

Dec 14, 2009

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

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

IN THE MATTER OF:)	
Mullinax Concrete Services Co.)	DOCKET NO. 09-4602
Limited Mining Operation Application)	
TFN 5 4/123)	

RESPONSE TO MOTION TO DISMISS

Petitioner, Mullinax Concrete Services Company, Inc., by and through its undersigned attorneys, hereby responds to and traverses the Motion To Dismiss filed by the State of Wyoming, Department of Environmental Quality (“DEQ”) in this matter as follows:

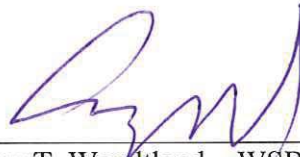
1. On November 3, 2009, Mullinax submitted a timely *pro se* appeal of the DEQ’s September 17, 2009 denial of a Mullinax September 15, 2009 application for a permit to establish and operate an LMO gravel operation at T53N, R83W, 6th PM, Section 22, SESW and SWSE; this LMO permit application was designated by the DEQ as application TFN 5 4/123 (Johnson County, Wyoming).
2. On December 3, 2009, counsel for the DEQ filed motion to dismiss alleging that there were technical deficiencies in Mullinax’s initial appeal filing with the Council that should lead to dismissal of this appeal case.
3. On December 14, 2009, Mullinax, now acting through counsel, served a Supplemental Petition on the DEQ, the Council and others as shown in the attached Exhibit A. As set forth therein, said Supplemental Petition clarified and verified any information that is required for an appeal like this one in Chapter 1, Section 3 of the Environmental Quality Council’s Rules of Practice and Procedure and also verified that all of the substantive information that needed to be disclosed to the Council and to the DEQ on November 3, 2009 when Mullinax’s appeal was docketed was known to the DEQ before that date and to the Council on November 3, 2009.
4. To the extent that Mullinax’s initial *pro se* appeal filing was not made technically in perfect compliance with Chapter 1, Section 3 of the Environmental Quality Council’s Rules of Practice and Procedure, any such arguable technical deficiencies have been corrected in a timely manner. The DEQ’s motion to dismiss filing otherwise does not state and the file does not show, that any interested party in this matter has been deprived of the basic information upon which this appeal is based or does not have sufficient actual record knowledge of the issues and facts on appeal to be able to proceed. Further, Mullinax has now retained counsel and has committed to proceeding with this appeal formally under the rules in all respects. There has been no prejudice or harm to anyone involved here at this point and this otherwise timely appeal case should proceed for resolution on the merits.

5. Pursuant to Chapter 1, Section 12(a) of the Environmental Quality Council's Rules of Practice and Procedure, the Council may deviate from its basic rules and requirements under Chapter 1 to the extent that a strict and technical application of the rules would be impossible or impracticable. Mullinax followed the instructions that it received from Council administrative staff when it initiated this appeal and the DEQ cannot identify any substantive prejudice to it or the Council now that the Supplemental Petition has been filed pursuant to the Rules.

Based on this information and argument, Mullinax respectfully requests that the Council deny the Motion To Dismiss and set this matter for a scheduling conference for contested case proceedings.

DATED this 14th day of December, 2009.

WENDTLAND & WENDTLAND, LLP



Anthony T. Wendtland – WSB#05-2468
Attorney for Mullinax Concrete Service
Company, Inc.
2161 Coffeen Ave., Suite 301
Sheridan, WY 82801
(307) 673-4696
(307) 673-4898 (fax)

CERTIFICATE OF SERVICE

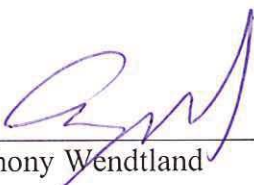
I, Anthony T. Wendtland, attorney for the Defendant in the above-entitled and numbered case do hereby certify that on the 14th day of December, 2009, I caused a true and correct copy of the foregoing Response to Motion To Dismiss to be served by U.S. First Class Mail and by electronic mail to the following:

Dennis Boal, Chairman
Environmental Quality Council
122 West 25th Street, Rm 1714
Herschler Building
Cheyenne, WY 82002
c/o kwarin@wyo.gov

John Corra
Director, DEQ
122 West 25th Street
Herschler Building
Cheyenne, WY 82002
jcorra@wyo.gov

John Burbridge
Assistant Attorney General
Attorney General's Office
123 Capitol Building
200 W. 24th Street
Cheyenne, WY 82002
jburb1@state.wy.us

Larry Ligoeki
Mullinax Concrete Service, Co
615 Fort Road
P.O. Box 2044
Sheridan, WY 82801
lligoeki@fiberpipe.net



Anthony Wendtland

EXHIBIT A - COPY OF SUPPLEMENTAL PETITION AND ATTACHMENTS

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

IN THE MATTER OF:)
Mullinax Concrete Services Co.) **DOCKET NO. 09-4602**
Limited Mining Operation Application)
TFN 5 4/123)

SUUPLEMENTAL PETITION FOR REVIEW / REQUEST FOR HEARING

Petitioner, Mullinax Concrete Service Co. ("Mullinax"), by and through its undersigned attorneys of record and pursuant to W. S. § 35-11-1001, and the Wyoming Department of Environmental Quality General Rules of Practice and Procedure, Ch 1 §§ 2 and 3, Mullinax hereby supplements its pending appeal Docket No. 09-4602 to the Environmental Quality Council of the State of Wyoming ("Council" or "EQC") as follows:

1. Name and Address of Petitioner and Petitioners' Attorney. The name and address of the Petitioner is: Mullinax Concrete Service Co., Inc., a Wyoming corporation of P.O. Box 2044, Sheridan, WY 82801. This information has actually been known to the Respondent, State of Wyoming Department of Environmental Quality ("DEQ") since at least September 17, 2009 by virtue of direct communications between Mullinax and the DEQ as shown in the attached Exhibit A materials. This information has been known to the Council since at least November 3, 2009.

2. Action Upon Which Hearing Is Requested. This appeal is pending from the final September 17, 2009 decision by David Schellinger, Natural Resources Analyst in of the Land Quality Division of the DEQ. A copy of the decision letter is marked and attached to this pleading as Exhibit A. This information has actually been known to the Respondent DEQ since

at least September 17, 2009 by virtue of direct communications between Mullinax and the DEQ as shown in the attached Exhibit A materials. This information has been known to the Council since at least November 3, 2009 as shown in the attached Exhibit A and B materials.

3. Facts.

a. On or about September 15, 2009, Mullinax applied for Limited Mining Operation (“LMO”) permit to establish and operate an LMO gravel operation at T53N, R83W, 6th PM, Section 22, SESW and SWSE; this LMO permit application was designated by the DEQ as application TFN 5 4/123. The application sought to establish and permit an LMO near Mullinax’s existing Regular Mining Permit (“RMP”) in the same area. See attached Exhibit A.

b. On or about September 17, 2009, the Sheridan, Wyoming office of the DEQ denied Mullinax’s LMO application TFN 5 4/123. See attached Exhibit B. The stated grounds for the denial by DEQ were that DEQ’s January 30, 2006 Non-coal Standard Operating Policy (SOP) No. 1.6 concerning the proximity of limited mining operations for small mining permits and regular mining permits somehow precluded granting the permit. The SOP is not a formally promulgated rule or regulation with the force of law. DEQ’s denial letter relied solely upon the SOP and did not state any other controlling statute or regulation as the basis of DEQ’s denial.

c. On September 24, 2009, Mullinax wrote a detailed letter back to the DEQ asking for clarification about its September 17, 2009 LMO denial and, essentially, seeking reconsideration of the denial based on additional facts and asking the DEQ to reconsider its reading of the SOP language. This letter also pointed out that the SOP is not a binding DEQ regulation and that the DEQ’s denial was not based rationally or logically on any controlling statute. See the attached Exhibit C.

d. On October 8, 2009, Larry Ligocki of Mullinax also exchanged email correspondence chain with DEQ personnel Mark Rogaczewski and Don McKenzie on the same issues raised in the September 24, 2009 letter. This email chain included communications between Mr. McKenzie and DEQ attorney John Burbridge. See the attached Exhibit C.

e. On October 9, 2009, Larry Ligocki of Mullinax wrote another letter to the DEQ ostensibly responding to the October 8, 2009 email chain and reiterating Mullinax's position concerning the denial of the LMO. See the attached Exhibit C.

f. Between October 22 and October 30, 2009, Larry Ligocki of Mullinax exchanged additional email correspondence chains with Mark Rogaczewski of DEQ concerning the LMO denial issue. DEQ legal counsel again reiterated reliance on the SOP to deny Mullinax's LMO application and suggested that Mullinax appeal the denial to the Council. See the attached Exhibit C.

g. On November 3, 2009, Mr. Ligocki telephoned Kim Warin at the EQC administrative offices and asked for help filing and processing Mullinax's appeal of the September 17, 2009 denial of the LMO permit application. Mr. Ligocki then emailed Ms. Warin all of its file materials on this issue and made a formal request to appeal the September 17, 2009 LMO permit application denial. The EQC received those materials and docketed this matter for an appeal on November 3, 2009 as Council Docket Appeal No. 09-4602. See the attached Exhibit D.

h. Legal counsel for Mullinax was then contacted and entered an appearance of record on or about November 30, 2009.

i. Counsel for the DEQ then filed its motion to dismiss Mullinax's appeal on December 3, 2009.

All of this information has actually been known to the Respondent DEQ since at least September 17, 2009 by virtue of direct communications between Mullinax and the DEQ as shown in the attached Exhibit A, B and C materials. This information has been known to the Council since at least November 3, 2009 as shown in the attached Exhibit A, B and C materials.

4. Council Issues On Appeal.

The following alternative issues on appeal exist in this matter:

- a. Whether the DEQ had the legal authority to deny Mullinax's application for LMO Permit TFN 5 4/123 given the facts and circumstances of that permit application?
- b. Whether DEQ's Non-coal Standard Operating Policy (SOP) No. 1.6 "guidelines" have any force and effect of law sufficient to serve as any legal basis for denial of Mullinax's application for LMO Permit TFN 5 4/123?
- c. Whether DEQ's past practices and interpretation of its own guidelines and any other DEQ authority governing the review and issuance of LMO permits has been such that DEQ's denial of Mullinax's application for LMO Permit TFN 5 4/123 is arbitrary and capricious and/or lacks a substantial evidence basis?
- d. Whether the DEQ's denial of Mullinax's application for LMO Permit TFN 5 4/123 record in this matter is otherwise arbitrary, capricious or an abuse of discretion?
- e. Whether the DEQ's denial of Mullinax's application for LMO Permit TFN 5 4/123 record in this matter is made otherwise not in accordance with law, in excess of statutory jurisdiction, authority or limitations, lacking statutory right, or was made without observance of procedure required by law?

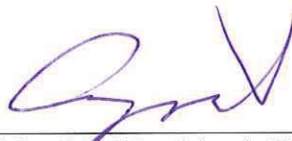
This information has actually been known to the Respondent, State of Wyoming Department of Environmental Quality ("DEQ") since at least September 17, 2009 by virtue of

direct communications between Mullinax and the DEQ as shown in the attached Exhibit A materials. This information has been known to the Council since at least November 3, 2009 as shown in the attached Exhibit A and B materials.

5. Reiterated Request for Hearing. Mullinax reiterates its existing November 3, 2009 request for a contested case hearing before the Environmental Quality Council and requests that the Council reverse the September 17, 2009 decision of the DEQ that is attached hereto as a part of Exhibit A.

DATED this 14th day of December, 2009.

Counsel for Petitioner



Wendtland & Wendtland, LLP
Anthony T. Wendtland – WSB#05-2468
Attorney for Petitioner
2161 Coffeen Ave., Suite 301
Sheridan, WY 82801
(307) 673-4696

CERTIFICATE OF SERVICE

I, Anthony T. Wendtland, attorney for the Petitioner, in the above-entitled and numbered cause do hereby certify that on the 14th day of December, 2009, I caused a true and correct copy of the Supplemental Petition For Review / Request For Hearing to be served as follows:

VIA REGISTERED MAIL / RETURN RECEIPT REQUESTED:

RE 120 276 254 US

Dennis Boal
Chairperson of the Environmental Quality Council
122 W. 25th St.
Herschler Bldg., Rm 1714
Cheyenne, WY 82002

RE 120 276 268 US

John Corra, Director
State of Wyoming, Dept. of Environmental Quality
122 West 25th Street
Herschler Building
Cheyenne, WY 82002

RE 120 276 270 US

Richard Chancellor, Administrator
State Dept. of Environmental Quality
Land Quality Division
122 West 25th Street
Cheyenne, WY 82002

RE 120 276 285 US

John S. Burbridge
Senior Assistant Attorney General
Attorney General's Office
123 Capitol Ave.
Cheyenne, WY 82002



Anthony T. Wendtland

Exhibit A



MULLINAX
Concrete - Irrigation
Construction Supply
Sheridan, Wyoming

September 15, 2009

Dave Schellinger
LQD Analyst
Wyoming DEQ
District III Office

RE: Piney Creek Hilltop 10-Acre ET Permit Application

Dear Mr. Schellinger,

I have enclosed the following with this cover letter:

- 1) Form 10 – Notification and surface owner consent for the Piney Creek Hilltop limited mining operation.
- 2) A letter from the Johnson County Planner stating the potential gravel pit will not be in violation of any local zoning rules & regulations.
- 3) A map indicating the location and existing haul roads for the operation.
- 4) A statement from Jake Kennedy giving Mullinax permission to access the mine site through his property.
- 5) The letter of credit from First Federal Savings Bank indicating the reclamation performance bond has been set up for the operation.

Please call if you have any questions.

Sincerely,

Larry Ligocki
Mullinax Concrete Service Co.
P.O. Box 2044
Sheridan, WY 82801
307-674-4466 (ext. 216)

**Notification and Surface Owner Consent for Limited Mining Operations
also known as Ten Acre Exemption**

Under the Wyoming Environmental Quality Act W.S. §35-11-401(e)(vi), this form may be used only for mining Sand, Gravel, Scoria, Limestone, Dolomite, Shale, Ballast or Feldspar. The cumulative affected lands may not exceed ten (10) acres.

1. Location of lands affected by the mining operation.
- A. Pit, Stockpile and equipment storage areas: enter quarter-quarter or equivalent description.
SE 1/4 SW 1/4, Section 22, T. S3 N., R. 83 W., Acres 9.05
SW 1/4 SE 1/4, Section 22, T. S3 N., R. 83 W., Acres 0.95
 _____, Section _____, T. _____ N., R. _____ W., Acres _____
- B. Haul and access roads; list those portions of newly constructed or upgraded private roads which provide exclusive service to the mining operation. *Intent of gravel pit is to provide material for the local, adjacent subdivision roads + haul roads. Existing roads will be utilized to access the pit.*
 _____, Section _____, T. _____ N., R. _____ W., Acres _____
 _____, Section _____, T. _____ N., R. _____ W., Acres _____
 _____, Section _____, T. _____ N., R. _____ W., Acres _____
- C. All listed lands occur in Johnson County, WY and the Total Acres are 10

2. List all operators defined in W.S. §35-11-103(e)(ix) as "...any person engaged in mining...or who acts as an agent or independent contractor...in the conduct of mining operations."

<p>A. Applicant for the Limited Mining Operation <u>Mullinax Concrete Service Co.</u> (individual or company name) <u>P.O. Box 2044</u> <u>Sheridan, WY 82801</u> (mailing address) (PHONE) <u>307-674-4466</u> (FAX) <u>307-674-6871</u> (area code and phone and fax number) <u>Corporation</u> (type of entity)</p>	<p>B. Operator (if different from applicant) _____ (individual or company name) _____ (mailing address) _____ (area code and phone and fax number) _____ (type of entity)</p>
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3. Description of affected lands and mining operation.
- A. The mineral to be mined is gravel and mineral ownership is private (private, state, federal)
- B. The mining operation will begin on January 2010 and is projected to last until January 2025 (month & year) *(until material is gone)*
- C. The mining operation will include 1) removing and stockpiling all topsoil with a dozer, scraper or similar equipment 2) removing and stockpiling overburden with a dozer, scraper or similar equipment 3) removing and processing and stockpiling the mineral 4) hauling the processed mineral 5) backfilling stockpiled overburden and unused mineral, regrading and contouring and retopsoiling and reseeding all affected lands.
- D. The premining and postmining land uses are grazing and wildlife habitat.
- E. The maximum depth of mining will be 15' feet and the estimated depth to groundwater at the pit is 50' + feet. *(fifteen)*

4. A Reclamation Performance Bond in the amount of \$ 10,000 calculated at the rate of \$1,000 per acre for the total acres listed in I.C. above. The bond is 01-800194-12 (C.D. No., Surety Bond No., Letter of Credit No.)

5. Under penalties of perjury, we declare that we have examined this notification and consent and the information contained herein, and to the best of our knowledge it is true, correct and complete, and that the location of the proposed operation is accurately shown in the original U.S.G.S. quadrangle map accompanying this consent, and this Ten Acre Exemption will not be used in conjunction with any other adjacent Ten Acre Exemption to circumvent the permitting requirements of the Wyoming Environmental Quality Act. Further, it is agreed that the reclamation of the lands affected by the mining operation shall be in compliance with applicable Land Quality Division (LQD) Rules and Regulations and that we have the right to mine the minerals.

6. We, the surface owner and lessee and operator, are aware that the LQD may conduct inspections of the operation and by our signatures below we give our consent to the conduct of such inspections.

<p><u>Robert Mullinax</u> 9/4/09 Signature of surface owner and date <u>Robert Mullinax</u> Print or type name of surface owner _____ Signature of surface lessee and date <u>P.O. Box 2044</u> <u>Sheridan, WY 82801</u> <u>307-674-4466</u> Print or type address and phone no. of surface owner</p>	<p>_____ Signature of applicant and date _____ Print or type name of applicant _____ Signature of applicant and date _____ Print or type name and phone no. of applicant</p>
--	--

-----MAKE NO ENTRIES-----FOR LQD USE ONLY-----

TFN No. _____ Permit No. _____ District _____	Approved: _____ Administrator, LQD Approval date: _____
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Johnson County Planning Department

26 North DeSmet Street, Buffalo, Wyoming 82834

Phone: (307) 684-1907 · Fax: (307) 684-2392 · e-mail: jcplanner@vcn.com

September 1, 2009

Mullinax Concrete Services
Attn: Larry Ligocki
P.O. Box 2044
Sheridan, WY 82834

Dear Mr. Ligocki:

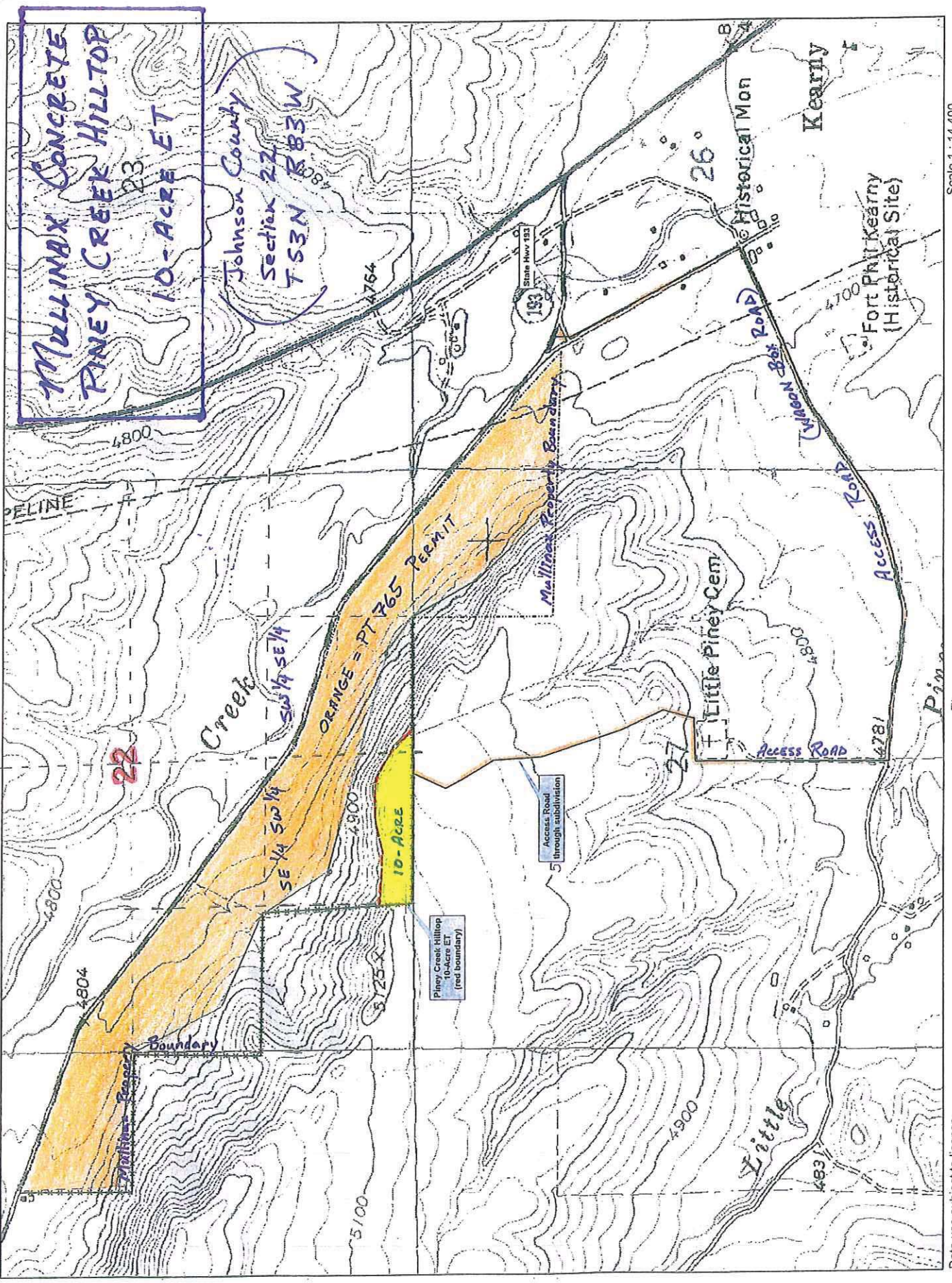
Please be advised that Johnson County, Wyoming currently has no officially adopted zoning regulations, building codes or associated zoning or building fees. Therefore, there are no Johnson County regulations that pertain to any type of gravel or gravel pit operations.

If you require any additional information, please contact me at any time.

Sincerely,

A handwritten signature in cursive script that reads "Rob Yingling".

Rob Yingling
County Planner & Project Manager

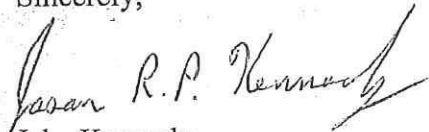


August 21, 2009

To Whom It May Concern,

I have given Mullinax Concrete Service Company permission to access the Piney Creek Hilltop 10-acre mine site through my property. It is understood that this mine site is intended to be a gravel supply for the adjacent subdivision and other nearby uses. Therefore, a regular, intensive gravel hauling operation is not intended or expected for reasons other than intermittent nearby uses.

Sincerely,

A handwritten signature in cursive script that reads "Jake R.P. Kennedy". The signature is written in dark ink and is positioned above the typed name.

Jake Kennedy
114 Warbonnet
Banner, WY 82832



IRREVOCABLE LETTER OF CREDIT NO. 01-800194-12

Date of Issue: 03/11/2009 Beneficiary: Wyoming Department of Environmental Quality

Date of Expiry: 04/11/2010 Amount: Ten Thousand Dollars and No/100 (\$10,000.00)

Gentleman:

We hereby establish our irrevocable letter of credit in your favor, available by your drafts at sight drawn on First Federal Savings Bank at 46 W. Brundage, Sheridan, WY 82801, accompanied by the following document:

A signed and dated statement from the Director of the Department of Environmental Quality and the land Quality Administrator in any one of the three following forms:

- a. "The Undersigned here by advise that an order in an amount identical to the amount of the sight draft which this statement accompanies has been entered by the Environmental Quality Council pursuant to W.S. 35-11-421, forfeiting all or part of the amount of the credit because of any violation of the Wyoming Environmental Quality Act, by Mullinax Concrete Service Co., Inc. Permit No. Piney Creek Hilltop 10 Acre ET . A certified copy of the order of forfeiture is attached."
- b. "The Undersigned hereby advise that a Settlement Agreement in an amount identical to the amount of the sight draft which this statement accompanies has been signed on behalf of the Department of Environmental Quality and on behalf of the operator, Mullinax Concrete Service Co., Inc., Permit No. Piney Creek Hilltop 10 Acre ET in which the parties have agreed to an amount due to the Department because of a violation of the Wyoming Environmental Quality Act, and that Mullinax Concrete Service Co., Inc., has failed to pay the amount due within the period of time specified in the agreement."
- c. "The Undersigned certify that the operator Mullinax Concrete Service Co., Inc. Permit No. Piney Creek Hilltop 10 Acre ET, has not filed with the Department

Letter of Credit No. 01-800194-12

Page 1

an extension of this letter of credit, a substitute letter of credit or other acceptable evidence of financial responsibility in the place of the letter of credit; and this it is thirty (30) days or less until the current or any amended expiration date of this Irrevocable Letter of Credit."

Pursuant to Chapter 12, Land Quality Division Noncoal Regulations, the bank shall give immediate notice to the permittee and the Director of the Department of Environmental Quality of: (a) any notice received or action filed alleging the insolvency or bankruptcy of the bank; or (b) alleging any violations of regulatory requirements which could result in suspension or revocation of the banks charter or license to do business; or (c) the bank, for any reason, becomes unable to fulfill its obligation under the letter of credit. Each draft must bear upon its face the clause, "Drawn under Letter of Credit No. 01-800194-12, dated March 11, 2009, and the total of this draft and all other previously drawn under this Letter of Credit does not exceed \$10,000.00."

It is a condition of this Letter of Credit that it shall be deemed automatically extended without amendment for one year from the present or any future expiration date hereof, unless ninety (90) days prior to any such date we shall notify the Director of the Wyoming Department of Environmental Quality in writing by overnight courier service at the above mentioned address that we elect not to consider this Letter of Credit renewed for any such additional period. Upon receipt by you of such notice, you may draw hereunder.

We hereby agree with you that draft drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to the above-mentioned drawee bank on or before April 11, 2010.

All questions arising in connection with this Letter of Credit shall be determined according to the laws of the State of Wyoming.

This Letter of Credit is subject to the Uniform Customs and Practice of Documentary Credits, 1993 Revision, International Chamber of Commerce Publication No. 500, except to the extent it is inconsistent with the laws of Wyoming.

Very truly yours,

FIRST FEDERAL SAVINGS BANK

By: 

Name: Steven D. Carroll
Title: Senior Vice President
Date: March 11, 2009

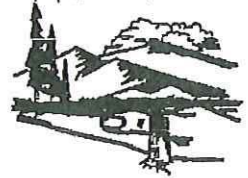
Exhibit B

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5 4/123



Department of Environmental Quality



To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Dave Freudenthal, Governor

John Corra, Director

September 17, 2009

Larry Ligoeki
Mullinax Concrete Services Co.
P.O. Box 2044
Sheridan, WY 82801

RE: Limited Mining Operation (LMO) Application, Mullinax Concrete Services Co., TFN 5 4/123

Dear Mr. Ligoeki,

Mullinax Concrete Services Co. submitted the above referenced Application under your cover letter of September 15, 2009. The materials were received at the LQD District III Office on the same day. The DEQ/LQD must deny your application on the grounds that the proximity of the proposed LMO to an existing regular mine permit, Permit No. 765, operated by Mullinax Concrete Services Co. breaches a standing LQD Standard Operating Procedure (SOP).

Noncoal SOP No. 1.6 was approved by the LQD Administrator on January 30, 2006. The subject of the SOP is "Proximity of Limited Mining Operations, Small Mining Permits and Regular Mine Permits." Section III(2) of this SOP states that the same Permittee may hold any combination of LMO and Small Mine Permit (SMP) or a LMO and Regular Mine Permit (RMP) as long as the pit and affected land of each LMO are at least six miles apart, as a crow flies. However, if the permittee holds a SMP or RMP, the Administrator will not issue a new, separate LMO. The prospective LMO lands must be amended to the existing SMP or RMP. The Form 10 Operator has no bearing on this configuration.

Basically, an LMO may not exist within six miles of an existing Permit operated by the same Permittee. However, the proposed LMO location may be amended to Permit No. 765. However, the DEQ/LQD must deny this application.

If you have questions, please contact me in the LQD District III Office (307)673-9337.

Sincerely,

David Schellinger
Natural Resources Analyst

/DS

xc: Cheyenne LQD File

AKC
9/18/09

1866 SOUTH SHERIDAN AVENUE • SHERIDAN, WY 82801

AIR, LAND AND WATER DIVISIONS
(307) 673-9337 • FAX (307) 672-2213



Exhibit C

Larry Ligocki

From: Larry Ligocki [lligocki@fiberpipe.net]
Sent: Tuesday, November 03, 2009 10:56 AM
To: 'kwarin@wyo.gov'
Subject: Limited Mining Operation TFN 5 4/123 Denial Appeal

Ms. Warin,

I visited with Mr. Joe Girardin yesterday about an appeal Mullinax Concrete Service Company would like to make regarding a Wyoming Department of Environmental Quality Land Quality Division denial of a limited mining operation (LMO) application (TFN 5 4/123) in Johnson County. He asked me to send the electronic copies of the information associated with the application denial. Attached are the documents.

By reviewing the information in chronological order it will be easier to follow the chain of dialog between Mullinax Concrete Service Co. and DEQ. The material attached in chronological order is:

- 1) Initial Denial Letter 9.17.09 (LQD's 1st letter denying our proposed LMO.)
- 2) Response 1 to Denied Permit 9.24.09 (Mullinax's 1st letter appealing the decision.)
- 3) E-mail from Cheyenne DEQ officials to Mark Rogaczewski dated 10/8/09. Mark forwarded this to Larry upon request.
- 4) Response 2 to Denied Permit 10.9.09. (Mullinax's 2nd letter appealing the decision)
- 5) E-mail from Cheyenne DEQ (Mark Rogaczewski to Mullinax - forwarding Burbridge's response) dated 10.22.09.
- 6) E-mail discussion between Larry Ligocki @ Mullinax and Mark Rogaczewski dated 10.26.09. Larry asking for written response.
- 7) Larry was informed during a phone conversation with Mark Rogaczewski that Burbridge would not respond in writing and an appeal is necessary. Larry was told to contact the Environmental Quality Council on 10/30/09.
- 8) E-mail from Mark Rogaczewski providing the contact information for the Environmental Quality Council dated 10.30.09.

I have thoroughly articulated Mullinax Concrete's interpretation of the rules associated with this application denial in the two letters written on September 24th and October 9th. I have requested a written response indicating why my interpretation is wrong and have not received such a response. Obviously, I do not agree that the cited rules and regulations cited as grounds for denial apply to this specific LMO application. Thus, I would like the issue reviewed by the Environmental Quality Council.

I will be happy to visit with you on the telephone and answer any questions you may have.

Thank you,

Larry Ligocki
Mullinax Concrete Service Company Inc.
P.O. Box 2044
Sheridan, WY 82801
307-674-4466 (ext. 216)

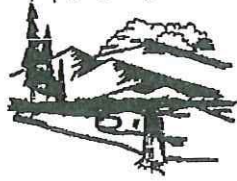
P.S. Because I can't seem to get the e-mail folder attached to this specific e-mail I am going to forward each e-mail correspondence between DEQ and Mullinax to you individually. I'm sorry for the inconvenience and unorganized nature of the process. (There should be four additional (4) e-mails forwarded.)

①

5 4/123



Department of Environmental Quality



To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Dave Freudenthal, Governor

John Corra, Director

September 17, 2009

Larry Ligocki
Mullinax Concrete Services Co.
P.O. Box 2044
Sheridan, WY 82801

RE: Limited Mining Operation (LMO) Application, Mullinax Concrete Services Co., TFN 5 4/123

Dear Mr. Ligocki,

Mullinax Concrete Services Co. submitted the above referenced Application under your cover letter of September 15, 2009. The materials were received at the LQD District III Office on the same day. The DEQ/LQD must deny your application on the grounds that the proximity of the proposed LMO to an existing regular mine permit, Permit No. 765, operated by Mullinax Concrete Services Co. breaches a standing LQD Standard Operating Procedure (SOP).

Noncoal SOP No. 1.6 was approved by the LQD Administrator on January 30, 2006. The subject of the SOP is "Proximity of Limited Mining Operations, Small Mining Permits and Regular Mine Permits." Section III(2) of this SOP states that the same Permittee may hold any combination of LMO and Small Mine Permit (SMP) or a LMO and Regular Mine Permit (RMP) as long as the pit and affected land of each LMO are at least six miles apart, as a crow flies. However, if the permittee holds a SMP or RMP, the Administrator will not issue a new, separate LMO. The prospective LMO lands must be amended to the existing SMP or RMP. The Form 10 Operator has no bearing on this configuration.

Basically, an LMO may not exist within six miles of an existing Permit operated by the same Permittee. However, the proposed LMO location may be amended to Permit No. 765. However, the DEQ/LQD must deny this application.

If you have questions, please contact me in the LQD District III Office (307)673-9337.

Sincerely,

David Schellinger
Natural Resources Analyst

/DS

xc: Cheyenne LQD File

MAE
9/18/09

1866 SOUTH SHERIDAN AVENUE • SHERIDAN, WY 82801

AIR, LAND AND WATER DIVISIONS
(307) 673-9337 • FAX (307) 672-2213



2



MULLINAX
Concrete - Irrigation
Construction Supply
Sheridan, Wyoming

September 24, 2009

Mr. Mark Rogaczewski
Wyoming DEQ
District III office
1866 S. Sheridan Ave.
Sheridan, WY 82801

RE: Limited Mining Operation (LMO) Application, TFN 5 4/123

Dear Mr. Rogaczewski,

Having personally worked very well with the land quality division for several years, I understand that as a DEQ employee it is your job and duty to abide by the rules and regulations set forth by state statutes. I also understand that the land quality division has set standard operating procedures (SOP's) which are not necessarily mandated by statute but intended to eliminate particular practices that have allowed operators to circumvent the original purposes of the permitting process. I know these procedures also serve as a mechanism to ensure equitable consideration for all operators. I do not request or expect DEQ personnel to compromise their integrity by approving unjustifiable permits. I understand that the proposed Piney Creek Hilltop limited mining operation has been denied on the basis that it violates the non-coal standard operating procedures, however, I disagree with such an assessment when one considers the standard operating procedures in their entirety.

The first statement which was cited in the Non-coal SOP 1.6 as grounds to deny our limited mining operation application states that;

- "the same permittee may hold any combination of a LMO and SMP or a LMO and RMP as long as the pit and affected land of each LMO are at least six miles apart, as the crow flies."

I believe this statement implies that as long as the pits and other affected lands associated with LMO's are not within six miles of each other - pit combinations are acceptable. An operator is limited, according to this statement, to one LMO combination within a six-mile radius. By obtaining the Piney Creek Hilltop LMO, Mullinax would have a "LMO - RMP" combination with no other LMO within six miles.

A second statement in the Non-coal SOP 1.6 document which was used as grounds to deny our application states that;

- "...if the permittee holds a SMP or RMP, the Administrator will not issue a new, separate LMO. The prospective LMO lands must be amended to the existing SMP or RMP."

This standard operating procedure which, to my knowledge, is not backed by state statute and for which there are "... no known elements of the Wyoming EQA or Non-coal R&R which directly address this topic of proximity of permits" can be justifiably overlooked if: "...a distinct physical barrier, such as an impassable stream or impassable topographic feature, separates the mineral deposits and the two mining operations are conducted entirely separately." (Non-coal SOP 1.6, Section II A.1.) As alluded to in the LMO application, the site will most assuredly be operated independently from the regular mine site. The purpose for opening the pit is to supply gravel for local roads in the nearby area. Mullinax Concrete will not be conducting a typical excavation and gravel haul as is the case on the regular mine site. In addition to this mine site being operated "entirely separate" from our other site, this proposed LMO is not readily accessible from the existing regular mine site. I would ask you, as the arbiter of this application, to please consider the topography separating the existing regular mine permit (PT 765) and the proposed limited mining operation 220 feet above the regular permit. This elevation difference is not gradual - it is very abrupt without access from the bottom of the property. Although I have not had the Mine Safety and Health Administration (MSHA - which regulates all the health and safety aspects at our mine sites) consider the elevation, I will guess that the inspectors would have serious concerns about the grade of any road built up to the proposed limited mining operation (reference Subpart H of 30 Code of Federal Regulations Part 57.9000 – Part 57.9330). Because hill slides are apparent on this location MSHA would also require regular "ground condition" inspections (reference 30 Code of Federal Regulations Part 57.3401) along the respective hillside if any roads were to be built and utilized. In other words, building, maintaining, and requiring employees to drive loaded haul trucks down a newly constructed road between the two gravel reserves is not a very safe practice and limits our ability to operate the site in conjunction with the existing regular mine site. This topographic feature is the reason the gravel on the hilltop was not included in the regular mine permit. In addition to the safety issue, the amount of disturbance to natural resources by constructing a road up such a steep grade would be significant. However, if allowed to mine and market the hilltop gravel in the unique manner proposed in the LMO application resource disturbance on the face of the hill is unnecessary. Again, the intent of opening this site is for the local Piney Creek area only and traditional, extensive Mullinax gravel hauls will not occur.

As was stated in Mr. Schellinger's letter of September 17, the Non-coal Standard Operating Procedure 1.6 was approved by the LQD Administrator on January 30, 2006. Even though I believe the above arguments are legitimate and the approval of the proposed LMO would not violate SOP 1.6, there is precedent for allowing separate

mining permits within a six mile radius since the 2006 approval of SOP 1.6. Mullinax Concrete currently has four separate permits in Sheridan County within a six mile radius - two of which were approved following the approval of SOP 1.6. Two of the permits are small mine permits (permit # 691 and permit # 548), one is a regular mine permit (# 742), and one is a limited mine permit (# 1383 ET). Permits 742 and 1383 ET were both approved in the year 2007.

Finally, I would like to mention that permitting the proposed site as a limited mining operation simply makes more sense than amending the regular mine permit to include the new area. It is a proper and legal means of satisfying the requirements of the Department of Environmental Quality when a gravel reserve of approximately four acres exists. When handling these small mineral reserves the limited mining permit is a much more efficient and economical means of permitting not only for the operator but also for DEQ. The regular mine permit # PT765 took approximately eighteen months (once submitted) and cost the operator well over \$20,000 of labor, contracted studies, and other expenses before getting approval. I do not know how much time state employees spent reviewing the application, asking and answering questions, visiting the site, etc. but I'm sure it was significant. It has been my experience that amending small and regular mine permits requires attention and review that parallels the time spent obtaining the original permit. The Wyoming Department of Environmental Quality will have the same opportunity, under a limited mining operation, to ensure that all environmental concerns associated with gravel extraction are monitored and enforced as it would if the site were designated a regular mining operation. The only difference will be the amount of resources (time and money) allocated to the process of permitting the very limited quantity of gravel. Given the current economic situation in the private sector and the tightening of government budgets, it is prudent to choose the most economically efficient route when allocating resources to achieve an outcome. Whether under a limited mining operation designation or a regular mine site designation the ultimate outcome will be the same. However, one route is characterized by sound budgetary resource management and the other is not.

Please understand that Mullinax Concrete is not asking for a limited mining operation to circumvent rules and regulations and please know this plan to mine the Piney Creek Hilltop" site under a limited mining operation developed only this summer (2009), long after the regular mine permit was submitted for review.

Sincerely,

Larry Ligocki
Mullinax Concrete Service Co. Inc.
P.O. Box 2044
Sheridan, WY 82801
307-674-4466 (ext. 216)

3) **Larry Ligocki**

From: larry@mullinax-inc.com
Sent: Tuesday, November 03, 2009 10:58 AM
To: 'kwarin@wyo.gov'
Subject: Mullinax's LMO Appeal Email 10.8.09

From: Rogaczewski, Mark [mailto:mrogac@wyo.gov]
Sent: Thursday, October 08, 2009 3:17 PM
To: larry@mullinax-inc.com
Subject: Requested Note - SOP 1.6

Larry,

Copy of correspondence for your question is below:

From: McKenzie, Don
Sent: Thursday, October 08, 2009 9:35 AM
To: Rogaczewski, Mark
Subject: FW: Mullinax Concrete LMO near Regular Mine Permit

Mark, the rules seem to support proximity and LMO abuse addressed by the SOP. I'll stick with the SOP as a response to Mullinax.

-----Original Message-----

From: John Burbridge [mailto:JBURB1@state.wy.us]
Sent: Thursday, October 08, 2009 9:32 AM
To: McKenzie, Don
Subject: RE: Mullinax Concrete LMO near Regular Mine Permit

I think so as well.

>>> "McKenzie, Don" <dmcken@wyo.gov> 10/8/2009 9:30 AM >>>
Good point, helps support the SOP.

-----Original Message-----

From: John Burbridge [mailto:JBURB1@state.wy.us]
Sent: Thursday, October 08, 2009 9:22 AM
To: McKenzie, Don; Rogaczewski, Mark
Subject: RE: Mullinax Concrete LMO near Regular Mine Permit

Non-coal rule, Chapter 10, Section 8 does generally address proximity of operations.

4



MULLINAX
Concrete - Irrigation
Construction Supply
Sheridan, Wyoming

October 9, 2009

Mr. Mark Rogaczewski
Wyoming DEQ
District III Office
1866 S. Sheridan Ave.
Sheridan, WY 82801

Dear Mr. Rogaczewski,

I appreciate the time you spent discussing the Piney Creek Hilltop ET with me yesterday. Given our conversation and my conversation with Mr. Dave Schellinger, I understand that Mr. John Burbridge and Mr. Don McKenzie believe that the non-coal rule, chapter 10, section 8 substantiates the denial of our proposed limited mining operation near our Piney Creek regular mine site PT765. However, after reading that rule I disagree.

Specifically, I believe you stated that non-coal rule, Chapter 10, Section 8 (a)(ii) is the rule that was being used to support the denial of our proposed LMO. The rule reads:

- (a) The operator will not be allowed to:
 - (ii) Conduct nearby operations of ten acres or less so as to circumvent the general requirements of the Environmental Quality Act.

First of all, this rule is a statement limiting the existence of "...nearby operations of ten acres or less..." In other words, two limited mining operations are not allowed in "nearby" proximity. As I have always been told by Land Quality staff, the same operator is not allowed to have two LMO's within six miles of each other. Since I have been performing the permitting duties for Mullinax Concrete Service Company this is the first time this rule has ever been represented as referring to LMO - RMP (regular mine permit) combinations.

Secondly, as I explained in my first letter, dated September 24, concerning this matter Mullinax Concrete is not intentionally circumventing the general requirements of the Environmental Quality Act, as LQD's use of this rule implies. I have enclosed a signed statement from Mr. Jason Kennedy (Exhibit A) in which he acknowledges his role in the

decision to permit the gravel resource in question. His statement establishes the fact that the idea to permit the hilltop adjacent to his property originated during the spring of 2009, well after the January 2008 submittal of the Piney Creek Regular Mine application. If Mullinax had originally planned on permitting the gravel in question, it would have originally been included in the regular mine permit application. Given the situation at hand, we are simply trying to permit the site in the most economical and legally acceptable manner possible. To my knowledge, LMO – RMP combinations by the same permittee are acceptable. Especially, “when the mining operations will be operated entirely separately and a distinct physical barrier separates the mineral deposits” as is the case with this LMO-RMP combination. (Non-coal SOP 1.6) When one considers the fact that Mullinax will not have another LMO within 20 miles it is evident that “LMO abuse” is not an issue in this case.

Having given much consideration to the SOP’s and Wyoming Statutes that have been cited as reasons to deny the Mullinax application, I have come to believe that these particular guidelines would serve as valid justification to approve the proposed limited mining operation in question. When my interpretation of these rules and guidelines is coupled with the precedent set in Sheridan County concerning LMO approval, it is difficult for me to understand where the error in my interpretation exists. I am beginning to believe LQD’s approach to this proposed operation is from the standpoint of trying to prove its inadequacy rather than objectively evaluating the justification for its approval.

Along with this letter, I have enclosed the original letter of concern (Exhibit B) I wrote on September 24 for your reference when considering the SOP 1.6 guidelines. I feel my comments in this letter concerning the LQD alleged SOP violations are valid and have not been addressed. If my point of view and interpretation of these guidelines is completely in error I politely ask for a letter pointing out the specific language I have misinterpreted and the specific reasons that this LMO application is not valid.

I certainly understand that you are busy and I do appreciate your time and consideration.

Sincerely,

Larry Ligocki
Mullinax Concrete Service Co
P.O. Box 2044
Sheridan, WY 82801
307-674-4466 (ext. 216)

5

Larry Ligocki

From: larry@mullinax-inc.com
Sent: Tuesday, November 03, 2009 10:58 AM
To: 'kwarin@wyo.gov'
Subject: Mullinax's LMO Appeal Email 10.22.09

From: Rogaczewski, Mark [mailto:mrogac@wyo.gov]
Sent: Thursday, October 22, 2009 10:45 AM
To: larry@mullinax-inc.com
Cc: Schellinger, David; Barbula, Larry
Subject: Proposed LMO denial near Permit 765

Larry,

I received the following information from the LQD AG – John Burbridge concerning your letter dated October 9, 2009:

“I stand by our reliance on Chapter 10, Section 8(a)(ii). If Mullinax wants to contest our reliance on that rule, Mullinax is free to appeal the LQD decision to deny his application.”

Mark

6

Larry Ligocki

From: larry@mullinax-inc.com
Sent: Tuesday, November 03, 2009 10:59 AM
To: 'kwarin@wyo.gov'
Subject: Mullinax's LMO Appeal Email 10.26.09

From: Rogaczewski, Mark [mailto:mrogac@wyo.gov]
Sent: Monday, October 26, 2009 6:14 AM
To: larry@mullinax-inc.com
Subject: RE: Proposed LMO denial near Permit 765

Larry,

I am heading to the Gillette area for coal inspections today. I will pass along your request that Mr. Burbridge put his explanation in writing.

Mark

From: larry@mullinax-inc.com [mailto:larry@mullinax-inc.com]
Sent: Friday, October 23, 2009 1:45 PM
To: Rogaczewski, Mark
Subject: RE: Proposed LMO denial near Permit 765

Thanks for the note Mark. If you have time I would like to come in on Monday and visit about how to appeal the decision. I understand Mr. Burbridge is standing by the decision, but without an explanation I can't understand why. He could save everyone a lot of time by simply articulating in writing why my interpretation is wrong. If I agree with his explanation as to how Chapter 10, Section 8(a)(ii) applies to a RMP-LMO combination I will concede that our proposed operation is invalid. If I do not agree with his explanation I can then appeal.

Just to reiterate my position, I strongly believe that the guideline for the limitation of operations applies to "...nearby operations of ten acres or less..." (the plural means more than one operation of ten acres or less). Again, Mullinax is only wanting one operation of ten acres or less within 20 miles. RMP-LMO combinations are okay as long as two LMO's are not within a 6 mile radius.

Larry Ligocki

From: Rogaczewski, Mark [mailto:mrogac@wyo.gov]
Sent: Thursday, October 22, 2009 10:45 AM
To: larry@mullinax-inc.com
Cc: Schellinger, David; Barbula, Larry
Subject: Proposed LMO denial near Permit 765

Larry,

I received the following information from the LQD AG – John Burbridge concerning your letter dated

11/25/2009

October 9, 2009:

"I stand by our reliance on Chapter 10, Section 8(a)(ii). If Mullinax wants to contest our reliance on that rule, Mullinax is free to appeal the LQD decision to deny his application."

Mark

Step
7 + 8

Larry Ligocki

From: larry@mullinax-inc.com
Sent: Tuesday, November 03, 2009 11:00 AM
To: 'kwarin@wyo.gov'
Subject: Mullinax's LMO Appeal Email 10.30.09

From: Rogaczewski, Mark [mailto:mrogac@wyo.gov]
Sent: Friday, October 30, 2009 3:20 PM
To: larry@mullinax-inc.com
Subject: Environmental Quality Council Phone No.

Larry,

The number to contact the Environmental Quality Council is:

307-777-7170

Mark

Larry Ligocki

From: Larry Ligocki [lligocki@fiberpipe.net]

Sent: Monday, November 09, 2009 8:26 AM

To: 'kwarin@wyo.gov'

Hello Kim,

I am sending you one more letter which I failed to include with my original email submission concerning the Piney Creek limited mining operation appeal. This letter was included as "Exhibit A" with my second letter to DEQ dated October 9, 2009. The October 9 letter explains my reasoning for including this note from Mr. Jason (Jake) Kennedy.

I have attached a scanned copy with a signature. If you have any questions please give me a call.

Thank you,

Larry Ligocki
Mullinax Concrete Service Co. Inc.
P.O. Box 2044
Sheridan, WY 82801
307-674-4466 (ext. 216) (office)
307-751-1226 (cell no.)

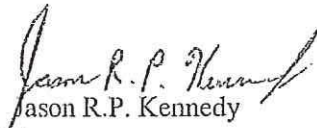
(EXHIBIT A)

October 9, 2009

To whom it may concern,

Larry Ligocki has requested that I verify with this letter my role in developing the idea to start up the small gravel pit behind my house on Mullinax's property. While visiting with Nathan Mullinax this past spring I asked him about getting some gravel for the access road to my house in the Little Piney Estates subdivision. Nathan mentioned that there was gravel on his property directly behind my house and that it would be a very close supply, not only for my road, but potentially for other roads in the subdivision. To my knowledge, the idea to mine this gravel supply next to my house began with our conversation this spring 2009.

Sincerely,



Jason R.P. Kennedy

⊗ This letter was "exhibit A"
attached to the Mullinax letter
of Oct. 9.

⊗ JJ

Exhibit D

09-4602	<i>Mullinax Concrete Service</i>	11/3/2009	
11/3/2009	<u>Appeal Letter.Ligocki</u>	Ligocki	
	<u>DEQ-Ligocki.Email Correspondence</u>	Ligocki	11/3/2009
	<u>DEQ Denial Letter</u>	Ligocki	11/3/2009
	<u>Mullinax Response.9-24-09</u>	Ligocki	11/3/2009
	<u>Mullinax Response.10-09-09</u>	Ligocki	11/3/2009
	<u>Response Order</u>	Boal	11/3/2009
	<u>Entry of Appearance.Wendtland</u>	Wendtland	12/1/2009
12/3/2009	<u>Motion to Dismiss.DEQ Proposed Order of Dismissal</u>	Burbridge Burbridge	12/3/2009

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Page updated on 12/03/2009