

FILED

JUN 15 2009

**John G. Gaby, Executive Secretary
Environmental Quality Council**

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL OF THE STATE OF WYOMING

IN THE MATTER OF THE OBJECTION) Docket No. 09-4802
TO THE SMALL MINE PERMIT OF) FINDINGS OF FACT, CONCLUSIONS
2M CONSTRUCTION, INC.) OF LAW, DECISION AND ORDER
TFN 56/053)

This matter came on for hearing before the Environmental Quality Council on May 1, 2009 in Riverton, Wyoming at 10:00 a.m. Present for the Council was the Presiding Officer, Cathy Guschewsky, and Councilman David Searle. Acting as the Hearing Officer was Deb Baumer. The Department was present through legal counsel, John Burbridge, Assistant Attorney General. The permittee was present through the President and Owner of 2 M Construction Inc., Mike Cunningham. The following objectors present were Ed Fowler and Eric Anderson. Lloyd and Nancy Eckstein had filed an objection to the Permit but failed to appear at the hearing.

All parties were given notice of the date, time and place of the hearing through a prehearing conference and Order.

FINDINGS OF FACT

1. 2 M Construction Inc. filed an initial application for surface mining permit with the Land Quality Division of the Wyoming Department of Environmental Quality. Publication of said application was published in The Ranger, a weekly newspaper of general circulation in Fremont County for four consecutive weeks beginning February 25, 2009 and ending on March 18, 2009.
2. The deadline for filing Objections was April 17, 2009.
3. Eric Anderson filed his objection on April 8, 2009, Ed Fowler filed his objection on April 14, 2009 and Lloyd and Nancy Eckstein filed their objection on March 27, 2009. Mr. Anderson and Mr. Fowler are surface owners with land immediately adjacent to the

proposed mining site. Mr. and Mrs. Eckstein are surface owners with land within ½ mile of the proposed mining site.

4. The Arapaho and Shoshone Indian Tribes own land immediately adjacent to the proposed mine area.

5. 2M failed to provide notice of the application by certified mail to the Arapaho and Shoshone Indian Tribes.

CONCLUSIONS OF LAW

6. "Any interested person has the right to file written objections to the application [for mining permit] with the administrator within thirty (30) days after the last publication of the above notice. . . . The council or director shall publish notice of the time, date and location of the hearing or conference in a newspaper of general circulation in the locality of the proposed operation once a week for two (2) consecutive weeks immediately prior to the hearing or conference. The hearing shall be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act, and right of judicial review shall be afforded as provided in that act." Wyo. Stat. Ann. § 35-11-406 (k) (LEXIS 2006), the Wyoming Administrative Procedure Act, WYO. STAT. ANN. §§ 16-3-101 through 16-3-115 and the Environmental Quality Council's Administrative Rules and Regulations (2001).

7. "The council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions." WYO. Stat. Ann. § 35-11-112(a).

8. The council shall, "Conduct hearings in any case contesting the grant, denial,

suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act." WYO. Stat. Ann. § 35-1 1-112(a)(iv).

9. 2M bears the burden of proof in the proceedings herein. "The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof" *JM v. Department of Family Services*, 922 P.2d 219,221 (Wyo. 1996) (citation omitted).

10. Wyo. Stat. Ann. § 35-11-406 (m) (LEXIS 2006) provides as follows:

The requested permit, other than a surface coal mining permit, shall be granted if the applicant demonstrates that the application complies with the requirements of this act and all applicable federal and state laws. The director shall not deny a permit except for one (1) or more of the following reasons:

- (I) The application is incomplete;
- (ii) The applicant has not properly paid the required fee;
- (iii) Any part of the proposed operation, reclamation program, or the proposed future use is contrary to the law or policy of this state, or the United States;
- (iv) The proposed mining operation would irreparably harm, destroy, or materially impair any area that has been designated by the council a rare or uncommon area and having particular historical, archaeological, wildlife, surface geological, botanical or scenic value;
- (v) If the proposed mining operation will cause pollution of any waters in violation of the laws of this state or of the federal government;
- (vi) If the applicant has had any other permit or license issued hereunder

revoked, or any bond posted to comply with this act forfeited;

(vii) The proposed operation constitutes a public nuisance or endangers the public health and safety;

(viii) The affected land lies within three hundred (300) feet of any existing occupied dwelling, home, public building, school, church, community or institutional building, park or cemetery, unless the landowner's consent has been obtained. The provisions of this subsection shall not apply to operations conducted under an approved permit issued by the state land commissioner in compliance with the "Open Cut Land Reclamation Act of 1969";

(ix) The operator is unable to produce the bonds required;

(x) If written objections are filed by an interested person under subsection (g) of this section;

(xi) If information in the application or information obtained through the director's investigation shows that reclamation cannot be accomplished consistent with the purposes and provisions of this act;

(xii) through (xiv) Repealed by Laws 1980, ch. 64, § 3.

(xv) If the applicant has been and continues to be in violation of the provisions of this act;

(xvi) No permit shall be denied on the basis that the applicant has been in actual violation of the provisions of this act if the violation has been corrected or discontinued.

11. Wyo. Stat. Ann. § 35-11-406(j) "The applicant shall cause notice of the application

to be published in a newspaper of general circulationFor initial or additions of new lands the applicant shall also mail a copy of the notice within five (5) days after the publication to all surface owners of record of the land within the permit area, **to surface owners of record of immediately adjacent lands**, and to any surface owners within one-half ½ mile of the proposed site....”

DECISION

12. Mr. Anderson and Mr. Fowler are interested persons with the right to file written objections to the application.

13. The applicant has the burden of establishing that the application is in compliance with this act and all applicable state laws.

14. The applicant failed to mail a copy of the notice within five (5) days after the first publication to two immediately adjacent land owners.

15. The applicant has failed to meet their burden of proof.

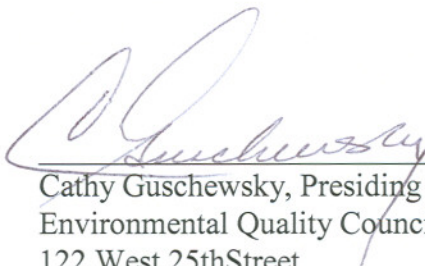
16. Pursuant to the authority vested in the Environmental Quality Council by WYO. STAT.ANN. § 35-11-406, the Council hereby **FINDS** that the Permit Application submitted by 2 M Construction Inc. regarding Mine Permit No. TFN 56/053 is

INCOMPLETE.

ORDER

IT IS THEREFORE ORDERED that the Permit Application filed by 2 M Construction Inc. for Permit No., TFN 56/053 is hereby **DENIED.**

SO ORDERED this _____ day of June, 2009.



Cathy Guschewsky, Presiding Officer
Environmental Quality Council
122 West 25th Street
Herschler Bldg., Rm. 1714
Cheyenne, Wyoming 82002
(307) 777-7170

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing document was served upon the Environmental Quality Council and a true and correct copy was served upon the parties by mailing same, postage prepaid, on the 15th day of June, 2009, addressed to the following:

Michael Cunningham
2 M Construction Inc.
P.O. Box 1298
Riverton WY 82501

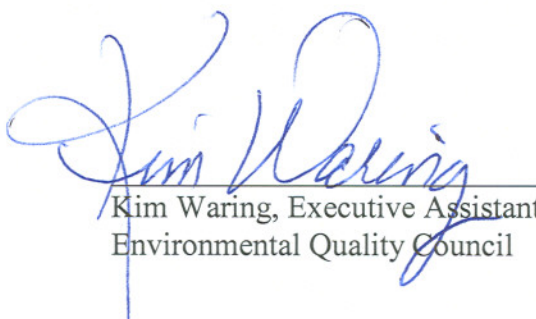
Eric Anderson - Objector
136 Honor Farm Road
Riverton WY 82501

Ed Fowler- Objector
P.O. Box 1519
Riverton WY 82501

Lloyd and Nancy Eckstein
20 Gardens North Drive
Riverton WY 82501

and by electronic mail to the following:

John Burbridge - Attorney for DEQ
Assistant Attorney General
jburl@state.wy.us



Kim Waring, Executive Assistant
Environmental Quality Council