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December 2, 2013

Ms. Nancy Nuttbrock  
Deputy Director of the Land Quality Division  
Wyoming Department of Environmental Quality  
Herschel Building  
122 West 25<sup>th</sup> Street  
Cheyenne, WY 82002  
Via US MAIL

Subject: *Objection by Meadows at Melody Ranch Homeowner's Association to  
Issuance of Small Mine Permit to Roger Seherr-Thoss Sand and Gravel*

Dear Ms. Nuttbrock:

I write on behalf of the Meadows at Melody Ranch Homeowner's Association (the "Melody Ranch HOA") to formally object to the Seherr-Thoss Sand & Gravel Application for a small mine permit. The Melody Ranch HOA represents over 350 homes that lie directly adjacent to the Seherr-Thoss gravel mine, located on South Park Loop Road in Jackson, Wyoming.

The Seherr-Thoss small mine permit application seeks to drastically expand the existing mining operation in a manner that is inconsistent with local zoning regulations, is prohibited under a valid District Court Order, and will create a local nuisance. The Melody Ranch HOA specifically requests that the Seherr-Thoss application be denied under the provisions of Wyo. Stat. §35-11-406(m) for the following reasons:

**Background**

In 2011, after many years of unsuccessful efforts by Teton County to bring the Seherr-Thoss gravel operation into compliance with County zoning regulations, the Teton County Board of Commissioners conducted a three-day contested case hearing regarding the status of the Seherr-Thoss mine. The goal of the hearing, which was presided over by an independent hearing officer, was to determine what is and is not allowed as part of the gravel operation, both under the Teton County Land Development Regulations (the "LDRs") and under Wyoming law. During this hearing, Mr. Seherr-Thoss and the County presented numerous witnesses, and the Board reviewed over 100 exhibits.

At the conclusion of the hearing, the Teton County Board of County Commissioners determined that although the Seherr-Thoss gravel mine existed prior to 1978, when the first LDRs were enacted, it existed only seasonally and on a very small

scale. The Board also determined that the quarry had failed to pay state mineral severance taxes for over twenty years, crushed gravel for thirty years without any of the required permits, and had illegally expanded without the required County approvals and permits. The Board ultimately ruled that the mine was grandfathered as a 3-acre operation, with limited extraction and processing rights. Expansion beyond these limits was specifically prohibited.

Seherr-Thoss appealed this decision to the District Court Judge of the Ninth Judicial District. After a complete review, the Court affirmed the Board's decision in full. The Court entered its formal *Order Affirming Agency Action*, which restricted the mine as follows:

1. Any gravel operation located at 4520 South Park Loop Road shall disturb not more than three (3) acres at any one time. This three (3) acre limit shall include gravel extraction, screening, stockpiling and crushing. Ponds not used for excavation shall be excluded from the three (3) acres that can be disturbed for the gravel operation at any one time. The 5.68 acre pond that already exists on site shall be excluded from this three (3) acre limit, provided that any expansion or enlargement of this pond for extraction shall count toward the maximum three (3) acres permissible disturbance. In the event extraction resumes from the 1.39 acre pond that exists on site, this acreage shall be counted toward the maximum three (3) acres permissible disturbance.
2. Within sixty (60) days of Teton County adopting these *Findings of Fact, Conclusions of Law and Order*, Seherr-Thoss or the current property owner shall submit a reclamation plan to the Teton County Planning Department for review and approval which will reduce the size of the gravel operation to three (3) acres as described above. A surety shall be provided to the Planning Department consistent with the LDRs. All terms of the approved reclamation plan shall be completed in a timely manner.
3. To ensure that volumes do not exceed the 15,000 cubic yards or 17,000 tons per year approved by the Board of County Commissioners, scale receipts for the gravel operation shall be submitted to the Planning Department no later than January 31 of each year beginning in 2013 for the prior year. Amounts in excess of permitted volumes shall constitute a violation of this Order.
4. Hours of operation on site shall be limited to Monday through Friday, 7:00 am to 5:00 pm.
5. The gravel operation shall comply with all requirements of the Department of Environmental Quality Land Quality and Air Quality Divisions.

This case is now on appeal to the Supreme Court, with oral arguments scheduled on December 10, 2013. It is expected that the Supreme Court ruling will provide the much needed "final word" on what is allowed under law at the Seherr-Thoss gravel mine.

Seherr-Thoss's small mine permit application was submitted in October, 2010, after he had already received a Notice to Abate from Teton County. As DEQ is aware, the pending application would allow for disturbance of 36.83 acres of land, with a total of ten acres being disturbed at any one time and no limit on extraction or processing volumes. Because of the pending abatement proceedings before the Teton County Commissioners', and because there was not yet a final determination as to whether Seherr-Thoss's mine was in violation of local zoning regulations, DEQ placed the permit on hold pending the outcome of these local proceedings.

Objecting to this hold, and despite the fact that the District Court appeal of the Board's abatement order was pending, Seherr-Thoss filed a complaint for Declaratory Judgment and Injunctive Relief against Teton County and the Wyoming Department of Environmental Quality ("DEQ" or "the Department"). With respect to the case against DEQ, Seherr-Thoss argued that the Department was required to process his small mine permit application. DEQ responded that, "as a matter of law, the DEQ cannot issue a permit for a gravel operation until it receives evidence from a county that the proposed operation is in compliance with county zoning and planning regulations." *See Exhibit A: State of Wyoming's Memorandum of Law in Support for Motion on the Pleadings, Civil Action No. 15684 (District Court of Teton County)*. The Court agreed that DEQ has the authority to require the applicant to demonstrate that his proposed mine complies with local zoning regulations, and granted DEQ's Motion for Judgment on the Pleadings.

In the fall of 2013, the DEQ resumed processing of Seherr-Thoss's small mine permit despite the fact that it had not received confirmation from Teton County that the proposed operation would comply with local zoning. This decision was, apparently, based on communications from Seherr-Thoss's attorney, Mr. Peter Moyer, who claimed that the Seherr-Thoss permit should be afforded the same treatment as the nearby Evans gravel operation. But DEQ failed to verify this information directly with the County, and therefore did not learn that in fact the two operations are not similarly situated and do not warrant the same treatment.<sup>1</sup> Likewise, Mr. Moyer did not advise or otherwise share with DEQ the fact that the Seherr-Thoss mine is subject to the above-referenced valid District Court order, which specifically prohibits gravel mining at the scope and levels contained in the permit application.

Based on this incorrect and incomplete information, and without first checking with Teton County regarding the validity of Mr. Moyer's claims, DEQ began to process the Seherr-Thoss application.

#### **Approval of the Seherr-Thoss Small Mine Permit Violates Wyo. Stat. §35-11-406(m)**

Under Wyo. Stat. §35-11-406(m), the Director may deny a small mine permit if:

(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; or

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<sup>1</sup> Teton County has submitted a letter to DEQ detailing the distinction between the Seherr-Thoss and Evans operation, and the Melody HOA will therefore not go into detail on this issue.

(vii) The proposed operation constitutes a public nuisance or endangers public safety; or

(xv) The applicant has been and continues to be in violation of the provisions of this act

As set forth below, the Seherr-Thoss small mine permit application violates each of these provisions; and denial is therefore mandated.

1. Seherr-Thoss's proposed future use directly conflicts with the valid District Court Order limiting the operation, and violates local zoning regulations.

As set forth above, there is a valid Court Order in place restricting the size and scope of the Seherr-Thoss mine to a three-acre footprint and 17,000 tons of gravel extraction and processing annually. This Order affirms the 2011 decision of the Teton County Board of County Commissioners which defined these as the appropriate limits under the terms of the Teton County LDRs and state law. Court orders are part of the laws of the state of Wyoming, and authorized permits must therefore comply with court orders. The Seherr-Thoss small mine permit application, if approved, will allow expansion to over 35-acres with no limits on gravel extraction and processing, far exceeding what is allowed under law.

In a recent analysis of an almost identical issue, the Wyoming Environmental Quality Council (the "EQC") denied a small mine permit under Wyo. Stat. §35-11-406(m) because the application did not meet the requirements of a properly issued executive order. *See Findings of Fact and Conclusions of Law; In the Matter of the Objection to the Small Mine Permit of McMurry Ready Mix Co.*, TFN5 3/143; Docket No. 10-4803, p. 8-9 (Wyo. Environ. Quality Council Docket No. 10-4803)(copy attached hereto as Exhibit B)<sup>2</sup> The executive order at issue, related to sage grouse, required certain analyses to be conducted and defined other limitations related to sage grouse protection. The EQC denied the permit after concluding it violated state law because it failed to comply with the specific terms of the executive order. *Id.* Administrative agencies must adhere to precedent when evaluating such similar facts. To issue a permit that, by its very terms, would promote violation of a standing Court order is prohibited under 406(m)(iii).

To be clear, the Melody HOA is not demanding that Seherr-Thoss be denied the right to mine gravel. It is merely requesting that the operation be required to follow the District Court Order and not be granted leeway by a state agency to violate that which clearly governs. At such time as the Supreme Court rules on this case, Seherr-Thoss will have the opportunity to present DEQ with a modified application that complies with, rather than violates, state law.

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<sup>2</sup> The Melody HOA is aware that in 2013 the McMurry permit was ultimately issued by the DEQ after certain modifications. The EQA's rationale is nonetheless persuasive and applicable to the DEQ's consideration of the Seherr-Thoss permit.

2. The drastic expansion proposed in the small mine permit application will create a public nuisance and will endanger public safety.

The current three-acre operation exposes Melody Ranch and the surrounding neighborhoods to the nuisance of heavy truck traffic, constant daily noise, and unnecessary air pollutants. The approximately twelve-fold increase in operation proposed by Seherr-Thoss in his recent application will turn this traffic, noise and air pollution into a far greater nuisance for the surrounding homeowners, which is prohibited under Wyo. Stat. §35-11-406(m)(vii). The increase in truck traffic where there will be no cap or monitoring of extraction and processing tonnage is particularly concerning given that the relatively narrow South Park Loop Road is regularly used by cyclists, runners and pedestrians. The increase in heavy truck traffic also has an impact on the road itself, which has recently had to be repaired at taxpayer expense.

Likewise, the increased production will yield an increase in noise, which is made more problematic by the flat terrain (over which noise travels well) and the lack of any effective vegetative screening between the mine and Melody Ranch. Excessive dust and air pollution issues have been routinely reported as a problem by Melody Residents, yet the dust and air pollution have never been tested or monitored by DEQ to ensure the safety and well-being of neighboring residents.

In the above-referenced *McMurry Redi-Mix* case, the EQC acknowledged that it has "jurisdiction to determine whether or not an operation may endanger the public health or safety if approved as proposed, including denial of the permit based upon the fact that the public roadway is not constructed to handle the amount and type of traffic created by the enterprise without endangering the public health or safety." The EQC likewise concluded, citing Restatement Second of Torts § 821B (1979), that "a public nuisance is an unreasonable interference with a right common to the general public" and that "public peace is a right that is common to the general public." *Small Mine Permit of McMurry Ready Mix Co. Findings of Fact and Conclusions of Law*, p. 9-10. Because the expansion proposed by Seherr-Thoss will cause additional truck traffic, noise and pollution beyond that which already disturbs an adjacent residential neighborhood, it should be denied under Wyo. Stat. §35-11-406(m)(vii).

3. The Seherr-Thoss operation continues to violate the Environmental Quality Act by failing to obtain or maintain permits for crushing equipment used continuously on site since 2000.

DEQ Air Quality Rules and Regulations, enacted under the Environmental Quality Act, require a permit for crushing equipment or any construction or modification of a source that will emit air pollution. The only crusher permit that appears in DEQ Air Quality Division records is a temporary permit for a portable cone crusher issued in 2001 (MD 647). This permit was issued by DEQ despite the fact that Seherr-Thoss's Teton County permit specifically prohibited crushing on the property. This permit expired in 2002. It has never been renewed, nor has Seherr-Thoss complied with the requirement that crushing terminate upon the expiration of the permit.

Rather, despite his lack of a valid permit, Seherr-Thoss has continuously crushed gravel on his property since 1995 in direct violation of DEQ regulations. In the 2011 County abatement contested case hearing, Seherr-Thoss readily acknowledged that he has maintained an active crushing operation on-site, arguing only that the County was without the authority to regulate his operation. During routine site visits conducted by the DEQ Land Quality Division to monitor compliance with his current limited mine exemption crushing equipment was observed and documented. Seherr-Thoss concedes that he is crushing gravel in his small mine Permit application. (Mine Plan, Page MP-4)

Crushing gravel for over 15 years without proper permits constitutes a violation of Wyo. Stat. §35-11-406(xv) and the Director should deny the Seherr-Thoss permit application on the grounds of these continued violations of the Wyoming Environmental Quality Act.

Thank you for your consideration of this objection. If the requested permit is issued by the DEQ, the Melody Ranch HOA hereby requests that its objection be heard at a public hearing conducted before the Environmental Quality Council. If the application is denied by the DEQ, the Melody Ranch HOA hereby requests that that it (and any of its members) be afforded the opportunity to make public comment and appear at any public hearings held in this matter. Thank you for your consideration and please don't hesitate to contact me with any questions.

Regards,



Nicole G. Krieger  
Attorney for the Meadows at Melody Ranch  
Homeowners Association

BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**FILED**

MAR 10 2011

Jim Ruby, Executive Secretary  
Environmental Quality Council

IN THE MATTER OF THE OBJECTION )  
TO THE SMALL MINE PERMIT OF ) DOCKET NO. 10-4803  
McMURRY READY MIX CO., )  
TFN 5 3/143 )

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This matter came before the Environmental Quality Council (Council) as a contested case hearing pursuant to WYO. STAT. ANN. § 35-11-406(k) on the issuance of small mine permit TFN 5 3/143 to McMurry Ready Mix Company (McMurry). Council members present included Dennis M. Boal, presiding officer; Catherine Guschewsky; Dr. Fred Ogden, (via videoconference); John N. Morris (via teleconference); and Chairman Tim Flitner (via teleconference).

2. The Council held the contested case hearing on December 10, 2010, in Rock Springs, Wyoming at which the objectors to the permit, Dave and Sandra Goodwin, Harv and Denise Hastings, Debbra White, David Payne, Randy Simpson, and Kelly Garside (collectively the Boulder Residents), were represented by Mark Sullivan; the East Fork Limited Partnership (East Fork) was represented by Jon Aimone; McMurry was represented by Harriet Hageman; and the Department of Environmental Quality, Land Quality Division (DEQ) was represented by Luke J. Esch.

3. Testifying on behalf of the Objectors were Kelly Garside, Sandra Goodwin, Dave Goodwin, Denise Hastings, Randy Simpson and Kenneth Routh. Testifying on behalf of the Department of Environmental Quality were Tanya King and Mary Flanderka. Testifying on behalf of McMurry Ready Mix were Ron McMurry and Steve Stresky.

4. Jurisdiction is proper for the Council to hear this contested case pursuant to WYO.



STAT. ANN. §§ 35-11-406(k) and 35-11-112(a)(iv).

5. The Council held its bimonthly meeting on January 13 and 14<sup>th</sup> in Cheyenne WY. On the agenda for the meeting was the discussion and vote on the case at bar. Present and participating in the discussion and vote were Dennis Boal, Cathy Guschewsky, David Searle, Tom Coverdale, John Morris, Tim Flitner and Dr. Fred Ogden.

## **I. FINDINGS OF FACT**

6. On September 22, 2010, DEQ authorized McMurry to issue a public notice that its application for a small mine permit TFN 5 3/143 (McMurry Permit) was to be approved by DEQ pursuant to WYO. STAT. ANN. § 35-11-406, *Dec. 10, 2010 Tr. 32:9-13*.

7. The Boulder Residents and East Fork filed timely objections to the proposed issuance of the McMurry Permit. The Boulder Residents alleged that the McMurry Permit will constitute a public nuisance or endanger the public health and safety; the McMurry Permit did not comply with the Governor's Executive Order 2010-4 on Greater Sage-Grouse (Executive Order); and McMurry should not receive a permit due to past alleged willful violations of DEQ rules and regulations pursuant to WYO. STAT. ANN. § 35-11-406(o). *See Boulder Residents List of Witnesses, Exhibits and List of Issues*.

8. East Fork alleged that the McMurry Permit did not comply with local zoning regulations and interfered with water rights. *See East Fork's Statement of Issues and List of Witnesses and Exhibits*.

9. The McMurry mine is a sand and gravel operation that has been in operation since February 15, 2008, as a limited mining operation. *Dec. 10, 2010 Tr. 30:21-25*.

10. The McMurry Permit authorizes the expansion of the limited mining operation beyond ten acres and allows it to expand over the next twenty years. *DEQ Exhibit A, MP-1*.



11. The McMurry mine is accessed by State Highway 353. *DEQ Exhibit A, Figure E-1.*

12. Trucks traveling to the McMurry mine also use County Road 133 to reach Highway 353. *Boulder Residents Exhibit 1.*

13. The petitioners and the general public have been impacted by the truck traffic traveling to and from the McMurry mine. *Dec. 10, 2010 Tr. 181:15-18, 193:11-21.*

14. The preponderance of the testimony demonstrated that the truck traffic associated with this permit will result in trucks travelling on this road in the amount of two trucks per minute or 300 trucks per day. *Dec. 10, 2010 Tr. 44:24-25 and 45:1-8, 160: 5-10, 19: 19-21, Boulder Residents Ex. 1.*

15. Mr. McMurry testified that there would be upwards of 300 truck loads per day. *Dec. 10, 2010 Tr 314: 1-4.*

16. Sandra Goodwin testified that she does not let her grandchildren cross County Road 133 and will not cross on horseback when the McMurry mine is operating. *Dec. 10, 2010 Tr. 187:7-14, 187:23-188:1-3.*

17. Randy Simpson testified that in the past he has had two close encounters with truck traffic travelling in the middle of the road. In one instance he drove into the ditch to avoid an accident with a truck on County Road 133. Mr. Simpson also testified that his wife is unable to walk along the road because of the gravel being picked up and thrown by the trucks. *Dec. 10, 2010 Tr., 255:17-23, 256: 5-8.*

18. Denise Hastings testified that she and her husband do not ride their ATV on County Road 133 when trucks are traveling on the road because the trucks don't slow down and the gravel is sprayed everywhere. *Dec. 10, 2010 Tr. 248:23, 249:3-9.*

19. Mr. Garside testified that every vehicle he owns had cracked windows and the truck he was driving the day of the hearing had 18 cracks. *Dec. 10, 2010 Tr. 172: 11-17*

20. Ms. Hastings also testified that the noise from the trucks would disrupt the peace of the neighborhood in the early hours of the day and awaken her and any guests present in her house. *Dec. 10, 2010 Tr. 246: 13-18, 250: 1-11*

21. Kenneth Routh testified that he was concerned that his water rights on the Baner No. 1 Ditch and the Hittle Enlargement of the Jorgenson Ditch would be impacted by the expansion of the McMurry mine. *Dec. 10, 2010 Tr. 263:8-18.*

22. The Baner No. 1 Ditch will not be impacted by the approval of the McMurry Permit. *Dec. 10, 2010 Tr. 75:20-22.*

23. The Hittle Enlargement of the Jorgenson Ditch has been abandoned for more than thirty years. No evidence was presented that showed Mr. Routh had an established right in the Hittle Enlargement of the Jorgenson Ditch. *Dec. 10, 2010 Tr. 83:14-25.*

24. The Sublette County Planning and Zoning Department determined that the McMurry mine did not require a conditional use permit because the County's regulations provide that the County may accept a permit issued by a state agency as evidence of compliance with all necessary regulations. *McMurry Exhibit K.*

25. Sublette County is responsible for the maintenance of County Road 133 and has imposed a thirty-five mile-per-hour speed limit and prohibited the use of jake brakes along County Road 133. *Dec. 10, 2010 Tr. 206:12-16, 37:12-15.*

26. McMurry submitted its application to expand the McMurry mine to DEQ in December of 2009. *DEQ Exhibit A.*

27. When McMurry first submitted its permit application to DEQ, the Executive

Order had not been issued. *Dec. 10, 2010 Tr. 119:1-3.*

28. On August 18, 2010, Governor Freudenthal signed Executive Order 2010-4. .

29. DEQ consulted with the Wyoming Game and Fish Department (WGF) on the Executive Order and incorporated the WGF's comments into the McMurry Permit. *Dec. 10, 2010 Tr. 47:14-16.*

30. DEQ relies on WGF to recommend permit conditions that comply with the Executive Order. *Dec. 10, 2010 Tr. 57:17-18.*

31. A Project Impact Analysis Area (PIAA) was conducted for the project as required by the Executive Order. *Dec. 10, 2010 Tr. 55:13-16.*

32. The PIAA was not conducted by McMurry, but rather by WGF. *Dec. 10, 2010 Tr. 50:8-13, 55:13-16.*

33. No habitat assessment was conducted by WGF for the PIAA; however, the WGF process manual states that if a habitat assessment is not conducted, WGF assumes all habitat within the PIAA is considered suitable for the PIAA. *Dec. 10, 2010 Tr. 133:9-12, 20-24.*

34. A disturbance analysis was conducted pursuant to the requirements of the Executive Order; however, no disturbance analysis was conducted by WGF for individual leks within the PIAA. *Dec. 10, 2010 Tr. 139:17-140:3.*

35. WGF did not require a monitoring plan on the McMurry Permit for the evaluation of impacts on sage grouse. *Dec. 10, 2010 Tr. 142:5-8.*

36. WGF did not impose any noise restrictions in the McMurry Permit or require McMurry to demonstrate that its operations will not exceed the ten decibels limit included in the Executive Order. *10, 2010 Tr. 126:15-20.*

37. The entrance to the McMurry mine from Highway 353 is narrow and unsuitable

for the intended purpose of allowing long trucks to enter and exit Highway 353 without the trucks turning into opposite lane in order to make the turn into the McMurry mine resulting in daily violations of the rules of the road as adopted by the Wyoming Legislature and creating a traffic hazard that endangers the public health and safety. *Dec. 10, 2010 Tr. 163:8-17, 164: 17-25, 165; 15-25, 166:1-10, 173;20-25, 255: 6-23, 324; 6-11.*

38. The McMurry Permit does not address the issues of trucks entering or accessing the McMurry mine or the volume of trucks using the local roadways. *DEQ Exhibit A.*

39. The McMurry Permit states that “[m]ining operations will normally be conducted during daylight hours on any day of the week.” *DEQ Exhibit A, MP-17.*

40. Ron McMurry testified that he interprets the hours of operation provision of the permit to mean that McMurry can operate outside of daylight hours so long as they do not do it more than fifty percent of the time. *Dec. 10, 2010 Tr. 316: 2-8, 335:1-25.*

41. The evidence was uncontroverted that there is Bureau of Land Management public land located within two and one-half miles from the mine and is located along Highway 353. That prior to the enlargement of the mine the public visited the land for recreational and hunting opportunities on a regular basis. That since the enlargement of the mine the traffic has substantially interfered with the public’s use of these lands and caused a substantial decrease in the use of these public lands by the public. *Dec. 10, 2010 TR. 186; 22-25, 187; 1-25, 188; 1-7, 195; 7-24, 217; 4-16, 229;1-25, 230; 1-4, 237; 3-21, 250; 9-16.*

## **II. CONCLUSIONS OF LAW**

42. To the extent any of the above findings of fact include conclusions of law, they are hereby incorporated as such..

42. The EQC has jurisdiction over the subject matter and the parties to this proceeding.

43. All notice requirements for the hearing have been met pursuant to the Act, the applicable rules of practice and procedure and non-coal rules and regulations.

44. McMurry's application is complete within the meaning of WYO. STAT. ANN. § 35-11-406(m), with the exception of the manner in which it addresses manner in which McMurry will control its traffic volume, the turning of its trucks into the mine from public roads and its hours of operation so as to avoid constituting a public nuisance or endangering the public health and safety within the meaning of WYO. STAT. ANN. § 35-11-406(m)(vii) .

45. WYO. STAT. ANN. § 35-11-406(m) requires that a permit be granted if the applicant demonstrates that the application complies with the requirements of the Act and all applicable state and federal laws. With the exception of the factors listed in Conclusion of Law 44, above, the applicant and DEQ otherwise met the requirements of WYO. STAT. ANN. § 35-11-406(m).

46. The objecting parties bear the initial burden of presenting evidence showing that the proposed issuance of permits is improper. *In the Matter of the Objection to the Small Mine Permit of Croell Redi-Mix, Inc. TFN 5 6/072, EQC Docket No. 09-4806.*

47. Once the objecting parties meet their burden of presentation, the burden shifts to the applicant to show that the application complies with the requirements of the Environmental Quality Act (Act). WYO. STAT. ANN. § 35-11-406(m).

48. A permit can be denied if at least one of the enumerated criteria in WYO. STAT. ANN. § 35-11-406(m) exist. The evidence demonstrates that one of these criteria exist in this case. WYO. STAT. ANN. § 35-11-406(m)(vii).

49. The policy and purpose of the Act is expressly described in WYO. STAT. ANN. § 35-

1-102 where it states that it is the “policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve and enhance the air, water and reclaim the land of Wyoming; [and] to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state.”

50. The extent to which the Act authorizes the establishment of mining operations within the state is governed by Article 4 of the Act. WYO. STAT. ANN. § 35-11-401.

51. WYO. STAT. ANN. § 35-11-406 establishes requirements for mine permit applications and the procedures under which DEQ reviews and approves or denies mining applications.

52. WYO. STAT. ANN. § 35-11-406(m) sets forth the bases upon which the director of DEQ may deny a permit application. Included in these criteria are: (1) whether any part of the proposed operation, reclamation program, or proposed future use would be contrary to the law or policy of Wyoming or the United States, and (2) whether the proposed operation would constitute a public nuisance or endanger public health or safety.

53. Properly issued executive orders are part of the laws and policy of the State of Wyoming and therefore authorized activities must satisfy the requirements of executive orders.

54. Executive Order 2010-4 requires state agencies to review new development or land uses within core areas and authorize or conduct it only when it can be demonstrated that the activity will not cause declines in sage grouse populations. Development conducted consistent with the requirements of the Executive Order is deemed sufficient to demonstrate that the activity will not cause declines in sage grouse populations. *Executive Order at 2.*

55. Executive Order 2010-4 requires certain analyses to be conducted on the project to determine potential impacts on sage grouse, including the PIAA, a disturbance analysis, and a habitat assessment. The Executive Order also places general stipulations on projects in core

areas, including limitations on surface disturbance, surface occupancy, seasonal use, and noise, in addition to monitoring requirements. *Executive Order at B-1 -- B-6.*

56. Existing land uses must be recognized and respected by state agencies and existing uses are exempt from compliance with the requirements of the Executive Order. *Executive Order at 2, Dec. 10, 2010 Tr. 125:6-9.*

57. DEQ and WGF followed the requirements of the Executive Order and a proper consultation was conducted. *Jan. 13, 2011 Tr. 21:13-22.* However, the McMurry Permit, as proposed, does not meet the requirements of the Executive Order because it fails to include monitoring requirements for sage grouse, noise restrictions, and a disturbance analysis for individual leks within the PIAA.

58. The McMurry Permit, as issued, would comply with all applicable zoning requirements. *Dec. 10, 2010 Tr. 88:6-17.*

59. The Council acknowledges that it has no authority to control the speed of traffic on public roads or the manner in which a county constructs or maintains its roads. However, it does have jurisdiction to determine whether or not an operation may endanger the public health or safety if approved as proposed.. Including denial of the permit based upon the fact that the public roadway is not constructed to handle the amount and type of traffic created by the enterprise without endangering the public health or safety and/or that the means provided for gaining access to and from the public roadway is constructed in a manner that endangers the public health and safety. *Jan. 13, 2011 Tr. 6:10-16.*

60. Use of the entrance to the McMurry mine from Highway 353 as described in testimony given at the contested case hearing, endanger the public health and safety due to the significant risk that an accident may occur when trucks enter into the opposite lane to make the

turn onto the access road to the McMurry mine or when they exit the access road onto Highway 353. *Jan. 13, 2011 Tr. 6:1-6.*

61. DEQ, and the Council when it hears an objection to a permit, are also required to consider whether the operation will constitute a public nuisance. WYO. STAT. ANN. § 35-11-406(m)(vii). DEQ is also required to consider whether the operation will endanger public safety. WYO. STAT. ANN. § 35-11-406(m)(vii).

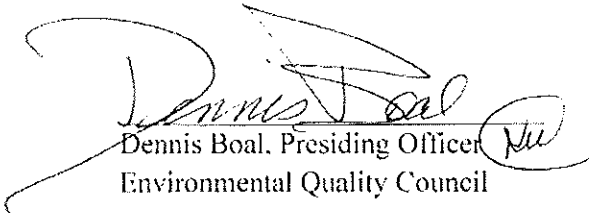
62. A public nuisance is an unreasonable interference with a right common to the general public. The public peace is a right that is common to the general public. Restatement (Second) of Torts § 821B (1979).

63. Operating the McMurry mine 24 hours a day, seven days a week, in accordance with Mr. McMurry's testimony at the contested case hearing would be an unreasonable interference with the public peace. *Dec. 10, 2010 Tr. 316; 2-8, 335:1-25; Jan. 13, 2011 Tr. 13:2-18.*

### III. ORDER

Therefore, the Council FINDS that the McMurry Permit is contrary to the laws and policies of the State and hereby ORDERS that the McMurry Permit be DENIED.

DATED this 10<sup>th</sup> day of March, 2011.

  
Dennis Boal, Presiding Officer  
Environmental Quality Council



## CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 10<sup>th</sup> day of March, 2011, I served a copy of the foregoing Findings of Fact and Conclusions of Law by electronic mail to the following:

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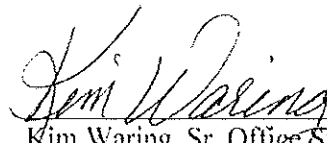
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Department of Environmental Quality

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CLERK OF DISTRICT COURT

IN THE DISTRICT COURT OF TETON COUNTY, WYOMING

NINTH JUDICIAL DISTRICT

ROGER SEHERR-THOSS, d/b/a  
RST SAND & GRAVEL,

Plaintiff

vs.

BOARD OF COUNTY COMMISSIONERS  
OF TETON COUNTY, WYOMING;  
TETON COUNTY PLANNING DIRECTOR; and  
WYOMING DEPARTMENT OF  
ENVIRONMENTAL QUALITY,

Defendants.

Civil Action No. 15684

STATE OF WYOMING'S MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant, State of Wyoming, Department of Environmental Quality (DEQ), pursuant to Rule 12(c) of the Wyoming Rules of Civil Procedure (W.R.C.P.), hereby submits this Memorandum in support of its *Motion for Judgment on the Pleadings* on Claim V of Plaintiff's *Amended Complaint*.

I. Introduction

While the majority of Plaintiff's claims relate to allegations that its gravel mining operations are "grandfathered" and the implications of that determination, Plaintiff has also called into question the DEQ's authority to require an applicant to provide evidence that a



proposed sand and gravel mine will comply with county planning and zoning regulations. Factual disputes between Plaintiff and Teton County clearly exist regarding the “grandfathered” status of certain aspects of Plaintiff’s gravel mining operations; however, there are no factual disputes relevant to the determination of Claim V. As a matter of law, the DEQ cannot issue a permit for a gravel operation until it receives evidence from a county that the proposed operation is in compliance or exempt from local planning and zoning regulations. This requirement is not based on a “policy” as Plaintiff alleges, but rather the Environmental Quality Act (Act) and properly promulgated regulations. Therefore, there is no question as to the DEQ’s authority to require such information and accordingly Claim V should be dismissed.

## **II. Standard of Review**

Motions for judgment on the pleadings pursuant to Rule 12(c) are appropriate when no relief can be granted to the Plaintiff, even if the allegations in the complaint are considered to be true. The standard of review for motions for judgment on the pleadings under Rule 12(c) is:

A defendant is entitled to judgment on the pleadings if the undisputed facts in the pleadings, supplemented by any facts of which the district court may take judicial notice, establish that no relief can be granted[.]

*Box L. Corp. v. Teton Cnty. ex. rel. Bd. of Cnty. Comm’rs of Teton Cnty.*, 2004 WY 75, ¶ 2, 92 P.3d 811, 813 (Wyo. 2004). As such, even if Plaintiff’s allegations are taken as true, judgment on the pleadings is proper when no relief that can be granted on the questions of law that remain.  
*Id.*

## **III. The DEQ has Authority to Require Authorization from County**

In Count V of the *Amended Complaint*, Plaintiff argues that the DEQ lacks both statutory and regulatory authority to require an applicant for a gravel mining permit to provide a statement from the county in which the operation is to be located stating that the proposed operation is in

compliance or exempt from local planning regulations. *See Amended Complaint* at ¶ 42. This argument lacks merit. The DEQ not only has statutory authority to require such information but also regulations in place that require the same.

Article 4 of the Act authorizes the DEQ to regulate mining operations in Wyoming and contains the permitting requirements applicants must meet before receiving a permit to operate mining facilities. WYO. STAT. ANN. §§ 35-11-401 through 437. Pursuant to WYO. STAT. ANN. § 35-11-406(m), applications for permits “shall be granted if the applicant demonstrates that the application complies with the requirements of this act and all applicable federal and state laws.” A permit may be denied if “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.” WYO. STAT. ANN. § 35-11-406(m)(iii). In order to ensure that the applicant is entitled to the permit, the DEQ also has the authority to require an applicant to provide “such other information as the administrator deems necessary or as good faith compliance with the provisions of this act require.” WYO. STAT. ANN. § 35-11-406(a)(xv).

Based on the foregoing statutory provisions, two things are clear: (1) the DEQ must ensure that the proposed project complies with “the laws and policy of this state;” and (2) the DEQ can require an applicant to submit information as it deems necessary to assure that all requirements of the Act are met. Therefore, because the DEQ has the authority to require information from the applicant on whether its operation is in compliance with the laws and policies of the state, the only remaining question is whether it is a law or policy of the state that counties in Wyoming can regulate gravel mining operations.

The issue of a county’s authority to regulate gravel operations was addressed by the Wyoming Supreme Court in *River Springs Ltd. Liab. Co. v. Bd. of Cnty. Comm’rs of Teton*

*Cnty.*, 899 P.2d 1329, 1336 (Wyo. 1995). In *River Springs*, the Wyoming Supreme Court examined the issue of whether sand, gravel and rock are “mineral resources” for the purposes of WYO. STAT. ANN. § 18-5-201, which prohibits counties from exercising zoning authority to restrict the use of land necessary for the extraction of mineral resources. *Id.* at 1330. The Court held that sand, gravel and rock are not “minerals” within the context of WYO. STAT. ANN. § 18-5-201. *Id.* at 1333–34. As a result, all Wyoming counties are authorized to use their zoning authority to regulate sand and gravel operations, unless the operations are non-conforming or “grandfathered.”<sup>1</sup> *Id.* at 1334.

Based on the holding in *River Springs*, counties are legally authorized to prohibit sand and gravel operations. Therefore, it is the applicant’s burden to provide the DEQ with a statement from the county that the proposed operation will not violate the county’s planning and zoning regulations and, therefore, will comply with the laws of Wyoming. This interpretation is supported by an October 9, 1996, Opinion from the Attorney General of Wyoming.<sup>2</sup> See Ex. A, p. 3.

The DEQ relies on statements from the counties because they have the factual background on the facility and knowledge of the zoning regulations and their applicability. The DEQ is not in a position to make these determinations without the participation of the counties,

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<sup>1</sup> A “grandfathered” or non-conforming use is “a use which, although it does not conform with existing zoning regulations, existed lawfully prior to the enactment of the zoning regulation.” A “grandfathered” use is allowed to continue, despite the fact that they are in violation of zoning regulations, until they are abandoned. *River Springs Ltd. Liab. Co. v. Bd. of Cnty. Comm’rs of Teton Cnty.*, 899 P.2d 1329, 1334 (Wyo. 1995).

<sup>2</sup> “Opinions of the Attorney General construing statutes are entitled to weight, particularly when they have been weathered by time and where the legislature has failed over a long period to make any change in a statute following its interpretation by the Attorney General.” *Galesburg Const. Co. Inc. of Wyoming v. Bd. of Tr. of Mem’l Hosp. of Converse*, 641 P.2d 745, 750 fn.9 (Wyo. 1982).

and issuing permits without the input of the counties would simply invite conflict between permit holders and the counties. Furthermore, to require such a determination to be made by a district court would unnecessarily delay the permitting process and also clog the court systems.

In addition to the authority of the DEQ to require the applicant to provide evidence of the county's position under Article 4 of the Act, other aspects of the Act also provide the DEQ with authority to require an applicant to provide evidence from a county that a proposed mining facility complies with the local land use planning. For example, an applicant must obtain a permit for "the construction or modification of any industrial facility that has the potential of causing or increasing air pollution in excess of standards established by DEQ." WYO. STAT. ANN. § 35-11-801(c). Sand and gravel mining operations have the potential to cause or increase air pollution, specifically particulate matter, and therefore, are required to obtain construction permits from the DEQ Air Quality Division.

In order for an applicant to obtain a construction permit from the DEQ Air Quality Division, they must meet the requirements of Chapter 6, Section 2 of the Air Quality Rules and Regulations which states in part:

No approval to construct or modify shall be granted unless the applicant shows, to the satisfaction of the Administrator of the Division of Air Quality that:

\* \* \*

- (iv) The proposed facility will be located in accordance with proper land use planning as determined by the appropriate state or local agency charged with such responsibility.

Chapter 6, Section 2(c).

These regulations clearly require acknowledgement from the county that a proposed operation is in compliance with the local land use plan before a construction permit will be issued. The DEQ Land Quality Division cannot issue a permit for a mining operation when such

a permit would not comply with the regulations of the DEQ Air Quality Division and would be a clear violation of the laws of the state. Therefore, WYO. STAT. ANN. § 35-11-406(m) authorizes the DEQ to deny a mining permit for sand and gravel operations, if it will not comply with all the laws of this state, including properly promulgated air quality regulations.

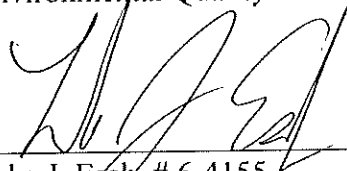
#### IV. Conclusion

Judgment on the pleadings for Claim V is appropriate in this case because even if the allegations of fact are admitted, Plaintiff is not entitled to any relief based on the question of law that remains. Plaintiff's claim that the DEQ is without authority to require acknowledgement of compliance with county zoning regulations is without basis in the law. Wyoming has statutory and regulatory authority to require evidence of a county's position on whether a proposed gravel mining operation complies with county zoning regulations.

WHEREFORE, the Wyoming Department of Environmental Quality requests that Claim V of Plaintiff's *Amended Complaint* be dismissed with prejudice pursuant to W.R.C.P. 12(c).

DATED, this 11<sup>th</sup> day of April, 2011.

Attorney for Defendant  
State of Wyoming  
Department of  
Environmental Quality



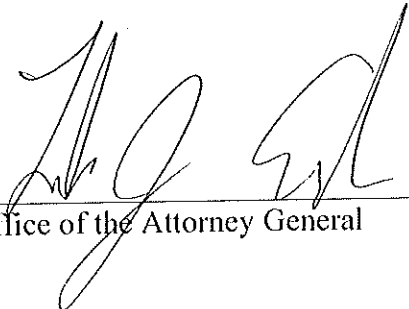
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### CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of April, 2011, the foregoing *State of Wyoming's Memorandum of Law in Support of Judgment on the Pleadings* was served by emailing and mailing a true and complete copy to the following attorneys of record:

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Office of the Attorney General



# Exhibit A



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## MEMORANDUM

TO: Dennis Hemmer  
Department of Environmental Quality

FROM: William U. Hill WUH  
Attorney General

Thomas J. Davidson  
Deputy Attorney General

Thomas A. Roan TAR  
Senior Assistant Attorney General

RECEIVED

NOV 10 1996

LAND QUALITY DIV.  
DIST. II

SUBJECT: Request for opinion on Department of Environmental Quality authority to regulate limited mining operations

DATE: October 9, 1996

You have requested an opinion on the following questions, in the context of the decision of the Wyoming Supreme Court in *River Springs v. County Commissioners of Teton*, 899 P.2d 1329 (Wyo. 1995):

- 1) Does the DEQ have authority to require a "nonmineral" surface mining permit applicant or limited mining operation applicant to submit evidence that the county in which the person intends to operate has authorized or not prohibited the proposed operation?
- 2) To what extent, if any, does the Environmental Quality Act restrict Wyoming counties from regulating "nonmineral" mines?

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## ANSWER TO QUESTION #1

### SUMMARY

The Department of Environmental Quality, Land Quality Division (DEQ) has authority to require "nonmineral"<sup>1</sup> surface mining permit applicants to submit evidence the county has not prohibited<sup>2</sup> the proposed operation. The DEQ has no authority to require the same information for a limited mining operation.<sup>3</sup>

### ANALYSIS

This question concerns three categories of operations<sup>4</sup>: the limited mining operation, the small mining operation<sup>5</sup> and the regular mining operation.<sup>6</sup> The latter two are permitted pursuant to *Wyo.*

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<sup>1</sup>The Supreme Court held sand, gravel, rock and limestone are not minerals, for purposes of the application of *Wyo. Stat. §18-5-201*. 899 P.2d at 1336. However, it is clear these materials are minerals, for purposes of applying the DEQ's jurisdiction under the Environmental Quality Act. See *Wyo. Stat. §35-11-103(e)(ii)*.

<sup>2</sup>The regulation of operations permitted pursuant to Article Four of the Environmental Quality Act is a different matter. See Answer to Question 2, *infra*.

<sup>3</sup>Limited mining operations are those operations identified in *Wyo. Stat. §35-11-401(e)(vi)*. See *DEQ Noncoal Rules, Chapter X. Section 401(e)(vi)* defines these operations as "surface mining operations, whether commercial or noncommercial, for the removal of sand, gravel, scoria, limestone, dolomite, shale, ballast or feldspar from an area of ten (10) acres or less of affected land...".

<sup>4</sup>*Wyo. Stat. §35-11-103(e)(viii)* defines "Operation"; this definition applies to all three categories.

<sup>5</sup>Small mining operations are those described at *Wyo. Stat. §35-11-401(j)*. See *DEQ Noncoal Rules, Chapter IX*. These are "surface mining operations involving not more than ten thousand (10,000) yards of overburden and ten (10) acres of affected land in any one (1) year...".

<sup>6</sup>Regular mining operations are all surface mining operations larger than a small mining operation. These operations must comply with all Article 4 requirements. *Section 401(a)*. The only exceptions to that statute are *Sections 401(e) and (j)*, which do not apply to operations

Dennis Hemmer  
October 9, 1996  
Page 3

*Stat. § 35-11-406*, which includes the DEQ's only authority to require evidence there is no county prohibition.

*Wyo. Stat. § 35-11-406* identifies that information which the DEQ may require an applicant to submit to obtain a small or regular mine permit. It includes no provision which explicitly requires the applicant to submit evidence of county authorization to proceed. However, it does authorize the DEQ to require additional information which may be necessary to determine the applicant's qualification for a permit.<sup>7</sup>

One qualification for a small or regular mine permit is that the proposed operation must not be contrary to the law or policy of this state or of the United States.<sup>8</sup> The Wyoming Supreme Court has decided the "law of this state" is that counties may prohibit "nonmineral" mining operations. In *River Springs*, the Supreme Court held:

A county can prohibit the extraction or processing of sand, gravel, rock, and limestone pursuant to its zoning authority... 899 P.2d at 1336-37.

If a Wyoming county has prohibited a proposed nonmineral mining operation, that operation would be contrary to the law of this state. In that situation, the DEQ director could deny the permit.<sup>9</sup> Since Wyoming counties' decisions regarding these operations have a direct bearing on the applicant's qualification for a permit issued pursuant to *Wyo. Stat. § 35-11-406*, the DEQ should require evidence of the county's position on the proposed operation. Without it, the DEQ is unable to completely assess the applicant's qualifications for the permit.

Limited mining operations are a different story. *Wyo. Stat. § 35-11-401(e)(vi) and (vii)* set forth all the prerequisites to qualify as a limited mining operation. There is no provision in these statutes which can be reasonably interpreted to authorize the DEQ to require the operator to submit

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larger than a small mining operation.

<sup>7</sup>*Wyo Stat. §35-11-406(a)(xv).*

<sup>8</sup>*Wyo. Stat. §35-11-406(m)(iii).*

<sup>9</sup>*Wyo. Stat. §35-11-406(m).*

evidence of the county's position on the mine. Thus, the DEQ cannot require the information as a prerequisite to commencing the operation.<sup>10</sup>

One might question whether such information is necessary for the DEQ to accept notice and a bond for a limited mining operation. If a county has prohibited the operation, the county is the only party which can enforce the prohibition. In that situation, the DEQ has no choice but to accept a properly submitted and executed notice and reclamation performance bond pursuant to *Sections 401(e)(vi) and (vii)*. If the DEQ desires the authority to prohibit a limited mining operation because a county has prohibited it, the DEQ may wish to consider proposing a legislative amendment.

## ANSWER TO QUESTION #2

### SUMMARY

The Environmental Quality Act (EQA) vests authority to regulate mines in the DEQ only. The primary statutes which define the DEQ's jurisdiction over the mines in question are located in Articles 1 and 4 of the EQA.<sup>11</sup> The EQA vests no mining regulation authority in Wyoming counties. Thus, all aspects of mining operations governed by the EQA are necessarily outside the scope of the counties' power to regulate.

Since the DEQ's jurisdiction is restricted for limited mining operations, the counties may have some authority over these operations.<sup>12</sup> The DEQ has pervasive authority to regulate an excavation of "nonminerals" for reuse or further processing, which disturbs in excess of ten acres. Consequently, the counties have no authority to regulate such activity.

### ANALYSIS

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<sup>10</sup>See *State v. Pacificorp.*, 872 P.2d 1163, 1166 (Wyo. 1994), (Agencies enjoy only those powers which the legislature has expressly conferred.)

<sup>11</sup>See *Wyo. Stat. §35-11-102* (policy and purpose of Act); *Section 401(a)* (Act governs all mining operations); *Section 103(e)(x)* (definition of surface mining); *Section 103(e)(viii)* (definition of operation); *Section 103(e)(ii)* (definition of minerals).

<sup>12</sup>Just because the Act creates limited authority for the DEQ over limited mining operations, it does not necessarily follow the counties have greater authority over these operations. The counties' authority to regulate limited mining operations must be delegated to the counties through their enabling legislation.

In *River Springs*, the Court describes the DEQ's jurisdiction over the two mining operators in question. One of the operators, River Springs Limited Liability Company, possessed a limited mining exemption and the other, Becho, Inc., possessed a regular mining permit. In regard to Becho's operation, the Court held the EQA restricts Wyoming counties from regulating "the extraction and production of minerals". The Court stated:

The authority of Teton County is limited by the authority granted to DEQ by the language of the EQA. The statutory scheme is exhaustive in its requirements relating to the extraction and production of "minerals". \*\*\* We are satisfied the EQA is sufficiently broad in this area to control the regulation of the removal of the identified minerals from the earth for reuse or further processing. It follows that the Board has no authority to regulate Becho's activity."<sup>13</sup>

The Court reached a different conclusion for River Springs, the limited mine operator. The Court noted the exemptions identified in *Wyo. Stat. § 35-11-401(e)* and stated, as the exemption applies to River Springs, "the regulation by the DEQ has a somewhat limited scope".<sup>14</sup> The court continued by stating

The significant conclusion is that, if the state has the authority to regulate, but excludes certain instances from its regulation, the local authority may invoke its regulatory power. We recognize the authority of the Board to regulate these activities so long as regulation by the county does not conflict with a regulation by the state.

For small or regular mining operations, the restriction is more simple. According to the Court's analysis, the EQA fully restricts counties' authority to regulate the excavation and production of "nonminerals". There may be matters incidental to the mining operation which a county may regulate.<sup>15</sup> However, land reclamation and environmental protection are solely within the DEQ's province.

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<sup>13</sup>899 P.2d at 1335-6.

<sup>14</sup>899 P.2d at 1336.

<sup>15</sup>For examples, the DEQ does not regulate the safety of mine workers, nor does it regulate the proper construction of buildings at a mine. Counties may be authorized to regulate matters such as these. The scope of this opinion does not include a description of county powers.

The more complicated issue is where one draws the line between the DEQ's and the counties' authority over limited mining operations. The EQA leaves room for counties to regulate limited mining operations, "so long as regulation by the county does not conflict with a regulation by the state."<sup>16</sup> The EQA does not fully restrict the counties' authority to regulate "nonmineral" limited mining operations. The counties cannot regulate reclamation matters for these operations because the Legislature has authorized the DEQ to do so under *Section 401(e)(viii)*.

Wyoming counties may be able to exercise some control over matters which, if it were a larger mine, would be under the DEQ's control.<sup>17</sup> However, counties must be careful to avoid imposing requirements which resemble the DEQ's requirements. Based on the Court's analysis in *River Springs*, it is clear the counties have no authority to do so. Counties should consider two issues: whether the EQA grants regulatory authority to the DEQ, and whether the counties' enabling legislation grants regulatory authority to the counties.

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<sup>16</sup>899 P.2d at 1336.

<sup>17</sup>For example, *Wyo. Stat. § 35-11-406(m)(vii)* authorizes the DEQ to deny a permit if the proposed operation constitutes a public nuisance or endangers the public health and safety. This statute does not apply to the limited mining operation. Thus, if such an operator decided to operate all night near a residential area, the DEQ could not prohibit such hours.