "makes it clear that the NWNE of Section 25 was not a part of the Croell Redi-Mix minesite[.]" (Amend. Pet. for Hr'g at FN 7).

To warrant reversal of an administrative decision, Petitioner must demonstrate that an incorrect legal description was prejudicial and affected her substantive rights. *See Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 960 (Wyo. 1995). Petitioner has failed to bring forth any material facts or demonstrate the prejudicial effect caused by the alleged error in the application's partial description of the quarry location, especially where Petitioner acknowledges the aerial map and full legal description are correct. As set forth in section V.A *supra*, Petitioner fully participated in the public comment process for AP-9645. Petitioner has failed to demonstrate how she was prejudiced. Therefore, the DEQ/AQD is entitled to summary judgment on this issue.

C. The DEQ/AQD properly limited quarry production and imposed BACT.

Petitioner alleges that DEQ's legal authority to limit quarry productions was unclear (Pet. for Hr'g at p. 4-5). Petitioner is incorrect. DEQ/AQD has specific statutory and regulatory authority to limit quarry production and impose BACT. Therefore, DEQ/AQD is entitled to summary judgment on this issue.

Pursuant to the WEQA and WAQSR, an air quality construction permit is required before modifying existing facilities which may cause the issuance of air pollution in

excess of established standards. WYO. STAT. ANN. § 35-11-801(c); *see also* WAQSR Ch. 6, § 2. Applicants must also demonstrate that “the proposed facility will not prevent the attainment or maintenance of any ambient air quality standard.” WAQSR Ch. 6, § 2(c)(ii). Under this permitting system, DEQ may impose permit conditions consistent with existing rules, regulations or standards necessary to accomplish the WEQA’s purpose. WYO. STAT. ANN. § 35-11-801(a); *see also* WAQSR Ch. 6, § 2(f). One such standard requires sources “to control fugitive dust emissions.” WAQSR Ch. 3, § 2(f). Another standard requires the proposed facility to use BACT for emissions of regulated pollutants. WAQSR Ch. 6, § 2(c)(v) and § 4(a).

Permit MD-9645 includes requirements limiting production and prescribing emission control requirements. (Ex. 25). Sources failing to comply with permit requirements may be subject to enforcement. WYO. STAT. ANN. §§ 35-11-701, 35-11-901. Therefore, such permit terms, including production limits, are enforceable by the DEQ, and DEQ is entitled to summary judgment on this issue.

D. Petitioner’s allegations regarding previously issued DEQ/AQD permits are jurisdictionally barred.

In her Amended Petition for Hearing, Petitioner alleges that DEQ/AQD permits CT-4526, CT-4527, CT-4089, CT-7113, and MD-8685, issued to Croell and others for equipment and quarry operations since 2007, are void for allegedly including an incorrect general location description of NWN Section 25, T52N R62W. (Amend. Pet. for Hr’g at pp. 3-9). Petitioner is jurisdictionally time-barred from challenging these permits. Therefore, DEQ is entitled to summary judgment on this issue.

An administrative agency, like a court, must have subject matter jurisdiction before it can hear a case. *Diamond B Services, Inc. v. Rohde*, 2005 WY 130, ¶ 13, 120 P.3d 1031, 1038 (Wyo. 2005). The agency “does not have discretion in determining whether or not it has subject matter jurisdiction; subject matter jurisdiction either exists or it does not.” *Amoco Production Co. v. Wyoming State Bd. Of Equalization*, 7 P.3d 900, 904 (Wyo. 2000). Administrative rules have the force and effect of law. *RME Petroleum Co. v. Wyoming Dept. of Revenue*, 2007 WY 16, ¶ 43, 150 P.3d 673, 688 (Wyo. 2007). Pursuant to Ch. I, § 16 of the DEQ Rules of Practice, appeals must be filed with the EQC within 60 days of the DEQ’s final decision. Thus, the timely filing of a request for hearing is mandatory and jurisdictional. After the time for filing a request for hearing has passed, the EQC is divested of jurisdiction.

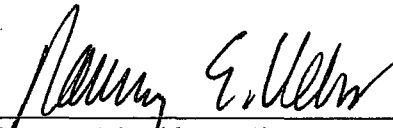
Petitioner’s Amended Petition for Hearing alleges that these other DEQ/AQD permits included incorrect legal descriptions and are therefore void. (Amend. Pet. for Hr’g at pp. 3-9). All of the alleged permit issuance dates fall outside of the EQC’s 60 day appeal deadline timeframe. *Id.* Petitioner’s allegations regarding such permits are therefore jurisdictionally time barred and not properly before the EQC. Accordingly, DEQ is entitled to summary judgment on this issue.

VI. Conclusion

For the reasons stated above, the DEQ/AQD requests the EQC grant DEQ's Motion for Summary Judgment, dismiss this matter, and order such other relief as may be appropriate.

DATED this 20th day of October, 2010.

FOR RESPONDENT DEQ:



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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2010, a true and correct copy of the foregoing *Memorandum In Support of DEQ's Motion for Summary Judgment* was served by placing the same in the United States mail, postage pre-paid, addressed to:

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