

**FILED**

**AUG 19 1994**

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

*Terri A. Lorenson, Attorney  
Environmental Quality Council*

IN THE MATTER OF OBJECTIONS )  
TO THE MINING PERMIT APPLICATION )  
OF AMAX COAL WEST, INC., )  
EAGLE BUTTE MINE, PERMIT NO. 428-T2 )

DOCKET NO. 2573-94

***DEPARTMENT'S  
POST-HEARING BRIEF***

The Department of Environmental Quality, Land Quality Division, by and through the Office of the Attorney General, submits the following brief in response to the Council's order for optional briefing on specified issues during the July 26, 1994 hearing of the above-captioned matter.

ISSUES

- I. - DID AMAX'S NOTICE PREJUDICE THE PFEILS' ABILITY TO FAIRLY PARTICIPATE IN THE HEARING?
- II. DID THE ENVIRONMENTAL QUALITY COUNCIL VIOLATE THE PFEILS' RIGHT TO DISCOVERY?
- III. IS W.S. 35-11-406(K) CONSISTENT WITH W.S. 16-3-107(g)?
- IV. DOES THE ENVIRONMENTAL QUALITY COUNCIL HAVE THE AUTHORITY TO DETERMINE WHETHER A WYOMING STATUTE IS UNCONSTITUTIONAL?
- V. DO THE ENVIRONMENTAL QUALITY ACT AND THE DEQ COAL RULES PROVIDE RESTRICTIONS WHICH ARE SUFFICIENT TO PROTECT THE PFEILS' PROPERTY FROM BLASTING?

ARGUMENTS

***I. THE PFEILS SUFFERED NO PREJUDICE AS A RESULT OF AMAX'S NOTICE OF ITS PENDING APPLICATION.***

AMAX caused to be published notice of its application for a permit transfer and for a permit revision, pursuant to W.S. 35-11-406(j) and DEQ Coal Rules, Chapter XIV, Section 3. *State's Exhibit*

#2. The Protestants, Linda and Roger Pfeil, argue that AMAX's notice did not satisfy the notice requirements.<sup>1</sup>

The DEQ approved this notice. We believe the notice contained all information required by Section 406(j), but we admit that the notice did not comply with the rules. The notice did not contain an explanation of why AMAX is seeking the revision in question. The notice did not contain an outline or index of changes to the permit. The DEQ regrets this error and intends to evaluate the notice requirements to ensure that future notices include all information required by law. However, that does not mean the Pfeils are entitled to another hearing.

In *Grams v. Environmental Quality Council*, 730 P.2d 784 (Wyo. 1986), the Wyoming Supreme Court entertained an appeal of this Council's decision granting a permit to AMAX Coal Company. One basis for appeal was a violation of the notice requirements in the Environmental Quality Act. The Court held that the Appellant would have to prove substantial prejudice for the Court to reverse the Council's decision granting a permit. 730 P.2d at 786-788.

The Council should apply the standard set forth in *Grams*. So, the issue is whether the error caused substantial prejudice to the Pfeils. It appears that AMAX's failure to include all information required by the rules was not prejudicial to the Pfeils.

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<sup>1</sup>On July 21, 1994, the Pfeils filed a supplemental objection to the permit revision application, in which they raise this notice issue for the first time. The last day to file objections was July 6th. *State's Exhibit #2, Publisher's Affidavit; W.S. 35-11-406(k)*. Since the Pfeils did not file the supplemental objection by the statutorily mandated deadline, the Council should consider whether it has the authority to hear the supplemental objection.

They have not offered any evidence which leads to the conclusion that they were prejudiced by the omissions in question. To the contrary, the Pfeils actually did receive notice and decided, based on that notice, to object to the application. There is no reason to believe that AMAX's failure to explain the reason for the proposed revision, or the location of all changes to the permit within the notice actually harmed the Pfeils.<sup>2</sup> Absent actual prejudice, the faulty notice constitutes harmless error and does not constitute grounds for a new hearing. *Grams*, 730 P.2d at 788.

**II. THE ENVIRONMENTAL QUALITY COUNCIL DID NOT VIOLATE THE PROTESTANTS' RIGHT TO DISCOVERY.**

The Pfeils argue that they were entitled to discovery in this matter. They argue that the Council has denied them the right to meaningful discovery by scheduling a hearing for July 26, 1994, after they retained a lawyer on July 18th. *Protestants' Motion For Continuance of Hearing*, pp. 2-4, dated July 20, 1994.

The DEQ agrees that the Pfeils were entitled to discovery in this case. The Council heard this case pursuant to W.S. 35-11-406(k). That statute provides that such proceedings "shall be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act..".

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<sup>2</sup>The Pfeils were informed in the notice of where they could obtain additional information. All information relevant to AMAX's application was available in the DEQ files in both Sheridan and Cheyenne, as well as the Campbell County Courthouse. Further, there is little or no doubt either the DEQ or AMAX would have answered to the best of their ability any question of the Pfeils, had they inquired.

The Administrative Procedure Act (APA) provides that discovery is available to the parties to a contested case proceeding, as provided by the Wyoming Rules of Civil Procedure, 26, 28 through 37, excluding 37(b)(1) and 37(b)(2)(D). *W.S. 16-3-107(g)*. Those rules provide several means for discovery of information held by opposing parties.

DEQ Rules of Practice and Procedure authorize the Council to issue subpoenas to compel witnesses to testify and to compel parties to produce documents. *Chapter II, Section 9*. All forms of discovery are available pursuant to Chapter II, Section 10. The Council is authorized to govern the conduct of discovery, including limiting the time for discovery, pursuant to Section 10.

While the Pfeils were entitled to discovery, they were also obligated to conduct discovery within the timeframe set forth in *W.S. 35-11-406(k)*, which states:

An informal conference or a public hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is stipulated to by the parties.

The Council was obligated to conduct a hearing by July 26, 1994<sup>3</sup>, absent an informal conference or a stipulated continuance. *Grams, 730 P.2d at 788*. The DEQ Director denied an informal conference, and the parties did not stipulate to a continuance.

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<sup>3</sup>The last day to hold a hearing was July 26th because that was 20 days after the last day for filing objections, July 6th. July 6th was the last day to filing objections because that day was 30 days after the last publication date. *State's Exhibit #2, Publisher's Affidavit*.

The Council complied with its duty.

If the Pfeils suffered any prejudice from a lack of discovery, they should be held responsible because they did not diligently prepare for a hearing, once they had reason to believe there would be a hearing. AMAX mailed notice to the Pfeils on May 20, 1994. *State's Exhibit #2*. That notice informed the Pfeils that an informal conference or hearing would be held within twenty days of the last date for filing objections, absent a stipulation among the parties. *Id.*

As soon as they received AMAX's notice, they should have filed their objection, and prepared for a hearing, or hired a lawyer to do so. Instead, they waited until July 6th to file their objection and they didn't hire a lawyer until July 18th.

In *Grams*, the Supreme Court held that protestants in these type of cases cannot delay their discovery requests and then claim they are not afforded adequate time. The Court held that protestants' "failure to conduct proper discovery until two days before the hearing cannot be charged to anyone's account other than their own." 730 P.2d at 788. The Pfeils acted more timely than did the protestants in *Grams*. Nevertheless, they did not make the most effective use of the available time.

**III. W.S. 35-11-406(k) IS CONSISTENT WITH W.S. 16-3-107(g).**

The Pfeils also argue that Section 406(k), on its face, does not provide enough time for discovery, because it requires a hearing within twenty days of the last date for filing objections. They rely on the discovery timeframes established in the Wyoming

Rules of Civil Procedure to support this proposition. They argue that Section 406(k) therefore denies their constitutional right to procedural due process. The DEQ will address the constitutionality issue later. Notwithstanding that issue, the Council must consider the proposition that Section 406(k) is not consistent with discovery rights afforded by the APA, at W.S. 16-3-107(g).<sup>4</sup>

W.S. 35-11-406(k) and W.S. 16-3-107(g) provide rights which can be consistently applied. When the law provides for an expedited litigation schedule, such as Section 406(k), the hearing body, when appropriate, has the authority to provide for an expedited discovery schedule.

The Wyoming Rules of Civil Procedure governing discovery authorize courts to shorten the discovery timeframes. *E.g.* W.R.C.P. 33(a). These rules apply to the Council through Section 406(k) and W.S. 16-3-107(g). Therefore, the Council can hold a hearing within the timeframe required by Section 406(k), and still protect the protestants' discovery rights by requiring an expedited discovery schedule.

If the parties provide timely and adequate responses to discovery requests, there should be no discovery issue. If a party cannot provide timely responses, the parties can stipulate to a continuance to complete discovery. If a party simply will not

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<sup>4</sup>In its July 21, 1994 Response to the Pfeils' Motion for a Continuance, the DEQ questioned whether these statutes are consistent. There is some question whether, practically, discovery can always be conducted within such an abbreviated schedule. However, the DEQ believes the statutes can be applied consistently. The test will come on a case by case basis.

cooperate, the aggrieved party can seek to compel cooperation before the agency and the district court. *W.S. 16-3-107(c), (g)*.

**IV. THE ENVIRONMENTAL QUALITY COUNCIL DOES NOT HAVE THE AUTHORITY TO RULE ON THE CONSTITUTIONALITY OF A WYOMING STATUTE.**

The Pfeils argue that *W.S. 35-11-406(k)*, on its face, violates their constitutional right to due process, because it effectively denies them the right to discovery. The Council is obligated to presume the statute is constitutional, and lacks the authority to determine whether the statute is constitutional. *Mekss v. Wyoming Girls' School*, 813 P.2d 185, 193 (Wyo. 1991); *Belco Petroleum Corp. v. State Board of Equalization*, 587 P.2d 204, 212-214 (Wyo. 1978).

Section 406(k) provides for an informal conference or public hearing within 20 days after the final date for filing objections. The Council acted lawfully by holding the hearing in this matter on July 26, 1994. The Council would be acting outside the scope of its authority to now rule that Section 406(k) is unconstitutional and grant the Pfeils' motion for a continuance.

**V. THE ENVIRONMENTAL QUALITY ACT AND THE DEQ COAL RULES REQUIRE AMAX TO PROTECT THE PFEILS' PROPERTY FROM POTENTIAL DAMAGE CAUSED BY BLASTING.**

The Pfeils' objection is based in large part on their concern that AMAX's blasting at the mine will damage their groundwater supply, their sewage treatment facility and other parts of their property, and will cause noise, fumes, fly rock, etc..<sup>5</sup> The

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<sup>5</sup>The Pfeils' objections that the mine operation would create a nuisance on their property by causing excessive noise, fly rock, and toxic fumes are beyond the scope of this application. AMAX has

Environmental Quality Act has several provisions designed to prevent this damage.

W.S. 35-11-406(b) (xvii) required AMAX to include in its permit application a blasting plan designed to satisfy the requirements in W.S. 35-11-415(b) (xi). Section 415(b) (xi) (A) - (E) requires AMAX to:

- 1) provide advance written notice of blasting to people including the Pfeils<sup>6</sup>;
- 2) maintain detailed blasting logs;
- 3) prevent damage to persons, property outside the permit area<sup>7</sup>, underground mines, and water sources;
- 4) conduct preblast surveys of property within one half mile of the permit area, upon request of the landowner.<sup>8</sup>

DEQ Coal Rules provide more detailed standards and requirements which AMAX must abide by in order to operate this mine. Chapter VI, Section 4(b) sets forth blasting vibration and airblast standards. These standards are designed to protect property outside the permit area from adverse effects caused by

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an approved blasting plan, which they do not propose to revise. Since that plan is not part of the application, it should not be subject to attack at this time. Therefore, the Council should consider whether it has the authority to hear these objections.

<sup>6</sup>Persons within one half mile of the permit area get notice by mail. The Pfeils live less than 1,630 feet away from the permit area. Hearing Transcript, pp. 50, 305.

<sup>7</sup>AMAX is obligated to prevent damage to all Rawhide Village Subdivision property, including the sewage treatment facility.

<sup>8</sup>The details of these surveys are set forth in DEQ Coal Rules, Chapter VI, Section 2. The purpose of the survey is to identify and document the condition of the concerned landowner's property, prior to blasting. If the blasting causes damage, all parties should be able to determine the extent of the blast-related damage, so the property owner can hold the mine operator responsible for damages it caused. The Pfeils are entitled to such a survey.



blasting. If AMAX complies with these standards, neither the Pfeils' property nor any other property in the subdivision should be damaged by blasting.

Chapter VI, Section 4 also requires AMAX to prevent damage to the Pfeils' property caused by flyrock. The Pfeils also raised concerns about air quality matters, such as dust and toxic fumes. The DEQ does not regulate air quality matters through the permit in question. The DEQ does require an air quality permit, which AMAX has received.

Chapter VI, Section 4(a)(i) requires AMAX to conduct blasting in a manner which will prevent injury to persons and property outside the permit area, including water sources. These provisions give the DEQ a broad source of authority to protect people such as the Pfeils from blasting damage.

If AMAX fails to comply with these standards and requirements, both the DEQ and the Pfeils have remedies. W.S. 35-11-415(xii) would require AMAX to replace the Pfeils' water supply, if AMAX damaged the supply<sup>9</sup>. If AMAX causes damage to the Pfeils' property by blasting at its mine, the DEQ is authorized to pursue an enforcement action against AMAX pursuant to W.S. 35-11-437. Such action would probably require AMAX to stop the damaging blasting practices, pay a penalty, and could require AMAX to stop its operation.

In addition to any causes of action based on tort law, W.S.

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<sup>9</sup>This assumes the Pfeils are owners of interest in real property, and that they have a legitimate use of water, the source of which has been effected by the mine.

35-11-416(b) provides a cause of action for persons whose water supply has been damaged by a surface coal mine. This may provide the Pfeils another course of action to protect their water rights.

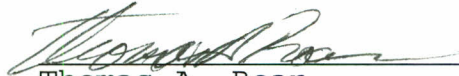
#### SUMMARY

There is no question that AMAX caused the Pfeils to be notified of its application for a permit revision. The notice did not comply with DEQ Rules. The DEQ will attempt to avoid that problem in the future. For the sake of the Pfeils, the error is inconsequential. The Pfeils did not file their objection and begin discovery immediately after they received notice. Under these circumstances, the Pfeils, not the Council, harmed their opportunity for discovery. The Pfeils might have been able to conduct discovery on an abbreviated schedule, had they prepared to do so from the beginning.

The Council could have granted a continuance to allow discovery. To do so would have been an abuse of discretion, since W.S. 35-11-406(K) requires that all parties agree to a continuance, and the Pfeils were unable to make such an agreement. The Pfeils challenge W.S. 35-11-406(k) as unconstitutional. They must take that claim to Court, because the Council lacks the authority to hear it.

The Pfeils have legitimate concerns about protecting their property from the effects of mining, particularly blasting. These concerns are addressed in AMAX's permit, and in detailed statutes and rules governing a highly regulated practice. AMAX has sworn to comply with these requirements. That is all the law requires.

DATED August 19, 1994.

  
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CERTIFICATE OF SERVICE

I, Thomas A. Roan, do certify that the foregoing DEPARTMENT'S POST-HEARING BRIEF was served by telefax, and by placing a true and correct copy in the United States mail, postage prepaid, on August 19, 1994, addressed to the following:

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