

John S. Burbridge, # 5-2856
Senior Assistant Attorney General
Attorney General's Office
123 Capitol Avenue
Cheyenne, Wyoming 82002
Telephone: (307) 777-6946
Fax: (307) 777-3542

Attorney for The Department
of Environmental Quality

FILED

DEC 03 2009

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

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

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

MOTION TO DISMISS

On November 3, 2009, Larry Ligocki of Mullinax Concrete Services Company, Inc. (Mullinax) transmitted electronic documents to the Environmental Quality Council (EQC), ostensibly, with the intent that such transmission would initiate to be a petition for review of the Department of Environmental Quality/Land Quality Division's (DEQ/LQD) denial of Mullinax's application for a limited mining operation, TFN 5 4/123. The DEQ/LQD is requesting that the EQC dismiss the above captioned matter for Mullinax's failure to file a petition for review in compliance with Chapter 1, Section 3 of the EQC's General Rules of Practice and Procedure. In support of this Motion, the DEQ/LQD states the following:

1. On November 3, 2009, Mullinax e-mailed the EQC asking that it review the decision of the DEQ/LQD denying Mullinax's application for a limited mining operation in Johnson County, Wyoming.

2. Attached to the e-mail communication were several documents, including the DEQ/LQD denial letter, copies of e-mail strings and other various written correspondence.

3. Chapter 1, Section 3(a) of the EQC's General Rules of Practice and Procedure requires that "[a]ll hearings before the Council, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. 35-11-101 through 1104 and the Wyoming Administrative Procedure Act."

4. Chapter 1, Section 3(b) of the EQC's General Rules of Practice and Procedure requires "[a]ll persons requesting a hearing or protesting a permit shall file two copies of a written petition directed to and served upon both the Chairman of the Council and the Director of the Department."

5. Mullinax has failed to file two copies of a written petition directed to and served upon both the Chairman of the Council and the Director of the Department.

6. Chapter 1, Section 3(b)(i) of the EQC's General Rules of Practice and Procedure requires that "[o]riginal service shall be by registered mail, return receipt requested."

7. Mullinax has not served the petition by registered mail, return receipt requested on either the Chairman of the Council or the Director of the Department.

8. All parties prevailing whose interest will be necessarily affected by a reversal, must be served and. *First Nat'l Bank v. Bonham*, 559 P.2d 42, 50 (Wyo. 1977). Until proper service is completed, the reviewing body has no jurisdiction over the matter. *Id.*

9. Chapter 1, Section 3(c) of the EQC's General Rules of Practice and Procedure requires the following:

The petition for hearing shall set forth:

(i) Name and address of the person making the request or protest and the name and address of his attorney, if any.

(ii) The action, decision, order or permit upon which a hearing is requested or an objection is made.

(iii) A statement in ordinary, but concise language of the facts on which the request or protest is based, including whenever possible particular reference to the statutes, rules or orders that the Applicant or Protestant alleges have been violated.

(iv) A request for hearing before the Council.

10. Mullinax has not filed a petition with the EQC and has most notably failed to include “[a] statement in ordinary, but concise language of the facts on which the request or protest is based, including whenever possible particular reference to the statutes, rules or orders that the Applicant or Protestant alleges have been violated.” Chapter 1, Section 3(c) of the EQC’s General Rules of Practice and Procedure.

11. Mullinax has failed to file a petition as set forth by Chapter 1, Section 3(c) resulting in the failure to commence a proceeding before the EQC as required by Chapter 1, Section 3(d) of the EQC’s General Rules of Practice and Procedure which states “[t]he filing of such petition shall constitute the commencement of the proceeding on the date filed.”

12. A petition is necessary to frame the issues to be reviewed by the EQC. *Basin Elec. Power Coop. v. State Bd. Of Control*, 578 P.2d 557, 570 (Wyo. 1978). Minimally, the contents of a petition should be a statement from which a reviewing court could be reasonably informed as to the nature of, and reasons for, the requested review. *Rolfes v. State ex rel. Burt*, 464 P.2d 531, 532 (Wyo. 1970).

13. Mullinax's electronic communication does not meet the requirements of Chapter 1, Section 3(c) of the EQC's General Rules of Practice and Procedure. When a petition for review fails to meet the basic requirements of the law, it is not an abuse of discretion to dismiss the appeal. *Pinther v. Webb*, 983 P.2d 1221, 1223 (Wyo. 1999).

For the reasons set forth above, the Department of Environmental Quality/Land Quality Division respectfully requests that the Environmental Quality Council dismiss docket number 09-4602 for Mullinax Concrete Services Company, Inc.'s failure to comply with Chapter 1, Section 3(c) of the Environmental Quality Council's General Rules of Practice and Procedure.

Respectfully submitted this 3rd day of December, 2009.

FOR THE DEPARTMENT OF
ENVIRONMENTAL QUALITY



John S. Burbridge, # 5-2846
Senior Assistant Attorney General
Attorney General's Office
123 Capitol Avenue
Cheyenne, Wyoming 82002
307-777-6946
307-777-3542 (fax)

CERTIFICATE OF SERVICE

I certify that the foregoing document was served by US. Mail, postage prepaid, and addressed correctly, to the following people on the 3rd day of December, 2009:

Larry Ligocki
Mullinax Concrete Service Company, Inc.
P.O. Box 2044
Sheridan, Wyoming 82801

Anthony T. Wendtland
2161 Coffeen Avenue, Suite 301
Sheridan, Wyoming 82801



Wyoming Attorney General's Office

John S. Burbridge, # 5-2856
Senior Assistant Attorney General
Attorney General's Office
123 Capitol Avenue
Cheyenne, Wyoming 82002
Telephone: (307) 777-6946
Fax: (307) 777-3542

Attorney for The Department
of Environmental Quality

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

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

ORDER OF DISMISSAL

THIS MATTER having come before the Wyoming Environmental Quality Council ("EQC") on a Motion to Dismiss from the Department of Environmental Quality ("DEQ") for dismissal of EQC docket number 09-4602. The EQC having reviewed the motion and having been otherwise fully informed in the premises MAKES THE FOLLOWING FINDINGS OF FACT, CONCLUSIONS OF LAW AND OREDR:

1. On November 3, 2009, Mullinax e-mailed the EQC asking that it review the decision of the DEQ/LQD denying Mullinax's application for a limited mining operation in Johnson County, Wyoming.
2. Attached to the e-mail communication were several documents, including the DEQ/LQD denial letter, copies of e-mail strings and other various written correspondence.
3. Mullinax has failed to file two copies of a written petition with the EQC.

4. Mullinax has not served the petition by registered mail, return receipt requested on either the Chairman of the EQC or the Director of the DEQ.

5. Mullinax's e-mail communication most notably fails to include "[a] statement in ordinary, but concise language of the facts on which the request or protest is based, including whenever possible particular reference to the statutes, rules or orders that the Applicant or Protestant alleges have been violated." Chapter 1, Section 3(c) of the EQC's General Rules of Practice and Procedure.

6. Mullinax has failed to file a petition as set forth by Chapter 1, Section 3(c) resulting in the failure to commence a proceeding before the EQC as required by Chapter 1, Section 3(d) of the EQC's General Rules of Practice and Procedure.

7. Chapter 1, Section 3(a) of the EQC's General Rules of Practice and Procedure requires that "[a]ll hearings before the Council, appeals or others, shall be held pursuant to these rules, the provisions of the Environmental Quality Act W.S. 35-11-101 through 1104 and the Wyoming Administrative Procedure Act."

8. Chapter 1, Section 3(b) of the EQC's General Rules of Practice and Procedure requires "[a]ll persons requesting a hearing or protesting a permit shall file two copies of a written petition directed to and served upon both the Chairman of the Council and the Director of the Department."

9. Chapter 1, Section 3(b)(i) of the EQC's General Rules of Practice and Procedure requires that "[o]riginal service shall be by registered mail, return receipt requested."

10. All parties prevailing whose interest will be necessarily affected by a reversal, must be served and. *First Nat'l Bank v. Bonham*, 559 P.2d 42, 50 (Wyo. 1977). Until proper service is completed, the reviewing body has no jurisdiction over the matter. *Id.*

11. A petition is necessary to frame the issues to be reviewed by the EQC. *Basin Elec. Power Coop. v. State Bd. Of Control*, 578 P.2d 557, 570 (Wyo. 1978). Minimally, the contents of a petition should be a statement from which a reviewing court could be reasonably informed as to the nature of, and reasons for, the requested review. *Rolfes v. State ex rel. Burt*, 464 P.2d 531, 532 (Wyo. 1970).

12. Mullinax's electronic communication does not meet the requirements of Chapter 1, Section 3(c) of the EQC's General Rules of Practice and Procedure. When a petition for review fails to meet the basic requirements of the law, it is not an abuse of discretion to dismiss the appeal. *Pinther v. Webb*, 983 P.2d 1221, 1223 (Wyo. 1999).

The Environmental Quality Council, being otherwise fully advised on the premises, HEREBY ORDERS:

1. That Mullinax Concrete Services Company, Inc.'s e-mail transmission to EQC staff does not constitute a petition for review and that the EQC is without jurisdiction to hear the above captioned matter.

2. That Docket Number 09-4602 be and is hereby DISMISSED.

WYOMING ENVIRONMENTAL
QUALITY COUNCIL

Chairman

CERTIFICATE OF SERVICE

I, Jim ruby, do hereby certify that the foregoing ORDER OF DISMISSAL was served by placing a true and correct copy in the United States mail, postage prepaid, on this day of _____, 20____, addressed to the following:

Larry Ligocki
Mullinax Concrete Service Company, Inc.
P.O. Box 2044
Sheridan, Wyoming 82801

Anthony T. Wendtland
2161 Coffeen Avenue, Suite 301
Sheridan, Wyoming 82801

AND also to the following person via interoffice mail of the State of Wyoming:

John Corra, Director
Department of Environmental Quality
Herschler Building
Cheyenne, WY 82002

Don McKenzie, Land Quality Administrator
Department of Environmental Quality
Herschler Building
Cheyenne, WY 82002

John S. Burbridge
Attorney General's Office
2424 Pioneer Building
Cheyenne, Wyoming 82002

Jim Ruby