

The Board of County Commissioners met in a work session on December 14, 2010. Those present for the session were Lynn M. Padgett, Chair; K. Keith Meinert, Vice-Chair; Heidi M. Albritton, Member; and Linda Munson-Haley, Clerk of the Board.

- **Note – This meeting was recorded for reference purposes.**

Commissioner Padgett opened the work session.

R K “Chip” Hancock III, Construction Permits Unit Supervisor with the Air Pollution Control Division of the Colorado Department of Public Health and Environment attended by phone.

Hancock provided a PowerPoint presentation for the meeting. Slides 2 and 3 listed what needed to be reported to the Division in the form of an APEN (Air Pollutant Emission Notice) and what required a permit prior to construction and operation. The lists included surface mines with  $\leq 70,000$  tons per year of production, surface activities at an underground mine, mine ventilation shafts, processing equipment such as crushers and screens, and diesel generators. Slide 4 explained that permits were issued as initial approval and listed requirements to complete in order to get final approval. Slide 5 explained that the Division was allowed 90 days from receipt of a completed application to process the permit and if public comment was needed there was an additional 45 days. In an attainment area such as Ouray County public comment was required if actual controlled emissions were 50 tons per year or more of any one pollutant, and if the permit needed to be written as “synthetic minor” that applied only to processing equipment and/or generators. There were synthetic minor mines in Colorado. There were only one or two gravel permits operating in Ouray County. The request for public comment was published in the local paper and on the Division’s website. Written comments needed to be submitted to the Division within 30 days of publish date. There was no provision for a public hearing.

Commissioner Padgett noted that Ouray County had active gold mines and asked if they were exempt.

Hancock advised that they did need APENs and probably needed permits. They would not have gotten an Air Quality permit. The agencies often did not talk to each other.

Commissioner Meinert asked how his agency coordinated with other agencies, particularly with the DRMS. The fact that there was an operating mine in Ouray County who had not applied for a permit told him that there was little coordination between DRMS and Air Quality.

Commissioner Padgett asked what it meant to be an “attainment area.”

Hancock replied that Ouray County was an attainment area until it was declared otherwise. Once an attainment area exceeded the National Ambient Air Quality Standards then it was declared a non-attainment area.

Commissioner Padgett asked in regard to the request for public comment if a notice was sent to the Counties to alert them to make comments.

Hancock replied that a copy of the materials was sent to the Clerk and Recorder in the County for public comment; otherwise, to the local papers and the Division’s website.

Commissioner Meinert discussed the APEN on Slide 2 and asked if the mine operator decided if the mine needed to make notification. Hancock replied yes or they could submit an application and have Air Quality figure it out. Commissioner Meinert suggested that the fact that Air Quality did not have any application or permit for underground mining taking place in Ouray County now could be because the mine operator had decided on his own that it was not necessary because he did not think that he was emitting more than 2 tons per year. Hancock admitted that was possible but not for commercial operators. Commissioner Meinert asked if there was any sanction if the operator did not make the necessary application and was found not to be in compliance. Hancock replied that he was not in enforcement, only permitting, but that there were fines and penalties for operating without proper permit or notification. Commissioner Meinert clarified that if Air Quality had not received any indication from an operator, it would not know that the operation was going on. Hancock replied that he was absolutely right. The Division did not have a large enough staff to cover the ground looking for something. One inspector covered basically most of the Western Slope. Commissioner Padgett suggested that the Division could look at the DRMS website to see if there were any active mines and then determine if there was a permit for that operation. Hancock noted that Chuck Freiers could check on it but if the County had information it made it easier for the inspectors to check it out.

Cheryl Roberts, Public Health Director, asked if the notices of operation and the permitting were the same if the mine operated within a municipality as if it operated within a county. She asked if the Clerk received the same notification. Hancock replied that there was no difference. The Clerk only received the notice if it went to public comment. Most gravel pits did not go that high.

Richard Thompson, Environmental Health Manager with Montrose County, asked if it would be possible to provide Hancock with a list of existing operations and have him check to see if they had APENs. Hancock said that his contact information was at the end of the slide.

Commissioner Meinert clarified that the main purpose today was not to try to make sure that the County was enforcing any operating facility right now; that was Hancock’s job. Public Health and Thompson needed to do their own follow-up for enforcement. The main objective was to determine the gaps in the framework surrounding hard rock mining, etc. so that, as a County, the Commissioners could do what they could to close those gaps and provide the necessary coordination to ensure that things did not fall between the cracks.

Slide 5. Hancock returned to the public comment information and noted that once comments were received the

Division was required to consider those in writing the final permit. The Division usually responded to all public comments they received even though they were not required to.

Slide 6. Impact Modeling was used to demonstrate compliance with the National Ambient Air Quality Standards (NAAQS) and may be required depending on the size of the mine and its emissions. If the mine was large enough or had large enough emissions the Division may require it to ensure that the operation did not cause non-attainment.

Slide 7 Enforcement (Regulation #1). A Dust Control Plan was submitted by the applicant and the Division reviewed it with the applicant. It could be approved as submitted, rejected, or negotiated, which was the typical route taken by the Division.

Slide 8 addressed guidelines for dust out of Regulation 1. For mining activities the visible emissions should not exceed 20%, no off-property transport of visible emissions. For haul roads, no off-property transport of visible emissions shall apply to on-site haul roads, the nuisance guidelines shall apply to off-site haul roads. For haul trucks, there shall be no off-property transport of visible emissions from haul trucks when operating on the property of the owner or operator. There shall be no off-vehicle transport of visible emissions from the material in the haul trucks when operating off of the property of the owner or operator. A discussion followed and Commissioner Meinert clarified with Hancock that his department regulated only up to the property line and not across the property line.

Commissioner Padgett asked Hancock if he could provide an idea of best practices for emissions control or dust management.

Hancock replied that usually water was applied to the road as needed or to stockpiles or processing equipment.

Commissioner Padgett asked if water was applied in an attempt to control dust what would happen if the water became acidic; if his Division tracked it. Hancock replied that his Division did not; the Water Quality Division would.

Thompson asked if the issue of tarping loads or removing excess material dropped onto the surfaces or tracking mud on paved roads was addressed. Hancock replied that it was sometimes addressed; it depended on the situation. It was sometimes included in the Dust Plan.

Audience Member: What are the nuisance guidelines?

Hancock admitted that he was not real familiar with them but basically if it caused a nuisance to someone else, it was a court thing.

Slide 9 discussed enforcement. If the source had a problem, the guidelines would ensure that they were following the Dust Control Plan. If the Plan was being followed, a new Dust Control Plan would be requested that would include how the Plan would be improved to meet the guidelines. It worked into a vicious circle until the dust was under control. Anyone seeing a dust problem was encouraged to report it to the Division's enforcement group. Any complaint received would be looked into.

Slide 10 Preemption. There was no preemption in the state regulations. The County could promulgate any rules or regulations on air pollution. This went to the County's ability to regulate. County's could do whatever they wanted.

Slide 11 Odors (Regulation #2) There was no regulation. He had never heard of an odor problem with mining.

The remainder of the slides provided contact information for the Division. Hancock added that Chuck Freier, who did the permitting for most of their mines, could be reached at 303-692-3133.

Commissioner Padgett asked Hancock if it was okay to post his presentation on the County website. Hancock replied that it was.

Hancock left the meeting at this point.

Commissioner Albritton asked if Roberts and Thompson could develop a list.

Thompson offered that he had a list of emissions inventory and could compile that. It was his contention that air pollution control was focused on critical problems on the other side of the mountain range while over here there was only air quality monitoring in Mesa County, and now in Rifle and Garfield County, and a little bit of monitoring in Telluride and Mount Crested Butte. In the four years that he had been around there never had been any in Montrose or Ouray County.

Commissioner Albritton asked to compile notes about gravel and mine operations.

Commissioner Padgett noted that Air Quality had other jobs than mining activities. Maybe Ouray County needed to push CCI to require the various departments to talk to each other or to suggest that an Air Quality person for mining activities be moved to DRMS.

Commissioner Albritton agreed. It was absurd for a County to determine who was doing what. The operators felt that they were being regulated to death. A centralized process was needed that got distributed to all of the applicable agencies.

Commissioner Meinert felt that it was reasonable to expect that the lead agency, who so far seemed to be DRMS, would have to have a checklist to ensure that all of the permits required by other state and county agencies were obtained before they issued a final permit to operate the mine. Thompson pointed out that even within one agency, the CDPHE, they recognized that air was in a silo and waste was

in a silo but the only place where they interacted was with the active local health departments and planning organizations because that was the only place that all of the silos came together. Some counties addressed these issues in conditional use permits.

Commissioner Meinert noted that a checklist by DRMS would be helpful to the operator, too, especially if there were sanctions if they were caught without a permit. The permitting agency should be responsible for the checklist.

Liz Mauch had a copy of a DRMS application and pointed out that compliance with other laws was part of the application. There was a list of agencies that DRMS suggested the applicant contact. She added that the Forest Service's final permitting required proof of compliance with other agencies.

Commissioner Padgett asked if the County would want to fill that gap to protect county assets and to look at how activities impacted the county roads with a checklist.

Commissioner Meinert stated that in the absence of a special use permit process the County would not have a framework to do that in.

Commissioner Padgett countered that there would have to be something in the Code.

Commissioner Meinert explained that a use by right was not an absolute license to do what someone pleased. Commissioners Albritton and Padgett stated that a use by right was a use by right. It needed clarification.

Commissioner Meinert a legal buildable parcel had a use by right to build a residential structure. It did not mean that the builder could build whatever they wanted. They had to go through the building permit process. Use by right did not give anyone a free reign.

Deganhart addressed use by right. Everyone knew that they could build a house on a piece of property but they did not have to. Building code regulations regulated health, safety and welfare. The County could not say that something was a use by right but it had to go through a process in order to do it.

Commissioner Meinert argued, not to do it, but to regulate how it was done. A discussion followed that also touched on regulation of offsite impacts.

Deganhart concluded that going through a process would take it out of the realm of being a use by right.

Audience Member: Under the basic health, safety and welfare powers, the County would not be seeking to regulate in any way what occurred onsite because that was DRMS, but offsite the County needed to protect its citizens.

Commissioner Padgett was struggling with, yes, the County had powers but how did it have a true, fair, consistent, objective, known process if it did not have some sort of application to have the conversation. It did have the authority to have the conversation but needed to enact it in the Land Use Code.

Commissioner Meinert asked how to build a process in the Code short of a special use permit. The Commissioners should be looking at how to get there. The County did have the right to regulate various things but needed the mechanism to exercise that right.

Commissioner Padgett understood why no one wanted to touch a special use permit with hard rock mining but there still needed to be some fairness with all of the other uses called out for special use permits.

Commissioner Meinert talked about the real distinction being where preemption of state regulators came into play. They determined whether or not someone could operate a mine. They had the right to issue an operating permit on the basis of safety and onsite issues. Those were not the things the County wanted to regulate. It was the offsite impacts of the operation on the health, safety and welfare and other impacts to the county. The County could not say that people could not mine but could say how they mined.

Deganhart explained that the use was what someone could do with a piece of land and that was something that the County may or may not have the ability to regulate. Prior Boards had made mining a use by right. A use by right was defined as a use which is listed as a use permitted by right in any given zoning district in the Code. Uses permitted by right were not required to show need for their location. A special use was defined as a use allowed in the indicated zoning district only with permission by the County Commissioners. Permission for a special use may be granted or denied in accordance with the basic purposes and intent of the Code. Part of this was a due process issue. It could not be a use by right if someone had to jump through all of these hoops. The building permit piece was somewhere else in the Code and had other regulations associated with it. She had a hard time with saying that the County could regulate use on a piece of property but it was a use by right. The County only had the ability to regulate based on the statutory framework and could talk about HB 1034 and HB 1041. Those were the County's abilities to regulate uses of land in the county. The other piece of that was that under 1041 if someone wanted to do something in area designated for a certain activity or an area of state interest they could only do it with a permit. She discussed the issue of preemption. The fact that a state agency regulated something did not preempt the County from regulating it. The question was whether the County could go down that path and fashion it as a special category. If the County wanted to regulate mining like it did for other special uses like gravel pits, etc. the best way to do it was to make it into a special use.

Commissioner Meinert agreed but if the Commissioners were unable to politically jump that hurdle he did not see how the County should willingly abdicate its responsibility. There should be some other way than eliminating the use by right.

Deganhart advised that the County was limited. It could not create a framework because it thought it was a good idea.

Audience Member: Did the County have the legal authority at this point to take the use by right and convert it to a use by special use permit.

Deganhart replied, yes, it would be a Code amendment and would require public hearings.

Audience Member: What if the mine had not operated in 30, 40 or 50 years.

Deganhart replied that the Board would have to delineate those things that might be grandfathered.

Audience Member: Were there examples in Colorado where mining or oil and gas was a use by right at some point but had been converted to a special use permit.

Deganhart replied that Ouray County was a good example of that anytime it did zoning.

Audience Member: Was Deganhart saying that Ouray County had a precedent in converting a use by right to a special use permit?

Deganhart replied that prior to the Code anyone could do what they wanted to with no permits but it was not a stated use by right.

Audience Member: The County now had a stated use by right. Was Deganhart aware of cases of stated use by rights that had been converted to a special use permit.

Deganhart was not aware of any Supreme Court cases that said that it could not be done.

Commissioner Padgett observed that initially hard rock mining was underground and did not have a lot of surface disturbance but now Counties were more aware of other impacts.

Commissioner Meinert stated that recognizing the difficulty of changing a use by right to a special use permit he thought the County's task needed to be to see how it could develop a regulatory structure embodied in the Code that would allow the County to regulate these offsite activities. It would be very difficult to convert the use by right on two grounds: 1) political, and 2) grandfathering.

Audience Member: He was looking at an analysis that had to do with Boulder County and AASI's (Areas and Activities of State Interest) that was a reference as to where the counties could have the ability to do something about an activity. It specifically mentioned mining activities and said that about 50% of the counties in the state had authority to have standards and guidelines outside of the activity itself, because the state only had authority to regulate activity in the envelope where the activity was, but not outside of it. It, therefore, put the burden on the county to have that authority in order to do something. It was quite common for a county to be able to do that and he wanted to know what the possibility was of doing that.

Commissioner Padgett acknowledged that the County received authority from the state but needed a process to use that authority, and that was the sticking point.

Deganhart cited two authorities giving the County that authority: 1041 Powers and the Local Government Land Use Control Enabling Act. She discussed the authorities given to the counties under these statutes.

Commissioner Meinert reflected that DRMS expected the Counties to regulate these activities for offsite impacts. Ouray County was allowing itself to be restrained because of use by right. He asked if Ouray County was unique in having mining as a use by right.

Deganhart suspected that most of the counties did not allow mining as a use by right and that Ouray County was an anomaly.

A discussion followed.

Audience Member: If he wanted to have a mine on his private land, did the County issue a permit.

The Commissioners replied no.

Deganhart clarified that they were talking about underground mining being a use by right, so no, he would not have to get any kind of land use permit. He may have to get an encroachment permit if a driveway was attached to a county road.

Audience Member: Could you require a permit 1) for the County to know they were doing it, and 2) so that the County could review all of the other required permits and be the clearinghouse. The County would not say that the applicant did not have a right to mine but the permit would say that the County reviewed the application to ensure that all of the other permits were in place. The Commissioners would then be authorizing the person to do the activity and had ensured that all other permits were in place.

There was some discussion of the site development process and more discussion about having a process to open dialogue with the operator to know what kind of impacts the County should be concerned about.

Commissioner Albritton agreed that some sort of process was necessary. The dilemma was whether or not the public in this county felt the same way and wanted a change to go to a special use permit process to protect the county's

assets. As far as culturally, Ouray County was trying to be proactive in encouraging mining activities but wanted them to happen in a way that was compatible with other uses that had developed over time, like tourism, that had sustained the county since mining was prevalent.

Commissioner Padgett asked if the County wanted to know the potential for sludge or have the ability to require that the sludge be dealt with. She was trying to understand if the County wanted a conversation on just that parcel within the property boundaries or a conversation beyond that boundary, and if it wanted to proactively plan for competing land uses. It seemed to her that the goals were the same as was gotten out of a special use permit process.

Deganhart recalled that a Pitkin County person had once said, "Zone it like you mean it."

Commissioner Padgett heard the other two Commissioners saying that a special use permit process was where they wanted to end up. She asked if they wanted to go to the public. If the barrier was political, then they could have open houses and look at precedents in other counties to see how big a deal it was.

Commissioner Albritton heard the comment about outreach to the public to get its temperature. She suggested drafting a white paper about what the Commissioners learned from the entities about what they did and did not do and put forward ways to approach that. One would be eliminating the use by right, another would be permitting. All fully acknowledged that the only way to have teeth would be to switch processes. She wanted to start with the white paper and have a town hall before getting into articulating solutions.

Audience Member: Recommended that the Commissioners do a white paper and point out that the County did not have the ability to react if the following things should occur, for example, a spill on a county road and no money to clean it up. Start out like Commissioner Meinert said without recommending a special use permit process as part of the conversation. At some point down the road the County Attorney could state that it could not be done without a special use permit or could come up with something else that could be done. The Commissioners could start out by saying that they wanted to solve problems and not take away the use by right but if it turned out that they could not solve the problems then consider the other options.

Audience Member: Already identified a number of people who own mines and he suggested a personal return receipt letter to each of them asking them to come to the meeting and bring them in as part of the process.

Commissioner Padgett was interested in learning if Newmont Mining Company did things as a use by right. It was a superfund site in the middle of town. She was interested to know if Telluride had learned anything.

Commissioner Albritton suggested scheduling another work session to set out a process to move forward. Deganhart suggested making it part of a regular meeting.

Commissioner Padgett wanted to discuss what could be accomplished with the various tools. She suggested placing the item on the January 4, 2011 agenda.

Commissioner Meinert wanted to identify the regulatory gaps in that meeting. Each of the Commissioners would identify gaps along with Deganhart and Castrodale.

Commissioner Meinert offered that the most powerful message to communicate to the public was the statement that the state regulators made that these impacts were not regulated by the state and the state assumed that they were regulated by the locals.

Commissioner Padgett asked Thompson to work with Roberts to identify gaps.

Thompson said that he would interface with Dave Schneck in Telluride and Richard Stinson in Gunnison in formulating comments.

Audience Member: The Commissioners should look at examples across the state of what Ouray County did not want to see.

Commissioner Albritton suggested that at the meeting on January 4 there should be public discussion about glaring gaps and the notion that the Commissioners would like to pursue drafting a white paper and ask Staff in the meeting to pursue that.

Deganhart suggested a debriefing of the two work sessions on January 4, 2011.

**12:02 The work session adjourned:**

OURAY COUNTY BOARD OF COUNTY COMMISSIONERS  
OURAY, COLORADO

ATTEST:

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Lynn M. Padgett, Chair

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K. Keith Meinert, Vice-Chair

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Michelle Nauer, County Clerk and Recorder  
by: Linda Munson-Haley, Clerk of the Board

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Heidi M. Albritton, Commission Member

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