

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

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Terri A. Lorenzon, Attorney
Environmental Quality Council

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IN THE MATTER OF OBJECTIONS)
TO THE PERMIT APPLICATION OF) Docket No. 2573-94
AMAX COAL COMPANY,)
EAGLE BUTTE MINE, PERMIT NO. 428-T2)

Terri A. Lorenzon, Attorney
Environmental Quality Council

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

At public meetings held October 5 and 24, 1994, the Wyoming Environmental Quality Council ("Council") considered the protests of Roger Pfeil, Linda Pfeil, Joe Gilsdorf, and Karla Okasanen (collectively "Protestants") to the Revision to Permit No. 428-T2, issued to Amax Coal Company ("Amax") by the Land Quality Division ("LQD") of the Wyoming Department of Environmental Quality (DEQ). The Council held an evidentiary hearing in this matter in Gillette, Wyoming, on July 26, 1994. Roger Pfeil and Linda Pfeil (the Pfeils) appeared and were represented by Anthony T. Wendtland of Davis & Cannon. Joe Gilsdorf and Karla Okasanen appeared pro se. Amax appeared through counsel Marilyn S. Kite of Holland & Hart, and Steven R. Youngbauer of Amax Coal West, Inc. LQD appeared and was represented by Thomas A. Roan, Assistant Attorney General. Terri A. Lorenzon was also present at the hearing and represented the Council.

Having considered the evidence presented at the hearing, the post hearing briefs and the arguments of counsel, and being fully advised in the premises, the Council finds, concludes, and orders as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In 1976, LQD issued Permit No. 428 for Amax's Eagle Butte Mine. In 1985, the permit was revised to conform with a new state regulatory program, and issued as Permit No. 428-T1. In 1990, the permit was renewed and revised as Permit No. 428-T2. In December, 1993, Amax applied for a revision to that permit, and this revision is the subject of this case.

2. The Protestants own property in Rawhide Village, located within one-half mile of Amax's permitted mine area. They filed timely protests to the revision, which entitled them to a hearing on the matter before the Council. Issues raised by the Protestants in their protests were the sequence and timing of mining allowed under the revision, potential hydrologic impacts, and potential impacts from blasting. At the hearing and in the post hearing briefs, additional issues were raised concerning the propriety of public notice in this case.

3. Pursuant to Wyo. Stat. §§ 35-11-112 and 406(k) the Council has jurisdiction over the parties and the subject matter of this proceeding.

MOTION FOR CONTINUANCE

4. Wyo. Stat. § 35-11-406(k) requires that a hearing on a mine permit protest be held within 20 days after the final date for filing objections. The notice in this case, published four times in May pursuant to the statutory requirement, notified the public that a hearing would be held, if one were requested, within that time limit. The last day for filing protests was July 6, and this date was included in the public notice. The final date for a hearing could easily

be calculated by the public. After receipt of the Protestants' letters, the Council notified all parties that a hearing would be held July 26, 1994, the latest date allowed by statute.

5. As discussed further in paragraphs 26 and 27 of this document, the Protestants were entitled to and did receive individual copies of the public notice for the permit revision which stated that a hearing would be held within the statutory time limit. The Protestants testified that they received and read their copies of the notice. However, the Pfeils waited until July 18, 1994 to contact an attorney.

6. On July 20, 1994, six days before the hearing, the Pfeils filed a motion to continue the hearing date, stating as grounds that their attorney needed more time to prepare for the hearing and conduct discovery. Section 35-11-406(k) denies the Council the discretion to grant a continuance beyond the prescribed 20 day limit unless there is a stipulation to the continuance among the parties. The parties did not stipulate to a continuance. The Pfeils argued that the combined effect of the statutory time period for a hearing and the inability of the Council to grant a continuance without a stipulation from the parties is to deny the Protestants a full and fair opportunity to be heard, and this denial of an opportunity for a fair hearing violates the due process rights of the Pfeils guaranteed under the state and federal constitutions. This issue was addressed in Grams v. Environmental Quality Council, 730 P.2d. 784 (Wyo. 1986).

7. After hearing arguments from the Pfeils, the DEQ, and Amax, the Hearing Examiner denied the continuance before evidence was presented, and he reconsidered the motion at the conclusion of the hearing. Gilsdorf and Okasanen did not join in the motion for a continuance and did not present argument on this issue. The Hearing Examiner determined that the Pfeils had an obligation to pursue their protest in a diligent and timely manner, and that the Pfeils, having received their copy of the public notice on or about May 23, 1994, had almost two months actual notice of the fact that the hearing had to be held within the 20 day time limit. The Hearing Examiner further determined that any concern about inadequate time to prepare for the hearing was caused by the Pfeils own delay in contacting an attorney, and the Pfeils had an opportunity to present their case on the issues they had raised during the proceedings on July 26, 1994. The Council discussed and affirmed the Hearing Examiner's decision to deny the continuance on October 5, 1994.

SEQUENCE AND TIMING

8. Through what DEQ has called a Form 11 revision, Amax sought to alter the sequence and timing of the mining operations at its Eagle Butte mine. The public notice also references a transfer of the mine permit, but that transfer was not an issue before the Council. The mine plan in effect prior to this revision would have allowed Amax to mine immediately adjacent to the Protestants' property in Rawhide Village starting in approximately 2007. The revision would allow mining in this area in 1994 and 1995, sooner than called for by the mining plan prior to this revision. The Protestants objected that this change in sequence and timing would deny them the use and enjoyment of their property in the near future, instead of at a later date.

9. Revisions to permits were anticipated by the Environmental Quality Act (the Act) as it requires the Council to enact rules and regulations providing for the processing of permit

revisions. Section 35-11-402(a)(10) states that the rules and regulations shall include "the criteria for review and information and public notice requirements for permit revisions. A permit may be revised without public notice or hearing for revisions, including incidental boundary revisions to the area covered by the permit, if these do not propose significant alterations in the reclamation plan." The LQD surface coal regulations contained in Chapter XIII of the 1994 compilation of surface coal mining rules and regulations and Chapter XIV of the 1989 compilation set forth the same requirements for permit revisions. The current compilation will be used in citations to the rules in this document.

10. Evidence at the hearing affirmed that surface coal mines commonly need to, and do, change mine plans. Amax has, on other occasions, changed the permitted mining plan for the Eagle Butte Mine. Under all permitted mine plans prior to the 1990 version, mining would actually have taken place closer to Rawhide Village, and sooner, than under the new revision. As late as 1990, mining had actually occurred adjacent to Rawhide Village.

11. The permit revision before the Council only seeks to change the timing and sequence of the mining operation. No evidence that the permit revisions sought to make any other alterations in the 428-T2 permit issued to Amax in 1990 was introduced. No evidence was introduced which would provide a basis for the Council to reexamine now the information that supported the issuance of the 428-T2 permit in 1990 was introduced, and although the Pfeils argued that Amax should be estopped from seeking a revision of the 428-T2 mining sequence, the evidence does not support a finding that Amax should be estopped from using a process that is expressly contemplated by the statute and regulations.

12. The Protestants purchased their property in Rawhide Village, and moved into the subdivision, at a time when the permitted plan allowed mining closer and sooner than under the revision.

13. The evidence demonstrates that the sequence and timing proposed by the revision does not violate any provision of the law, and the revision complies with all applicable legal requirements. The Council finds and concludes that the permit revision should be issued.

HYDROLOGIC IMPACTS

14. At the hearing, the Protestants raised concerns about possible impacts of mining on water levels or the hydrologic balance beneath their property. Evidence at the hearing showed that the Protestants have no water rights to be protected by the law, but the Council considered this issue to the extent the law also protects public water supplies.

15. The evidence showed that a change in the mining sequence did not change the hydrologic impacts, and that a series of geologic and hydrologic barriers isolate Rawhide Village from the mining operation, making it unlikely that mining will have any adverse impact on Rawhide Village water supplies. Furthermore, actual monitoring of water levels indicates that, even though a pit close to Rawhide Village is presently being dewatered, no declines in water levels have ever been detected in wells in or near Rawhide Village. Evidence also showed that the Rawhide Village water supply well is completed at over a thousand feet deep, much deeper than the mining operation will ever reach. Based on this evidence, the Council finds and concludes that a change in the mining sequence of Amax's mining operations is unlikely to have any hydrologic impacts on Rawhide Village or its water supplies.

16. Even if Amax's mining operations should have an impact on Rawhide Village's water supply wells, Wyo. Stat. §35-11-415(b)(xii) requires the mine operator to:

replace in accordance with state law the water supply of an owner of interest in real property who obtains all or part of his supply of water . . . from an underground source where the supply has been affected by contamination, diminution or interruption proximately resulting from the surface coal mine operation.

A similar requirement is imposed by Chapter II, Section 3(b)(ix)(E), LQD Rules and Regulations. Amax has made a specific commitment to replace any affected water supplies in its current permit, and this commitment is unaffected by the revision. Evidence at the hearing showed that Amax has a history of meeting this commitment as required by law.

17. For these reasons, the Council finds and concludes that the evidence does not support concerns over the revision in mining sequence causing hydrologic impacts, and that Amax adequately demonstrated compliance with all applicable legal requirements relating to hydrologic impacts.

BLASTING

18. The Protestants raised concerns that blasting in mining operations could adversely impact their homes, wells which supply water to Rawhide Village, the Rawhide Village sewer system, and methane wells in or near Rawhide Village.

19. The evidence demonstrates that the existing blasting plans are unaffected by the mine sequence revision, and these blasting plans fully comply with the extensive legal requirements relating to blasting. In addition, evidence at the hearing indicated that Amax has performed blasting operations at locations even closer to Rawhide Village than the revised permit would allow, without adverse impacts to Rawhide Village.

20. Under Wyo. Stat. § 35-11-415(b)(xi)(E), Amax must, if requested, perform preblasting surveys of nearby homes and structures. The Protestants may request these surveys. The Council concludes that this requirement applies to "structures," and therefore provides the same measure of protection to water wells, sewer systems, and methane wells, as it does to the Protestants' homes.

21. Under Wyo. Stat. § 35-11-406(a)(xiii), Amax has complied with the permit requirement that it provide a liability insurance policy to cover:

personal injury and property damage protection in an amount adequate to compensate any persons damaged as a result of the surface coal mining and reclamation operations including the use of explosives and entitled to compensation under the applicable provisions of state law. (Emphasis added.)

Accordingly, the Protestants have an adequate remedy should Amax's blasting operations cause any damage to homes or structures.

22. For these reasons, the Council finds and concludes that the evidence does not provide a legal basis for denying the permit revision. The revision will not change the blasting plan or requirements, and the existing permit complies with all applicable legal requirements relating to blasting. The Council notes that Amax must comply with Wyo. Stat. § 35-11-415(b)(xi)(E), and related statutory and regulatory requirements applicable to blasting, with regard to any methane wells or other structures in or near Rawhide Village.

NOTICE

23. Chapter XIII, LQD Rules and Regulations, provides for both "non-significant" permit revisions and major permit revisions. LQD determined that the revision now at issue would be considered a major permit revision. For major permit revisions, the regulations require public notice and opportunity for hearing. Previous changes in the sequence and timing of mining at the Eagle Butte Mine had been accomplished as non-significant permit revisions, but Amax did not object to LQD's decision to treat the present revision as a major permit revision.

24. Pursuant to Chapter XIII, Section 2(a), the LQD notified Amax by letter dated May 13, 1994, that the application for revision was complete and that public notice should be published.

25. Pursuant to Chapter XIII, Section 3(a), on May 20, May 26, June 1, and June 6, 1994, notice of Amax's application for revision was published in the Gillette News-Record, a newspaper of general circulation in the area. The text of this notice had been drafted and approved by LQD, and the contents of the notice were consistent with notices previously published under this regulation for purposes of permit revisions.

26. Pursuant to Chapter XIII, Section 3(a), and in accordance with Wyo. Stat. § 35-11-406(j), on May 23, 1994, Amax mailed copies of the notice to all owners of record of surface and mineral rights within the permit area, to all owners of record of surface rights on adjacent lands, and to all other persons within one-half mile having valid legal estates of record.

27. The Protestants own property in the Rawhide Subdivision, within one-half mile of Amax's Eagle Butte Mine. All the Protestants received the notice mailed by Amax. Evidence at the hearing indicated that the notice originally mailed to Gilsdorf and Okasanen was returned to Amax. This notice was sent as certified mail on May 23, 1994. The testimony reflected that Amax had obtained the addresses for the Protestants from the Campbell County property records in 1993. Although Gilsdorf and Okasanen testified that the address used by Amax on May 23rd was outdated and they could not understand how the wrong address could have been given to Amax, the testimony of the Amax witnesses was not refuted. Immediately after being contacted by Karla Okasanen, Amax mailed a notice to a new address. This notice was received by Gilsdorf and Okasanen on July 5, 1994.

28. The Council finds and concludes that, by mailing notice to the address of legal record, Amax satisfied the legal requirements of mailing notice to Gilsdorf and Okasanen. See Grams v. Environmental Quality Council, 730 P.2d 784, 788 (Wyo. 1986).

29. After receiving the notices mailed by Amax, the Protestants exercised their rights under Wyo. Stat. § 35-11-406(k), and filed protests on or before the deadline of July 6, 1994. These protests were timely and entitled the Protestants to a hearing before the Council.

30. Evidence presented at the hearing indicated the notices published in the newspaper and mailed to the Protestants contained information regarding the identity of the applicant, the location of the proposed operation, the proposed dates of commencement and completion of the operation, the proposed future use of the affected land, the location at which detailed information about the application may be obtained, a brief description of the proposed

revisions, information about the hearing process, and the final date for filing objections to the application. These notices contained all the information required by, and complied in all respects with, Wyo. Stat. § 35-11-406(j).

31. The notices did not contain "an outline or index indicating what pages, maps, tables, or other parts of the approved permit are affected by the revision," or an explanation of "why the proposed change is being sought" as required by Chapter XIII, Sections 3(a), 1(b)(ii), and (iii).

32. In post-hearing briefs, the Protestants complained for the first time that the omission of an outline, an index, or an explanation of the reason for the revision was fatal error, and the notices therefore did not comply with applicable requirements of the law. They argued that the permit revision must therefore be denied.

33. When considering issues of notice, the Council is aware that it must consider "the gravity of the error, not its mere occurrence." Grams v. Environmental Quality Council, 730 P.2d 784, 786 (Wyo. 1986). In the case at hand, the Protestants had the burden of showing how any error in the notices was prejudicial to them and affected their substantial rights. The Protestants presented no evidence at the hearing which demonstrated they were prejudiced by the error in the notices, and failed to demonstrate that the error affected any substantial rights. The Protestants did not meet their burden of presenting such evidence and proving their claims. Accordingly, the Council finds and concludes that the error in the notices was harmless, did not prejudice the Protestants, and does not provide a valid reason for denying the permit revision.

34. Evidence presented at the hearing showed all the Protestants received the notice mailed by Amax, that Protestant Roger Pfeil actually read the notice, and that he was prompted by the notice to review the application for revision. The legal test requires: "a reasonable opportunity to know the claims of the opposing party and to meet them"; the notice was "not misleading"; and the notice "apprise[d them] of the issues in controversy". White v. Board of Trustees, 648 P.2d 528, 535 (Wyo. 1982), cert. denied 459 U.S. 1107 (1983). On this basis, the Council finds and concludes that the notices substantially complied with applicable requirements, and provided actual notice which was fully adequate and reasonable under the circumstances.

35. The requirements of notice are satisfied by actual knowledge, particularly where that knowledge was acted upon. First National Bank v. Oklahoma Sav. & Loan Bd., 569 P.2d 993 (Okla. 1977); Landover Brooks, Inc. v. Prince George's County, 566 A.2d 792 (Md. App. 1989). Because the notices in this case provided actual knowledge, and particularly because the Protestants acted upon that notice, the Council finds and concludes that such notices fulfilled their legal purpose and satisfied applicable requirements of the law.

36. Chapter XIII, Sections 3(a) and 1(b) presents analytical problems as Section 1(b) sets forth the contents of an application for a non-significant permit revision, not the contents of a notice regarding a major permit revision. Because Section 1(b) deals with non-significant permit revisions, it is unclear that it is even meant to apply to the major revision in this case.

37. In particular, the Section 1(b)(ii) requirement for "an outline or index indicating what pages, maps, tables, or other parts of the approved permit are affected by the revision" could create a significant burden for those who must publish notice of a revision.

While such an outline or index is appropriately placed in the application, it could be impractical and very costly to publish such an index or outline in a newspaper notice. Statutes and regulations "should not be interpreted in a manner producing absurd results." In re JRW, 814 P.2d 1256, 1263 (Wyo. 1991); see also Gertsell v. Department of Revenue and Taxation, 769 P.2d 389, 394 (Wyo. 1989) ("in construing statutes, an absurd result should be avoided"); State Bd. of Equalization v. Cheyenne Newspapers, Inc., 611 P.2d 805, 809 (Wyo. 1980) ("statutes should be given reasonable, practical construction"). Where the revision of a mine permit is not complicated, the notice of the revision alone may give the public an indication of the "part of the approved permit that is affected by the revision". In this case, notice of the change in the sequence of mining, a change which does not involve mining an area not previously included in the mine plan, tells the public that the portion of the approved permit that will be altered is the mine sequence.

38. The permit revision at issue here is not complex and the application for the permit revision, which was available for review by the Protestants, is not voluminous. The efficacy of public notice is partially dependent on the nature of the activity of which notice is given. Accordingly, although the public notice in this case did not contain all the information required by Chapter XIII, Section 1(b), the notice did contain information sufficient to alert readers to the nature of the revision and the portion of the permit to be revised.

39. The Pfeils first raised the issue of noncompliance with Chapter XIII in an amended prehearing submission filed by FAX transmission on July 25, 1994, the day before the hearing. The DEQ and Amax argue that the Pfeils should not be allowed to raise this issue after the time for filing objections lapsed. This argument is premised on the idea that the July 6 deadline is a jurisdictional deadline and the Council cannot consider new objections to the Amax revision filed after that date. The Council did not reach this issue in its deliberations because it concluded that the notice substantially complied with the requirements of Chapter XIII and the Protestants were not prejudiced by any omissions in the notice. Also, because the Council concluded that the permit as revised meets all statutory and regulatory requirements, remanding the permit to the Department for republication of notice would serve no purpose in this case other than delay.

OTHER MOTIONS

40. The Pfeils filed a motion to have the full Council present for the hearing held on July 26, 1994 and a motion for informal conference. The motion for an informal conference was the subject of a separate order contained in the record of these proceedings. The Council did not rule on the motion seeking a hearing before the full Council prior to the July 26 hearing. Due to the short period of time in which the Council had to prepare for this hearing, the Council was unable to schedule a hearing within the statutory time period and at the same time schedule a hearing which seven Council members could attend. The letters of objection filed by the Protestants were filed July 6, giving the Council only 20 days in which to schedule the hearing, publish public notice, and hold the hearing. The hearing was scheduled at a time which gave all participants the full 20 day period for preparation and which allowed 2 Council members to attend. The attorney for the Pfeils acknowledged that the motion was deemed denied when the Council proceeded to hold the hearing at the time required by the statute with two members

present


ORDER

IT IS THEREFORE ORDERED that Amax Coal Company's application to revise the permit for its Eagle Butte Mine, Permit No. 428-T2, should be granted;

IT IS ALSO ORDERED that Amax must comply with Wyo. Stat. § 35-11-415(b)(xi)(E), and related statutory and regulatory requirements applicable to blasting, with regard to any methane wells or other structures in or near Rawhide Village; and

IT IS FURTHER ORDERED that the Administrator of the Land Quality Division of the Wyoming Department of Environmental Quality shall promptly take all actions necessary to approve the proposed revision pursuant to Chapter XIII, Section 4, Land Quality Division Rules and Regulations.

Dated this 7th day of November, 1994.


HAROLD L. BERGMAN
Hearing Examiner

present

ORDER

IT IS THEREFORE ORDERED that Amax Coal Company's application to revise the permit for its Eagle Butte Mine, Permit No. 428-T2, should be granted;

IT IS ALSO ORDERED that Amax must comply with Wyo. Stat. § 35-11-415(b)(xi)(E), and related statutory and regulatory requirements applicable to blasting, with regard to any methane wells or other structures in or near Rawhide Village; and

IT IS FURTHER ORDERED that the Administrator of the Land Quality Division of the Wyoming Department of Environmental Quality shall promptly take all actions necessary to approve the proposed revision pursuant to Chapter XIII, Section 4, Land Quality Division Rules and Regulations.

Dated this 7th day of November, 1994.


HAROLD L. BERGMAN
Hearing Examiner

CERTIFICATE OF SERVICE

I, Terri A. Lorenzon, certify that at Cheyenne, Wyoming, on the 7th day of November, 1994, I served a copy of the foregoing ORDER by depositing copies of the same in the United States mail, postage prepaid, duly enveloped and addressed to:

Anthony T. Wendtland (Fax #1-307-672-8955)
Davis and Cannon
40 South Main Street
P. O. Box 728
Sheridan, WY 82801

Marilyn S. Kite (Fax #1-307-739-9744)
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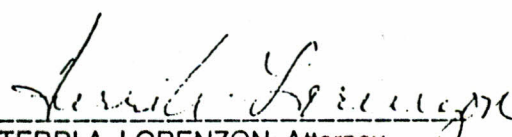
Steven R. Youngbauer (Fax #1-307-687-3480)
Amax Coal West, Inc.
P. O. Box 3039
Gillette, WY 82717-3039

and also to the following persons via interoffice mail:

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