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Jim Ruby, Executive Secretary
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February 11, 2010

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107 JX-Lane
Sundance, WY 82729

Les and Karen Turgeon
725 Rifle Pit Road
Beulah, WY 82712

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9298 Mique Circle
Port Charlotte, FL 33981

Judith Bush
2313 County Rd. 64
Carrying Place ON Canada KOKILO

RE: Croell Redi-Mix Proposed Findings of Fact, Conclusions of Law and Order

Please find enclosed with this letter the Proposed Findings of Fact, Conclusions of Law and Order (Order), filed today with the Environmental Quality Council (EQC), in the Croell Redi-Mix matter. If you have objections to the proposed Order, please file those objections with the EQC no later than noon, MST, March 3, 2010.

Thank you for your attention to this matter.

Sincerely,

John S. Burbridge

Cc: Land Quality Division
EQC

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Jim Ruby, Executive Secretary
Environmental Quality Council

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

**IN THE MATTER OF THE OBJECTION)
TO THE MINE PERMIT OF)
Croell Redi-Mix, Inc., TFN 5 6/072)**

Docket No. 09-4806

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter was brought before the Environmental Quality Council (EQC) on December 21, 2009, in Gillette, Wyoming at 1:00 p.m. Present for the EQC was the Presiding Officer David Searle; Councilwoman Cathy Guschewsky and Councilmen Tim Flitner and Thomas Coverdale participated by telephone. The Department of Environmental Quality (DEQ)/Land Quality Division (LQD) was present through legal counsel John S. Burbridge, Senior Assistant Attorney General. The permittee, Croell Redi Mix, Inc. (Croell), was present through the President of Croell, Roger Croell. The following objectors were present, Paul Tomer, Judith Bush and Les & Karen Turgeon; and Judith Hamm who participated by telephone (collectively Objectors). Exhibits 1 through 26 were received into evidence at the hearing. The Council has considered the evidence and arguments of the parties, and makes the following:

FINDINGS OF FACT

1. Croell filed an initial application for surface mining permit with the LQD of the DEQ on September 29, 2009. (Ex. 11, Cover).
2. The LQD determined on October 9, 2009, that Croell's application was technically complete. (Tr. at 36).

3. Notice that the application was technically complete was published in the Sundance Times on October 15, 2009 and November 5, 2009. (Ex. 11, Proof of Publication).
4. The deadline for filing objections to Croell's application was December 7, 2009. (Tr. at 5, Ex. 11, Proof of Publication).
5. Croell's application was available for public viewing in the Crook County Clerk's office and at the LQD's Sheridan and Cheyenne offices. (Tr. at 37-8).
6. Paul Tomer, Richard & Judith Hamm and Les & Karen Turgeon filed their objections to Croell's application on November 18, 2009. Judith Bush filed her objection on December 6, 2009. (A.R., Objection letter and Bush objection letter).
7. The Objectors made the following objections: 1. A part of the proposed operation, reclamation plan is contrary to the law or policy of this state or the United States; 2. The proposed operation constitutes a public nuisance or endangers the public health and safety; 3. The application is incomplete; 4. The proposed mining operation will cause pollution of any waters in violation of the laws of this state or the federal government; 5. The applicant had another permit or license issued hereunder revoked, or any bond posted to comply with the act forfeited. (A.R., Prehearing Conference Order at 2).
8. Notice of the time and place for the hearing in this proceeding was sent to the parties on December 8, 2009, with an amended notice of hearing sent on December 9, 2009. (Tr. at 5).

9. Notice of the hearing was published in the Sundance Times on December 17, 2009 and on December 19 and 20, 2009, in the Casper Star-Tribune, pursuant to WYO. STAT. ANN. § 35-11-406(k) (West 2009). (A.R., Affidavit of Publication, Sundance & Affidavit of Publication, Casper Star).
10. The Objectors asserted that Croell's proposed mining permit would create dust that could pose a potential health risk to humans and livestock. (Tr. at 137, 194).
11. The Objectors asserted that truck traffic from Croell's proposed mining operation would create excessive dust and hazardous driving conditions on Rifle Pit Road. (Tr. at 145). The record shows that Rifle Pit Road is a state road up to the entrance of Croell's proposed mining operation and that it is a county road thereafter. (Tr. at 151).
12. Croell is not currently in violation of the Act and the evidence presented by the Objectors did not show a history of violations by Croell that would allow denial of a mining permit under the application being considered in this proceeding. (Tr. at 132-34).
13. The Objectors asserted that Croell was acting in bad faith and was attempting to mislead the LQD by stating in its application that a new access road to the proposed mining site had been completed when, in fact, it had not. The record shows that Croell experienced unexpected delays in the permitting for the construction of the access road, but that Croell had completed the access road by the time of the hearing in this proceeding. Croell's representation regarding the

- access road in its application does not constitute an intentional misrepresentation to the LQD allowing denial of a mining permit to Croell. (Tr. at 190-92, 243-44).
14. The Objectors asserted that water runoff from Croell's proposed mining site would pollute surrounding underground and surface waters, specifically Sand Draw Creek and Sundance Creek. (Tr. at 201-03). Croell's application shows that hydrology concerns have been adequately addressed. The record shows that runoff within the mining area will flow into the pit and not off the site. (Tr. at 259-62). In addition, Croell's application states that berms and other drainage control methods will be used to prevent runoff from leaving the boundary of the permit area. There is not sufficient evidence to deny Croell's mining permit based on hydrologic and/or water pollution concerns. (Ex. 11, MP 2.3, 4.7 & 4.8).
 15. Croell's application contains the name and address of the applicant and the names and addresses of all managers, partners and executives directly responsible for Croell's mining operations in Wyoming. (Ex. 11, Form 1).
 16. Croell's application contains a sworn statement showing the power and legal estate for the right to mine from the land described in the application. (Tr. at 47, Ex. 11, Form 1 & Surface Owner Consent).
 17. The application contains a sworn statement that Croell has not forfeited a bond posted for reclamation purposes and that all the statements contained in the application are true and correct to the best knowledge of the applicant. *Id.*

18. Croell's application contains the last known addresses of the owners of record of the surface and mineral estates on the land covered by the proposed mining permit. (Ex. 11, Appendices A & B & Map A-1).
19. The application contains the names and last known addresses of the owners of record of the surface rights of the lands immediately adjacent to the proposed permit area. *Id.*
20. Croell's application identifies by legal description the land included in the permit area including the approximate number of acres to be affected and the total number of acres in the area covered by the proposed permit. (Ex. 11, Form 1).
21. Croell's application identifies Sundance, Wyoming as the nearest town to the proposed mining operation. *Id.*
22. Croell's application includes a Mine Plan that is consistent with the objectives and purposes of the Act and the LQD non-coal rules and regulations. (Ex. 11, Mine Plan at MP.1-MP.18).
23. Croell's application includes a general description of the land together with its vegetative cover, the annual rainfall, the general directions and average velocities of the winds, indigenous wildlife, its past a present uses, its present surface waters, adjudicated water rights and their immediate drainage areas and uses, the nature and depth of the overburden, topsoil, subsoil mineral seams and other deposits and any subsurface waters know to exist above the deepest projected depth of the proposed mining operation. (Tr. at 40 and Ex. 11, Appendices D-1 – Land Use, D-4 – Climatology, D-5 – Topography, Geology, and Overburden, D-6 –

Hydrology, D-7 – Premining Soils Assessment, D-8 – Premining Vegetation Assessment, D-9 – Wildlife, D10 – Wetlands Inventory and Permanent Mitigation Plan, E-1 – Oil and Gas Within One-half Mile of the Permit Boundary, E-2 – Valid Groundwater Rights Within Three Miles of the Permit Area, E-3 – Surface Water Rights Within and Adjacent to the Permit Boundary, and Map E-1).

24. Croell's mining operation, reclamation program and future use is not contrary to the law or policy of this state, or the United States. (Tr. at 38).
25. Croell's mining operation will not irreparably harm, destroy, or materially impair any area that has been designated as rare or uncommon by the EQC, (Tr. at 39).
26. The area proposed by Croell for its mining operation does not have any particular historical, archaeological, wildlife, surface, geological, botanical or other scenic values that it will irreparably harm. *Id.* and see (Ex. 11, Appendices D-1 – Land use, D-3 – Cultural Resources and D-5 – Geology and Overburden Assessment).
27. Both the Wyoming Game and Fish Department and US Fish and Wildlife Service reviewed the application and neither made a recommendation to deny a mining permit to Croell. (Tr. at 39 & Ex. 11, Appendix D-9 – Wildlife).
28. Croell's proposed mining operation will not cause pollution of any waters of the state in violation of the laws of the state of Wyoming. (Tr. at 40, Ex. 11, Appendix D-6 – Hydrology, & MP 4.7-4.8).
29. Croell has not had any other permit or license or bond revoked by the LQD. (Tr. at 40-1).

30. Croell's proposed mining operation will not constitute a public nuisance or endanger the public health and safety. (Tr. at 41-2 & Ex. MP 4.9).
31. Croell's proposed permit boundaries are not within 300 feet of any occupied structure. (Tr. at 42-3 & Ex. 11, Appendix E at App. E.4).
32. Croell will be able to produce the bond required by the LQD. (Tr. at 43-4 & Ex. 11, Reclamation Bond).
33. Croell will be able to perform reclamation of the proposed mining site in a manner consistent with the purpose and provisions of the Environmental Quality Act (Act). (Tr. at 44 & Ex. 11, Reclamation Plan).
34. Croell is not currently in violation of the Act. (Tr. at 44, 132-34).
35. Croell's application, for its proposed mining operation, is complete pursuant to WYO. STAT. ANN. § 35-11-406. (Tr. at 50, 56).

CONCLUSIONS OF LAW

36. The EQC has jurisdiction over the subject matter and the parties to this proceeding.
37. The EQC does not have jurisdiction, in this proceeding, to decide the Air Quality issues raised by Objectors.
38. All notice requirements for the hearing have been met pursuant to the Act, the EQC rules of practice and procedure and the LQD non-coal rules and regulations.
39. "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), the Wyoming Administrative Procedure Act, WYO. STAT. ANN. §§ 16-3-101 through 16-3-115 and the EQC's Administrative Rules and Regulations (2001).

40. "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).
41. 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. § 35-11-112(a)(iv).
42. The objectors bear 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." (Tr. at 8), See also *JM v. Dep't. of Family Serv.*, 922 P.2d 219, 221 (Wyo. 1996) (citation omitted).

43. WYO. STAT. ANN. § 35-11-406(m) 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.

44. WYO. STAT. ANN. § 35-11-406(m) requires that a permit be granted if the applicant demonstrates that the application complies with the requirements of the Environmental Quality Act and all applicable state and federal laws. The permit can only be denied for the enumerated criteria in WYO. STAT. ANN. § 35-11-406(m).

DECISION

45. Paul Tomer, Judith Bush, Richard & Judith Hamm and Les & Karen Turgeon are interested persons with the right to file written objections to Croell Redi-Mix, Inc's application.

46. The Objectors failed to carry their burden of proof in this proceeding that the permit should be denied for any of the reasons set forth in WYO. STAT. ANN. § 35-11-406(m).

47. Croell Redi Mix's application is complete within the meaning of WYO. STAT. ANN. § 35-11-406(m).

48. 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 Croell Redi-Mix, Inc. regarding Mine Permit No. TFN 5 6/072 is **COMPLETE**.

ORDER

IT IS THEREFORE ORDERED that the Permit Application filed by Croell Redi-Mix, Inc. for Permit No., TFN 5 6/072 is hereby **GRANTED**

SO ORDERED this _____ day of _____, 2010.

David Searle, Presiding Officer
Environmental Quality Council
122 West 25th Street
Herschler Building, Room 1714
Cheyenne, Wyoming 82002

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 11th day of February, 2010:

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