

BEFORE THE WYOMING ENVIRONMENTAL QUALITY COUNCIL **DEC 07 2007**

STATE OF WYOMING

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF OBJECTION TO)	
THE MINING PERMIT APPLICATION OF)	EQC DOCKET NO. 07-4804
MOUNTAIN CEMENT COMPANY)	
PERMIT NO. 298C, TFN 4 2/220)	
)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER came before the Environmental Quality Council (EQC) on October 29, 2007, for evidentiary hearing and the record was closed on that date. Council members present at the hearing included Richard C. Moore, P.E., Chairman and Presiding Officer, John N. Morris, Kirby L. Hedrick, and Mark W. Gifford, Esq. Terri A. Lorenzon, Executive Director of EQC and Bridget Hill, Assistant Attorney General were also present. Deborah A. Baumer from the Office of Administrative Hearings served as the Hearing Examiner in the contested case proceeding. The Applicant, Mountain Cement Company (Mountain Cement) appeared by and through counsel, Philip A. Nicholas and Mitchell H. Edwards. The Objector, Brian R. Waitkus (Waitkus) appeared pro se. The Department of Environmental Quality, Land Quality Division (Division) appeared by and through Senior Assistant Attorney General, John Burbridge. Mountain Cement's Exhibits MCC-1 through MCC-11 and MCC-13 through MCC-15 and Waitkus' Exhibits 2 (a through e), 4, 6, 7, 8, 14, 19, 20, 22, and 31 were received into evidence at the hearing. The Council has considered the evidence and argument of the parties, and makes the following:

I. JURISDICTION

“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 (LEXIS 2006) and the Environmental Quality Council’s Administrative Rules and Regulations (2001).

“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) (LEXIS 2006).

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) (LEXIS 2006).

Mountain Cement filed an application to amend its mining permit. Waitkus filed a timely objection to the mining permit amendment application. Therefore, the EQC has jurisdiction to hear and decide this matter.

II. STATEMENT OF THE CASE

Mountain Cement filed an application with the Department of Environmental Quality, Land Quality Division, to amend an existing permit to expand its mining operation to a new area (Area C) outside of its existing permit boundary. After public notification, Waitkus, an adjacent property owner, submitted a written objection to the issuance of the permit alleging 20 different deficiencies in the permit amendment application. Mountain Cement and DEQ asserted the application complies with the requirements of the Environmental Quality Act and all applicable state and federal laws, and therefore should be approved.

III. ISSUES AND CONTENTIONS

The sole issue in this case is whether Mountain Cement has proven, by a preponderance of the evidence, that it has complied with the requirements of the Environmental Quality Act, Wyo. Stat. Ann. § 35-11-406 (m) (LEXIS 2006) and should be issued an amended mining permit for Area C. At the October 29, 2007 hearing, Waitkus asserted that 12 of the 20 deficiencies still existed in the application including inadequate groundwater studies and protection, inadequate climatology studies and monitoring, and public nuisance and safety issues related to blasting. The Land Quality Division determined that Mountain Cement's application was complete and in full compliance with Wyoming Law and is ready to issue the amended mining permit.

IV. FINDINGS OF FACT

1. Mountain Cement owns and operates a cement plant two miles south of Laramie in Albany County, Wyoming. Limestone, shale, gypsum and iron ore are the raw materials used

to manufacture cement, with limestone constituting 80 percent of the raw material needed for manufacture.

2. Cement grade limestone is found in the foothills of the Laramie Range, east of Laramie. It is not available to the west or north of Laramie or the cement plant.

3. Waitkus owns property adjacent to Mountain Cement. In October 2006, Mountain Cement entered into a stipulated agreement with Waitkus that Mountain Cement would, in addition to a number of other conditions, mine Area C as soon as possible after completing the mining in Area A. *Exhibit MCC-2*.

4. On June 21, 2007, Stuart A. Tomlinson, President of Mountain Cement, filed a permit amendment application to include an additional 40 acres of limestone to be mined in an area referred to as #298C (Area C). The area involves 40 acres of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$, Section 36, T. 15 N., R. 73 W. *Exhibit MCC-1*.

5. In his October 18, 2007 pre-hearing disclosure statement, Waitkus lodged a two-fold objection to Mountain Cement's application. First, Waitkus asserted that the Council should establish rules and regulations to better implement the reclamation standards found in Wyo. Stat. Ann. § 35-11-402(a)(i) and 402(a)(vi). Those arguments are not relevant to the issue before this Council and therefore will not be addressed in this Order.

6. In Waitkus' second general objection reflected in his pre-trial disclosure statement, Waitkus asserted the application failed to comply with several sections of Wyo. Stat. Ann. § 35-11-406 (m) (LEXIS 2006), including the application was incomplete, the mining operation would pollute area waters and the operation constituted a public nuisance. Waitkus had previously filed an October 9, 2007 written comment in response to the public notification of Mountain Cement's application for permit amendment, wherein he asserted 20 separate points of

contention to Mountain Cement's permit. At the October 29, 2007 hearing, Waitkus used his October 9, 2007 list of comments to assert that 12 of his 20 written objections were still at issue before this Council. Those 12 issues were specifically addressed by Waitkus at the hearing and each will be addressed separately below.

- I. Waitkus argued that Mountain Cement failed to adequately study the aquifer properties of the area. Specifically, Waitkus stated he wanted Mountain Cement to test the porosity of the fracturing of the bedrock to determine the potential for polluting the aquifer. Waitkus is not a hydrologist and failed to submit any credible evidence to substantiate this argument.
- II. Waitkus argued the data used regarding the groundwater quality was 9 years old and needed to be updated. Waitkus failed to submit any credible evidence to substantiate the data was inaccurate.
- III. Waitkus argued the climatology data was 17 years old and therefore inaccurate. Again, Waitkus submitted no evidence, merely argument, which does not substantiate his claim.
- IV. Waitkus took exception with Mountain Cement's assertion that although several faults were identified along the western flank of the Laramie Range, none were identified in the proposed limestone expansion permit. Waitkus is not a geologist and submitted no credible evidence that the statement is not true.
- V. Waitkus complained about Mountain Cement's statement that, "MCC will notify Wyoming Department of Environmental Quality, Water Quality division of all spills of refined crude oil products which are in quantities greater than twenty-five gallons." See *MPVIII-4B*. Waitkus argued that the size requirement was too high and constituted a public nuisance. Waitkus failed to support

this argument with any evidence that Mountain Cement's notification was not in accordance with the law.

- VI. Waitkus complained that NOx results from blasting and can send pollutants toward residential areas when the prevailing winds change a short period of time before blasting, thus constituting a public nuisance. Waitkus demands a weather monitoring system be placed at Mountain Cement and that videotaping occurs both before and after each blast. Mountain Cement currently records the location, date and time of each blast and also the direction of the prevailing wind at the time of the blast. *See MPVIII 4.4.3.* There is absolutely no requirement that Mountain Cement must videotape each blast or place a weather monitoring station on its premises.
- VII. Waitkus complained Mountain Cement's Reclamation Schedule wherein it agreed to complete reclamation activities within 2 years after mining is completed, should also state that the reclamation should start within one year from the completion of the mining. No evidence was submitted by Waitkus to show that Mountain Cement's reclamation schedule was not in accordance with the law.
- VIII. Waitkus wanted to see any study or data collected to support Mountain Cement's statement that "paleontological resources have not been observed in area "C" limestone quarry area." Waitkus submitted Exhibit 2, which he claimed represented feeding tracks of tube worms. Waitkus is not a paleontologist. Waitkus' exhibit failed to show that feeding tracks of tube worms constituted "paleontological resources." Additionally, a June 26, 2006 letter from the Wyoming State Historic Preservation Office (SHPO), confirmed that SHPO reviewed the project and found that it met

the Secretary of the Interior's Standards for Archeology and Historic Preservation. *Exhibit 1, p. DVIII 3-6.*

- IX. Waitkus complained that Mountain Cement had been cited in the past for allowing sediment from their mine to flow into drainages during a rain event. Past violations are not relevant to the issue before the Council and no evidence was submitted by Waitkus that a violation currently exists.
- X. Waitkus complained that an inconsistency existed in DVIII6.3.4 – Channel Geometry. Mountain Cement agreed to correct the typographical error.
- XI. Waitkus complained that Mountain Cement's statement that "post mining land use will be livestock grazing, which is consistent with the pre-mining uses" fails to consider wildlife. Mountain Cement agreed to add the word "wildlife" to the statement.
- XII. Finally, Waitkus took issue with the Permanent Seed Mixtures discussed in the permit and believed the species numbers was too low to provide a diversity of plants for wildlife. Waitkus demanded a "large increase in the forb and shrub re-vegetation species list following a data search of their uses by the local fauna." Waitkus is not a biologist and provided no evidence that Mountain Cement's description of plants occupying Area C was incorrect.

7. On October 23, 2007, Mountain Cement filed Mountain Cement Company's Response wherein Mountain Cement agreed to six separate revisions to the Mine Plan providing that Waitkus agree to withdraw his objections to the application amendment. Specifically, Mountain Cement agreed to the following:

- Change the blasting section of its Mine Plan to conform to the same blasting requirements which were approved by DEQ/LQD as part of Mountain Cement's permit 298C-A5. *See Exhibit A, draft pages of MPVIII 4.4, pp. MPVIII-6 through MPVIII-8.*

- Change the section regarding surface water and ground water monitoring during mining to include a sentence stating that the monitoring will be done on a quarterly basis. *See Section MPVIII 4.9, Exhibit B, p. MPVIII-14.*
- Change the public nuisance and safety section to include a requirement that Mountain Cement will avoid shining stationary lights on homes to the north and northwest.
- Change the reclamation schedule of the Reclamation Plan to remove the errant reference to “RP-3 block.” *RPVIII 6.0.*
- Change the Introduction of Hydrology Appendix to clarify the location of the ephemeral drainages (E9 and E12) in relationship to the mining areas in Area C. *DVIII 6.1*
- Change the section relating to surface water section to correct the “E10” typographical error to correctly state “E12.” *DVIII 6.3, p. 6.6.*

8. Waitkus did not withdraw his objection to the permit amendment or his request for hearing. Nevertheless, Mountain Cement agreed to modify the permit application amendment to include the above noted revisions.

9. All findings of fact set forth in the following conclusions of law section shall be considered a finding of fact and are fully incorporated into this paragraph.

V. CONCLUSIONS OF LAW

A. Principles of Law

10. Mountain Cement 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).

11. 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) (LEXIS 2006).

12. 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.

13. Rule 50, W.R.C.P. provides:

(a) Judgment as a matter of law.-

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

B. Application of Principles of Law

14. Wyo. Stat. Ann. § 35-11-406 (m) (LEXIS 2006) 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 § 35-11-406 (m).

15. Waitkus' 12 objections fell within three separate categories in the above noted statute -- that the application was incomplete, that the mining operation would cause pollution of area waters and that the operation constituted a public nuisance. Waitkus attempted to submit

articles he printed from the internet, prior notices of violation received by Mountain Cement (all of which were resolved) and argument to support his position that the permit should not be issued. After Waitkus argued his points of objection, Mountain Cement moved for a judgment as a matter of law. Waitkus' evidence did not sufficiently rebut Mountain Cement's evidence in this case and judgment as a matter of law was granted.

16. Mountain Cement's permit application amendment meets the requirements of the Environmental Quality Act and the regulations pertinent to small mine operations. Based upon the above findings of fact, the Council concludes that the permit should be granted.

DECISION

Pursuant to the authority vested in the Environmental Quality Council by WYO. STAT. ANN. § 35-11-406 (LEXIS 2006), the Council hereby **APPROVES** the Permit Application Amendment submitted by Mountain Cement Company regarding Mine Permit No. 298(C) TFN 4 2/220 incorporating Mountain Cement Company's Response filed on October 23, 2007.

ORDER

IT IS THEREFORE ORDERED that the Permit Application Amendment filed by Mountain Cement Company for Permit No, 298C, TFN 4 2/220 is hereby **GRANTED**.

DONE this 6th day of December, 2007.



Richard C. Moore, P.E., Chairman
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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 7 day of December, 2007, addressed to the following:

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