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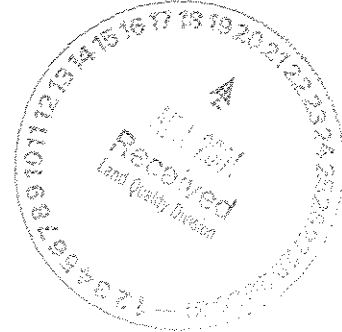
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April 20, 2001

Via Hand Delivery

Mr. Richard Chancellor
Administrator, Land Quality Division
Department of Environmental Quality
122 West 25th Street, 3rd Floor West
Cheyenne, Wyoming 82002



**OBJECTIONS TO FLETCHER CONSTRUCTION COMPANY'S
SMALL MINING PERMIT APPLICATION**

Robert and Carol S. Berry, by and through their attorneys Brown, Drew & Massey, LLP, and pursuant to WYO. STAT. § 35-11-406, hereby submits their objections to Fletcher Construction Company's ("Fletcher") mining application seeking a small mining permit authorizing mining in the W1/2SW1/4, Section 20, Township 55 N, Range 85 W, in Sheridan County, Wyoming.

I. IDENTIFICATION OF OBJECTORS

The Objectors are adjoining and affected landowners identified as follows: Robert and Carol S. Berry, 100 Rapid Creek Road, Sheridan, Wyoming 82801. Mr. and Mrs. Berry's attorneys in this matter are:

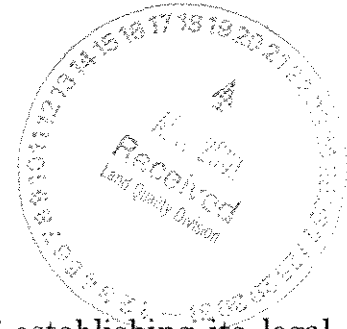
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FILED

APR 30 2001

Terri A. Lorenzon, Director
Environmental Quality Council

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II. OBJECTIONS

(A) *Fletcher Has Not Established Its Right To Mine*

An applicant for a mining permit has the burden of establishing its legal right to mine within all of the area subject to the permit application. WYO. STAT. § 35-11-406(a)(ii). Pursuant to WYO. STAT. § 35-11-406(a)(ii), Fletcher is obligated to obtain zoning authorization from Sheridan County before its permit application is deemed complete, before the application may be noticed for public comment. WYO. STAT. § 35-11-406(g). Fletcher has not obtained necessary permitting through the quarry permits sections of the Sheridan County zoning regulations, and without a quarry permit from Sheridan County, Fletcher does not hold the legal right to mine as required by WYO. STAT. § 35-11-406(a)(ii).

Fletcher's application proceeds on the assumption that Fletcher is entitled to "grandfathered" status under Sheridan County's zoning regulations. However, on April 12, 2001, the Sheridan County Commissioners informed Fletcher that only the original 10-acre quarry was entitled to "grandfathered" treatment. "Any quarry operations outside of the original quarry," the Sheridan County Commissioners wrote, "will need to follow the county quarry permit process." A copy of the Commissioners' April 12, 2001 letter is attached hereto as Exhibit "A."

The Wyoming Supreme Court has held that the planning and zoning provisions of the Wyoming statutes do not restrict the authority of county commissioners to limit land use by foreclosing the extraction of sand, gravel, rock, and limestone for road building, as in this case. *River Springs Ltd. Liab. Co. v. Board of County Commissioners*, 899 P.2d 1329 (Wyo. 1995). If extraction is permitted by the Sheridan County Commissioners, then (and only then) is the authority to regulate the mining process assigned by statute to DEQ. *Id.*

Where the right to mine has not been determined by Sheridan County, the DEQ does not possess statutory authority to issue a small mining permit.¹ It is axiomatic that an agency cannot act in derogation of its statutory authorization. Rather, under the facts presented, DEQ must deny the permit.

¹ Moreover, Fletcher's right to mine is in dispute. After the April 12, 2001 letter from the Sheridan County Commissioners, Fletcher has no alternative but to seek a quarry permit from the Sheridan County Commission. When this happens, Mr. and Mrs. Berry fully intend to protest the issuance of a quarry permit under Sheridan County zoning regulations.

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(B) The Application Does Not Outline Adequate Procedures To Prevent The Mining Operation From Constituting A Danger To Public Health and Safety And A Public Nuisance



Pursuant to WYO. STAT. § 35-11-406(b)(xiii), Fletcher is obligated to identify adequate procedures to prevent the mining operation from posing a threat to public health and safety and from constituting a public nuisance. The permit application has not attributed any significance to the requirements of Section 406(b)(xiii). The application indicates only that equipment will operate from sunrise to sunset (or until 9:00 p.m. at Fletcher's discretion), Monday through Saturday, presumably all year. Fletcher's application is structured to allow operations when, and how, is most beneficial to Fletcher without any more than cursory consideration given to impacts on adjacent landowners.

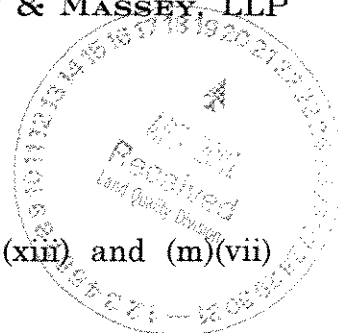
You should be aware of the experience with the existing mining operation, and the ongoing safety issues relating to that operation. During crushing operations, when the prevailing wind is from the north, the dust from the operation so severely reduces visibility on Rapid Creek Road that oncoming traffic cannot be seen. The road is used by landowners in the area, and occasionally, by pedestrians. Heavy truck traffic only compounds an already unsafe condition.

For the same reasons, the dust caused by the existing operation significantly interferes with the use and enjoyment of surrounding properties. Permitting mining of additional lands will only exacerbate an existing problem.

Moreover, in light of the severity of the existing problem (exposure levels) and long term exposure, we believe that DEQ has a responsibility to require Fletcher to study the potential for impact to human health. While Mr. and Mrs. Berry recognize Fletcher's profit incentive to expand the mining operation, development is not guaranteed at all cost. Until Fletcher has addressed the health and safety issues, the permit cannot be granted. WYO. STAT. § 35-11-406(b)(xiii) and (m)(vii).

Further, the application does not set guidelines for (i) the safe operation of equipment, (ii) speed limits on vehicles, (iii) dust control measures (discussed above), or (iv) reasonable hours of operation that afford neighboring landowners quiet use and enjoyment of their land other than during sleeping hours. Where the application has failed to define procedures to prevent the mining operation from

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constituting a public nuisance, as WYO. STAT. § 35-11-406(b)(xiii) and (m)(vii) require, the permit must be denied as incomplete.

(C) *The Application Fails to Adequately Address Surface Water Diversion To Prevent Pollution and Erosion*

WYO. STAT. § 35-11-406(b)(xiv) requires the applicant to demonstrate "[t]he methods of diverting surface water around the affected lands where necessary to control pollution or unnecessary erosion." Mr. and Mrs. Berry ask that you review the application to ensure that pollution and erosion concerns have been adequately addressed. In this regard, we note that the Wyoming Game and Fish Department has advised that "[a]ny ground disturbance activities should be conducted outside the riparian corridor for [Rapid Creek] and accepted best management practices should be implemented to ensure that all sediments and other pollutants are contained within the boundaries of the work area." Given this admonition, we do not believe that the application's treatment of these issues is adequate.

III. CONCLUSION

Fletcher's small mining application does not meet the criteria established by WYO. STAT. § 35-11-406 as it has failed to (1) demonstrate that Fletcher has the legal right to mine, (2) define procedures to prevent the mining operation from constituting a public nuisance, and (3) adequately address the diversion of surface water to prevent pollution and unnecessary erosion. Whereas the application does not meet the statutorily prescribed criteria for the issuance of a small mining permit, the permit should be denied.

Respectfully submitted this 20 day of April, 2001.

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