

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

MAY 06 2010

Jim Ruby, Executive Secretary
Environmental Quality Council

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

Docket No. 09-4806

PERMITTEE CROELL REDI-MIX, INC.'S
OBJECTION TO PETITION FOR REHEARING

Permittee, Croell Redi-Mix, Inc, TFN 5 6/072, by and through its undersigned attorney, Kim D. Cannon, of Davis & Cannon, LLP, Sheridan, Wyoming, appears and joins in the Department of Environmental Quality, Land Quality Division's, objection to Petition for Rehearing dated April 28, 2010, and further states:

1. The Rule. The Petition for Rehearing dated and filed on April 1, 2010 fails to address new questions raised by the decision and upon which the petitioner had no opportunity to argue before the Council at the hearing on December 21, 2009 contrary to Department of Environmental Quality, Procedural Rules and Regulations, Chapter IV, Section 1(b):

Any petition for rehearing filed under this section must be **confined** to **new questions** raised by the decision and upon which the petitioner had **no opportunity** to argue before the Council. (emphasis added)

2. No New Issues. Not only does the Petition For Rehearing fail to "address" any "new questions raised by the decision," it fails to identify any such new questions of fact or law. Indeed, the Petition fails to quote from the Findings of Fact and Conclusions of Law and Order entered by the Council on March 12, 2010. It is not possible to tell what finding or conclusion of the Council raised any new question. Adjudicative bodies should not grant rehearings simply to reiterate the

arguments made during the initial hearing. State Board of Equalization v. Jackson Hole Ski Corp., 745 P.2d 58, 60 (Wyo. 1987); Elmer v. State, 466 P.2d 375, 376 (Wyo. 1970). As noted in Elmer, “Rehearings will not be granted ... where all the facts have been duly considered by the court and the application presents no new facts but simply reiterates the arguments made on the hearing.” Elmer v. State, 466 P.2d 375, 376 (Wyo. 1970).

3. No New Facts. Nor are there any new facts presented on any issue by the Petitioner. No expert testimony on any issue is presented. The facts supporting such a properly rendered expert opinion are also not identified. Issues pertaining to the overburden, depth and thickness of the deposit subject to being mined was described in the application for mining permit and was the subject of testimony and cross-examination. Similarly, issues pertaining to ground water and the relationship between underground and surface water were the subject of specific Findings of Fact Nos. 12 and 26.
4. No Presentation of The Letter of January 14, 2010. The essence of the Petitioner’s complaint is that the Environmental Quality Council has not considered the letter she wrote and submitted to the Environment Quality Council after the presiding officer officially closed the hearing on December 21, 2009, pursuant to Chapter II, Section 8(h)(viii):

The presiding officer shall officially open and officially close the hearing.

However, rather than providing credible new evidence that the Petitioner did not have the opportunity to argue on December 21, 2009, the Petition for Rehearing is simply an effort to make excuses for failing to timely present whatever material

was contained in the letter of January 14, 2010 to the Council. Despite emphasis on the letter of January 14, 2010, it is not attached to the Petition For Rehearing. Therefore, it is not properly before the Council for consideration at the hearing on the Petition For Rehearing.

5. Due Process and Finality. For the reasons of due process and finality, any evidence offered as part of a petition for rehearing process is strictly scrutinized to ensure that it is newly discovered evidence. The time for submitting evidence is at the properly noticed hearing prior to closing of the hearing. In this case, that was December 21, 2009. Contested cases, like all administrative proceedings, must be brought to conclusion after everyone has had a full and fair opportunity to examine the witnesses and evidence presented. The procedure of closing the hearing and the record to additional evidence serves the dual purposes of due process and finality. Parties cannot be permitted to submit additional evidence after the record is closed when the adverse party no longer has the opportunity to object to exhibits or cross examine witnesses. Secondly, if there is no moment in time when the hearing and record is closed to additional evidence, there can never be any finality. Such finality is a critical part of any adjudicative process.
6. No Abuse of Discretion In Denying Petition. This Council's rule on a Petition for rehearing may be reversed only for an abuse of discretion. In *Utah Power & Light & Company v. Public Service Commission of Wyoming*, 713 P.2d 240 (Wyo. 1986) the Supreme Court upheld the denial of a Petition for rehearing by the Public Service Commission, stating:

A rehearing requires a 'judgment' by the commission that there is 'sufficient reason therefor.' A rehearing is in the

discretion of the agency and will be interfered with only for a clear abuse of such discretion. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821 (1946); *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65 S.Ct. 1490, 89 L.Ed. 2051 (1945).

‘Abuse of discretion’ as defined for court action is applicable to agency action:

‘A court does not abuse its discretion unless it acts in a manner which exceeds the bounds of reason under the circumstances. In determining whether there has been an abuse of discretion, the ultimate issue is whether or not the court could reasonably conclude as it did. An abuse of discretion has been said to mean an error of law committed by the court under the circumstances. * * *’ *Martinez v. State, Wyo.*, 611 P.2d 831, 838 (1980).

As so defined, an abuse of discretion did not here occur in the refusal by the commission to rehear this matter.

Ruling on this Petition is clearly committed to the discretion of the Council which should deny it.

WHEREFORE, Permittee Croell Redi-Mix, Inc. respectfully requests the Environmental Quality Council to deny the Petition for Rehearing.

Dated this 5th day of May, 2010.

DAVIS & CANNON, LLP

By: _____



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CERTIFICATE OF SERVICE

I, Kim D. Cannon, attorney for Croell Redi-Mix, Inc. in the above-entitled and numbered cause, do hereby certify that on the 5th day of May, 2010, I caused a true and correct copy of Permittee Croell Redi-Mix, Inc. Objection to Petition for Rehearing to be served as follows:

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