

FILED

SEP 18 2008

Jim Ruby, Executive Secretary
Environmental Quality Council

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

In the Matter of Permit No. CT-7066,)
Touchstone Materials, LLC, and)
Tom Berry and Susie Berry,)
Protestants.)

Docket No. 08-2801

PROTESTANTS' RESPONSE TO MOTION TO DISMISS

COME NOW TOM BERRY AND SUSIE BERRY, the Protestants, by and through their undersigned attorneys, and hereby submit the following *Response to the Motion to Dismiss*.

1. On June 2, 2008, the Air Quality Division of the Department of Environmental Quality (hereinafter referred to collectively as the "Department") issued Permit No. CT-7066 to Touchstone Materials, LLC. This Permit was received by the Protestants, through their legal counsel, on June 17, 2008. On Friday, August 1, 2008, Protestants' Notice of Appeal and Petition for Review (hereinafter "Petition") was served upon the appropriate parties as required by the *Department of Environmental Quality General Rules of Practice and Procedure*, Chapter 1, Section 3(b). The Petition was received by the Department on Monday, August 4, 2008.

2. In response to the Petition, the Department filed a motion to dismiss alleging first that the Petition was untimely. According to the Department, the Petition should have been received by the appropriate parties by August 1, 2008.

3. However, the Department's argument fails to consider the Wyoming Rules of Civil Procedure, which is required by the Department's own rules. According to the *Department of Environmental Quality Rules of Practice and Procedure Applicable to Hearings in Contested*

Cases, Chapter 2, Section 14, the “Wyoming Rules of Civil Procedure, insofar as the same may be applicable and not inconsistent with the laws of the state and these rules **shall apply to matters before the Council.**”

4. Under Wyoming Rules of Civil Procedure 6(d) (hereinafter “Rule 6(d)”), additional time is always allowed when a notice or paper which requires a response or action is served and/or received by mail. Under this rule, a party is afforded an extra three (3) days to the prescribed period. Specifically, Rule 6(d) provides, in pertinent part, as follows:

(d) Additional Time After Service by Mail

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party, and the notice or paper is served upon the party by mail or by delivery to the clerk for service, three days shall be added to the prescribed period

5. In this case, Protestants received the Department’s decision by mail. Thus, Rule 6(d) allots additional time in which to take action on the decision. The filing deadline would be sixty three days (63) from the date of the decision, or Monday, August 4, 2008. As noted above, this is the date of the actual receipt of the Petition. Thus, under the Rules of Civil Procedure, the Petition was timely filed.

6. Furthermore, even if the Council believes that the Rules of Civil Procedure do not apply, the basic doctrines of equity and fairness should prevent a dismissal of the Petition. The Petition was signed and served by Protestants on Friday, August 1, 2008 – the day which the Department claims was the last date to receive a petition. The Petition was actually received by the Department on the very next business day, Monday, August 4, 2008.

7. The purpose of the time limit for appeal is to protect the Department from the prejudice of defending appeals years after they take place. The rule is not meant to prohibit petitions which are allegedly one day late. In the instant case, the difference in the alleged required date of receipt and the actual date of receipt – one day – has not prejudiced any party to this case. Consequently, a dismissal for late filing in this case would seem to be an unjust and inequitable result.

8. In its second argument, the Department contends that none of the issues raised in the Petition pertain to the issuance of a clean air permit. In making this argument, however, the Department ignores its own rules and regulations.

9. Under the *Department of Environmental Quality Air Quality Division Permitting Requirements*, Chapter 6, Section 2(c)(i), no air quality permit shall be issued if the proposed facility fails to comply with the general intent of the Wyoming Environmental Quality. In this case, the proposed facility obviously fails to comply with such intent. First, the affected lands lie within three hundred (300) feet of an existing occupied dwelling or home in violation of Wyoming Statute § 35-11-406. Second, the facility constitutes a public nuisance and endangers the public health and safety.

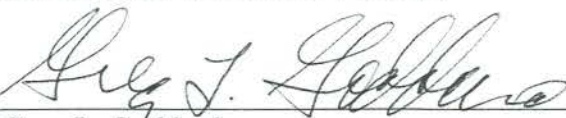
10. The rules also require that prior to the issuance of an air quality permit the operator show that it will prevent a reduction of ambient air quality as a result of hauling activities. See *Department of Environmental Quality Air Quality Division Permitting Requirements*, Chapter 6, Section 2(c)(v). This usually requires paving of access roads or dust treatment on haul roads. See *id.* In this case, such treatments are not available as operator does not have a legal access to its mining operations. Thus, treatment of the road and/or paving

activities will be available to the operator. Consequently, this rule was also violated by the issuance of the permit.

11. Based upon the foregoing, the Protestants respectfully request that the Council deny the Department's Motion to Dismiss.

Dated this 17th day of September, 2008.

GODDARD, WAGES & VOGEL:

By 
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Certificate of Service

I, Greg L. Goddard, attorney for Protestants in the above-entitled matter, do hereby certify that on the 17th day of September, 2008, I caused a true and correct copy of the foregoing Response to Motion to Dismiss to be served as follows:

John S. Burbridge	<input checked="" type="checkbox"/>	U.S. Mail
Senior Assistant Attorney General	<input type="checkbox"/>	Fed Ex
123 Capitol Avenue	<input type="checkbox"/>	Facsimile
Cheyenne, WY 82002	<input type="checkbox"/>	Hand-Delivered

Dennis M. Boal, Chair	<input checked="" type="checkbox"/>	U.S. Mail
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