

May 18, 2016

Wyoming Department of Environmental Quality
Land Quality Division Herschler Building
122 West 25th Street
Cheyenne, Wyoming 82002

MAY 19 2016

VIA FAX: 307-635-1784

Subject: Objecting to Seherr-Thoss (aka RST) Sand & Gravel of Jackson 334 Acre Small Mine Permit – Teton County, Wyoming

To Whom It May Concern:

I object to the issuance of the 334-acre Small Mine Permit for the Seherr-Thoss Sand & Gravel operation located adjacent to my subdivision - and request a public hearing before the Environmental Quality Council.

I have written extensively over the last several years on various mine applications and violations of the Wyoming air quality act related to this same operator.

I have lived with my wife on the west side of the Melody Ranch subdivision approximately 1,750 feet from this operation for over eleven years.

Wyoming Statute 35-11-406(m) sets forth the possible grounds for denial of a permit.

Specifically:

The director shall not deny a permit except for one (1) or more of the following reasons:

1. (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;
2. (xv) If the applicant has been and continues to be in violation of the provisions of this act;
3. (vii) The proposed operation constitutes a public nuisance or endangers the public health and safety;

This permit fails the test on reason 1. For this reason the director is obligated to deny the permit. I will expand on this standard.

1. **(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;**

In the past, the DEQ has interpreted subsection (iii) to require compliance with local regulations. Thus the DEQ, by the powers in the Wyoming Environmental Quality Act, requires an operation be in full compliance with local land use ordinances. This includes any expansion of grandfathered uses.

The June 2014 Wyoming Supreme Court decision effectively affirmed Mr. Seherr-Thoss's right to expand under the diminishing assets test - and limited the County to regulatory control only on items that the DEQ does not manage (but affirmed the right of the County to regulate hours of operation). The findings of the Supreme Court said he could expand his footprint in order to pursue the area of ancestral gravel that his grandfathered operation has always pursued. It did not give him the right to expand his mine area to either mine for other materials – or in this case to expand excavation in order to solely construct amenity ponds. This activity is not mining, is not in the pursuit of gravel – and is not an activity affirmed under the June 2014 Wyoming Supreme Court decision.

In particular the application readily admits that the initial five additional large ponds (each two acres or more) in the northern half of his large parcel will be excavated to no more than 20 feet and are NOT in the pursuit of gravel. The remaining gravel on the site is to the northwest of the existing large pond located in the southwest portion of his property near South Park Loop Road. His application also admits and addresses that location – and its need for expansion. I am not objecting to that. These additional ponds on the other hand - which have triggered a request to expand his operation from 15 acres to the entirety of his 334 acres - should be permitted and regulated by Teton County. Not the DEQ.

In his application specifically in the first paragraph below he addresses the need for expansion to construct these amenity ponds – and in the final paragraph the very limited expansion area to pursue the actual gravel lens. His permit that was expanded last year from ten acres to fifteen acres already covers the area needed to pursue the gravel lens. There is no gravel in the area where he wants to construct amenity ponds:

“RST Sand and Gravel has chosen to permit an area of approximately 340 acres in order to create a number of ponds in the north ½ of the permit area. The ponds will be used in any future development of the property. There are five ponds proposed. The ponds will be several acres in size and up to 20 feet deep. Material excavated from pond construction will be trucked to the processing area. Topsoil and overburden will be temporarily stockpiled adjacent to the ponds and used in the reclamation of the pond banks. Any permitting for the ponds will take place prior to construction.

A typical cross-section of the ponds is shown on Reclamation Map R-3 in the Reclamation section of this permit application.

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The excavation area in the future will continue to expand to the west and north of its current location inside the affected boundary area.

Per the June 2014 Wyoming Supreme Court Decision:

“CONCLUSION

[¶62] Our review of this case leads us to conclude that the Board’s Order was an improper agency determination and exercise of authority except for the uncontested regulation pertaining to hours of operation.

To summarize our holdings, § 18-5-207 is ambiguous regarding the extent of its protection of nonconforming land uses. To resolve this ambiguity, we adopt the three-prong test of the doctrine of diminishing assets. The application of the three-prong test to this case reveals that RST may expand his gravel operation on the parcel on which it lies to the extent that it complies with the requirements of the EQA and its accompanying regulations. This protection also precludes the County from limiting the volume of gravel extracted. Moreover, the bonding and reclamation requirements of the Board’s Order duplicate and conflict with the regulatory authority of the DEQ under the EQA and are thus invalid. Finally, RST failed to establish the defense of laches. We reverse and remand for further proceedings in accordance with this opinion.”

No Expansion Requested on Volume or Production Quantity

I do want to remind the DEQ that this application does not ask for an increase on either his excavation levels or crushing production levels. It also states that no hot mix asphalt plant or concrete batch plant are ever planned for this site. It is critical to note this issue is also covered by the June 2014 Wyoming Supreme Court decision – in particular:

“[¶34] There appears to be a growing consensus among jurisdictions that apply the doctrine of diminishing assets to use the following three-prong test:

First, [the land owner] must prove that excavation activities were actively being pursued when the [Ordinance] became effective; second, [the land owner] must prove that the area that he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent; and, third, [the land owner] must prove that the continued operations do not, and/or will not, have a substantially different and adverse impact on the neighborhood.”

To be clear any increase in production or the addition of new uses such as asphalt or concrete plants (and I contend the construction of amenity ponds) will: “*have a substantially different and adverse impact on the neighborhood.*”

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In Summary

The location of this 334 acre small mine permit is surrounded by residential development. In fact the required public notice went out to some 1,000 homeowners. Given the intentional secretive nature of the operation from 1978-1994, the non-payment of mineral severance taxes for over twenty years, the crushing of gravel without lawfully required DEQ permits for over thirty years – it is a wonder that the mine has the expansion authority (under the diminishing assets test) granted by the Supreme Court in June 2014.

In Closing

I ask you to deny the 334-acre Gravel & Sand Small Mine Permit application as currently submitted.

I also request a public hearing before the Environmental Quality Council if the permit is approved; or to present evidence at a hearing if the permit is denied.

If the issues I brought forward are addressed by either modifying the application or making them a condition of approval – I reserve the right to withdraw my objection and request for a public hearing.

I want to make clear I am not opposed to the applicant pursuing legal enhancements to his property in order to get it ready for subdivision under both state and County regulatory authority. I also am not opposed to the applicant building ponds if he first gets the proper County permits.

I am opposed to the Wyoming DEQ approving a permit that is not in the pursuit of gravel – nor covered by the fairly explicit language of the June 2014 Wyoming Supreme Court decision.

Sincerely,

A handwritten signature in black ink that reads "Richard Bloom". The signature is written in a cursive, flowing style.

Richard Bloom

4390 Kestrel Lane
Jackson, Wyoming 83001

FedEx

Express

FedEx carbon-neutral
envelope shipping

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FZ 918

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5433
05.19

ORIGIN ID: JACA (307) 690-5273
RICH BLOOM
4390 KESTREL DR
JACKSON, WY 83001
UNITED STATES US

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CAD: 006994323/SSFE1704
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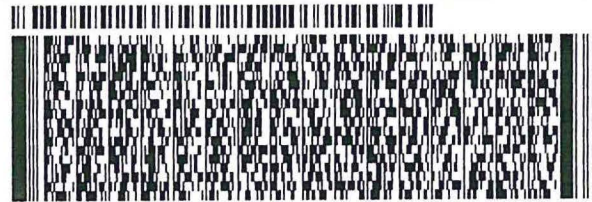
TO WY LAND QUALITY DIV
DEPT OF ENVIRONMENTAL QTY
200 WEST 17TH ST

CHEYENNE WY 82001

(565) 565-5655
INV:
PO:

REF:

DEPT:



Part # 155297V-435 R112 EXP 04/17 ...

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THU - 19 MAY 3:00P
STANDARD OVERNIGHT

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