

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL STATE OF WYOMING

FILED

JUN 02 2005

Terri A. Lorenzon, Director Environmental Quality Council

Docket No. 04-2801

IN THE MATTER OF OBJECTIONS TO THE AIR QUALITY PERMIT NO. MD-1041 OF KEN HARVEY RABBIT PIT

WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY(DEQ) REPLY TO GARY AND SHARON CRANE'S RESPONSE TO DEQ'S MOTION TO DISMISS

COMES NOW, Respondent Wyoming Department of Environmental Quality (DEQ) by and through the Office of Attorney General, and replies as follows:

1. DEQ General Rules of Practice and Procedure (DEQ Rules), Chapter 1 § 3(b) requires both filing and service of a written petition to initiate hearings before the Environmental Quality Council (EQC). Filing and service are two distinct requirements. DEQ's Motion to Dismiss did not allege that Protestants Gary and Sharon Crane (Cranes) improperly served their written petition. Rather, DEQ's Motion to Dismiss is based on the Cranes failure to timely file their written petition.

2. DEQ Rules, Chapter 1 § 3 states in its entirety:

Section 3. Initiation of Proceedings.

(a) All 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.

(b) All persons requesting a hearing or protesting a permit shall file two copies of written petition directed to and served upon both the Chairman of the

Council and the Director of the Department.

(i) Original service shall be by registered mail, return receipt requested. Thereafter, all service shall be proved in accordance with the Wyoming Rules of Civil Procedure.

(ii) Where protestant is objecting to a permit, he shall also serve the permit applicant with a copy of the petition and all other pleadings and motions.

DEQ Rules, Ch. 1 § 3 (emphasis added).

3. Filing is an act of depositing pleadings and other papers with the court, or in this case the EQC. *See*, WYO. R. CIV. P. Rule 5(e)(defining filing with the court). Filing signifies delivery to the proper custodian of the record. A paper is not filed until it is deposited with the EQC for the purpose of making the pleading or other paper a part of the case record. *See*, BLACK'S LAW DICTIONARY 566 (5th ed. 1979); *In re Gubleman*, 10 F.2d 926, 929 (2nd Cir. 1925); *see also*, WYO. R. CIV. P. Rule 3 (civil action commences upon filing the complaint).

4. Service is an act of delivering pleadings and other papers to the parties in the proceeding. *See*, WYO. R. CIV. P. Rule 5(b)(describing how service is made) and Rule 4(describing methods of service); BLACK'S LAW DICTIONARY 1227 (5th ed. 1979). Service is required so that a party has an opportunity to appear and be heard on the matter.

5. "Rules of statutory interpretation apply to the interpretation of administrative rules and regulations. If the language of the rule communicates a plain meaning, that meaning will be applied." *Antelope Valley Improvement v. State Board of Equalization*, 992 P.2d 563, 566 (Wyo. 1999)(internal citations omitted). The plain language of DEQ Rules

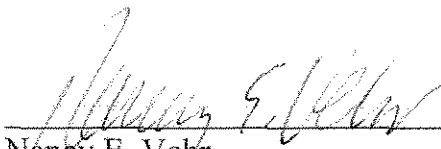
Chapter 1 § 3 distinguishes between filing and serving the written petition. Filing a petition is a distinct separate act and has a distinct and separate purpose from serving a petition.

6. Timely filing of a request for review is mandatory and jurisdictional, and untimely filing deprives the reviewing board of subject matter jurisdiction over the appeal. Unlike personal jurisdiction which is obtained by service of process, subject matter jurisdiction cannot be waived. *Brunsvold v. State*, 864 P.2d 34, 36 (Wyo.1993); *DB v. State Department of Family Services (In re MFB)*, 860 P.2d 1140, 1146 (Wyo.1993).

7. Respondents Gary and Sharon Crane did not timely file their written petition with the EQC. Untimely filing deprives the EQC of subject matter jurisdiction over their appeal.

WHEREFORE, Respondent DEQ respectfully requests the EQC dismiss Gary and Sharon Crane's appeal of permit no. MD-1041 with prejudice due to lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of June, 2005.

  
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CERTIFICATE OF SERVICE

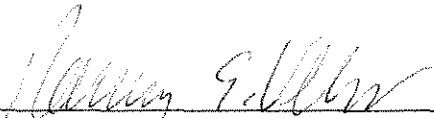
I certify that on this 2nd day of June, 2005, a true and correct copy of WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY(DEQ) REPLY TO GARY AND SHARON CRANE'S RESPONSE TO DEQ'S MOTION TO DISMISS was served via U.S. Mail, postage prepaid, addressed as follows:

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