

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

In re Black Hills Bentonite)	DOCKET 17-1601
Permit to Mine No. 248C)	
(Herco Amendment))	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER

I. APPEARANCES

The final contested case hearing in this matter occurred before the Environmental Quality Council on February 22, 2018, in Cheyenne, Wyoming. Present for the Council was Chairwoman and Hearing Officer Meghan Lally, Vice-Chairwoman Deb Baumer, Secretary John Corra, and Council members Dr. David Bagley, Tim Flitner, and Nick Agopian. Council member Flitner was not able to attend the entire contested case on February 22, however, for the portion of the hearing that he did not attend, he read the transcript.

Present at the hearing for Petitioner, Black Hills Bentonite, LLC was David G. Ditto from Associated Legal Group, LLC. Appearing on behalf of Respondents, TTT Ranch Company and James H. Crossingham, Jr. was Scott P. Klosterman from Williams, Porter, Day & Neville, P.C.

Present and testifying on behalf of Petitioner was Douglas Gibson, Bruce Lawson, and Tom Thorson. Petitioner's exhibits 10-13, 16, 21-22, 25, 27-32, 34-35, and 37-42 were admitted into evidence. Testifying on behalf of Respondents was Clayton McGuire. Respondents' exhibits 1 through 14, and 19-21 were admitted into evidence.

The Council subsequently deliberated on this matter on March 29, 2018 in Cheyenne, Wyoming. Council member Nick Agopian was absent from and did not participate in the deliberations or this decision.

The Council, having heard and considered all the evidence in this case and being fully advised, pursuant to the Wyoming Administrative Procedure Act, Wyoming Statute § 16-3-110, unanimously (5-0) finds and concludes as follow:

II. JURISDICTION

This case arises from Petitioner Black Hills Bentonite, LLC's request to the Council for the issuance of an order in lieu of surface owner consent. Petitioner was unable to obtain surface owner consent to its mining and reclamation plans from Respondents TTT Ranch Company and James H. Crossingham, Jr. Under Wyoming Statute § 35-11-406(b)(xii), if consent cannot be obtained as to the mining plan or reclamation plan or both, Petitioner may request a hearing before the Council. Accordingly, this matter is properly before the Council and the Council has jurisdiction over this matter and the parties.

III. STATEMENT OF THE CASE/ISSUES AND CONTENTIONS

Black Hills Bentonite, LLC is petitioning the Council for an order in lieu of consent under Wyoming Statute § 35-11-406(b)(xii) after it could not obtain Respondents' consent. Under that statute, if consent cannot be obtained from a surface owner as to the mining plan and reclamation plan, the Council shall issue an order in lieu of consent if it finds:

- (A) That the mining plan and the reclamation plan have been submitted to the surface owner for approval;
- (B) That the mining plan and the reclamation plan is detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress;
- (C) That the use does not substantially prohibit the operations of the surface owner;

(D) The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible[.]

....

Wyo. Stat. Ann. § 35-11-406(b)(xii)(A) through (D).

This dispute centers on whether Petitioner has proven all four elements. Petitioner claims that it has, and as a result, the Council must issue an order in lieu of consent against Respondents. Respondents disagree and assert that Petitioner has failed to meet its burden.

IV. FINDINGS OF FACT¹

1. Black Hills Bentonite has conducted bentonite mining operations on land within the TTT Ranch since 1975. *Transcript – Lawson testimony, pp. 83, 102; Thorson testimony, pp. 160-161, 180.* The TTT Ranch includes approximately 63,000 acres. *Transcript – Lawson testimony, p. 85.* The Ranch operates a cow-calf operation and allows hunting activities. *Transcript – Lawson testimony, pp. 86-87; McGuire testimony, p. 203.* The TTT Ranch typically runs about a thousand cow-calf pairs. *Transcript – McGuire testimony, p. 204.*

2. On June 15, 2017, Petitioner provided its mining and reclamation plans to Respondents concerning an amendment to Petitioner’s current mining operations within the TTT Ranch. *Petitioner Exhs. 25, 42; Transcript – Gibson testimony, pp. 20-21.*

3. At the time Black Hills Bentonite submitted the mining and reclamation plans to Respondents, Black Hills Bentonite also requested surface owner consent from Respondents. *Petitioner Exh. 25.*

¹ To the extent testimony is cited as the basis for a finding of fact, the Council has resolved any conflicts or dispute between testimony of others in favor of the cited testimony.

4. As part of the amendment, Petitioner seeks to increase the number of acres that it is permitted to mine under Permit to Mine No. 248C within the TTT Ranch located near Kaycee, Wyoming. *Petitioner Exh. 25*. This new amendment application incorporates an additional 347 acres into the existing permit area. *Petitioner Exhs. 25, 42; Respondents Exh. 19*.

5. These additional 347 acres are known as the Herco Amendment. *Petitioner Exhs. 25, 42; Respondents Exh. 19; Transcript – Gibson testimony, p. 26*. Petitioner has the right to mine for bentonite on all the land within the Herco Amendment. *Transcript – Thorson testimony, p. 159*. Currently, there are 28,928.53 permitted acres within Permit to Mine No. 248C. *Respondents Exh. 19*.

6. TTT Ranch is the surface owner of all the land within the Herco Amendment. *Transcript – Thorson testimony, p. 159*. Although the Herco Amendment seeks to add 347 acres to the permitted area, the Herco Amendment would only affect 28.7 acres of the TTT Ranch. *Respondents Exh. 19; Transcript – Gibson testimony, pp. 26-27*.

7. There are approximately 60,000 to 70,000 tons of bentonite to be mined from the Herco Amendment. *Transcript – Thorson testimony, p. 175; Petitioner Exh. 25*. The Herco Amendment lands are immediately adjacent to two different mines where Petitioner has current bentonite mining operations. *Transcript – Gibson testimony, pp. 69-70; Lawson testimony, p. 140; Petitioner Exhs. 25, 42*.

8. Respondents have refused to give its consent to Petitioner for the Herco Amendment. *Transcript – Gibson testimony, p. 31; Thorson testimony, pp. 151-152*.

9. Respondents have provided surface owner consent for Petitioner's mining and reclamation plans for other amendments to Permit to Mine No. 248C within the TTT Ranch. *Transcript – Gibson testimony, pp. 29-31; Petitioner Exhs. 42.*

10. Petitioner's mining plan describes: 1) the type of mining activities and operations within the Herco Amendment, 2) the life of the mining activities, 3) the equipment and machinery used for mining and reclamation, 4) the mine facilities, including the access and haul roads, 5) the mining method and schedule, 6) the topsoil removal and handling, 7) the mine pit excavation, backfilling, and contouring, 8) the bentonite removal, handling, and processing, 9) the location of the pits, 10) and other items such as mining hydrology, refuse disposal, and public nuisance and safety. *Petitioner Exh. 25.*

11. The mining plan explains that the mining method is surface mining, whereby a sequence of small excavated areas or pits, typically less than five acres in size, are developed to expose and remove the underlying bentonite deposit. Due to the shallow depth of the bentonite deposit, the deepest portion of the pits will typically not exceed fifty feet. No explosive or blasting agents will be used. *Petitioner Exh. 25.* The plan further explains that the pits are designed in a sequence where each pit is adjoining, allowing for a multiple-cut direct-backfill sequence. As the excavation of each pit progresses through the sequence, overburden removed from each advancing pit is directly placed (direct-backfill) in the previous open pit. Mining in this sequence allows for reclamation to occur concurrent with each new pit being developed in the advancing sequence. *Petitioner Exh. 25.*

12. The plan specifically identifies the location of the pits, the overburden and topsoil stockpiles, and the access/haul roads. *Petitioner Exhs. 25, 42; Transcript – Gibson testimony, pp. 22-23; Lawson testimony, pp. 90-91.*

13. The mining plan identifies all of Petitioner’s mining activities that will occur on the Herco Amendment. *Transcript – Gibson testimony, p. 72; Lawson testimony, pp. 90-91; Petitioner Exhs. 25, 42.*

14. The mining activities, including reclamation are expected to last five years and will impact approximately 30 acres. *Transcript – Gibson testimony, pp. 73-74; Lawson testimony, p. 85; Petitioner Exhs. 25, 42; Respondents Exh. 19.* The mine plan explains that Petitioner would start mining immediately and the mining in the Herco Amendment could be completed by 2020. *Transcript – Gibson testimony, p. 58; Lawson testimony, p. 97; Thorson testimony, p. 166; McGuire testimony, pp. 205-206; Petitioner Exhs. 25, 42.*

15. Petitioner’s reclamation plan explains how it will restore the disturbed areas in the Herco Amendment to the pre-mining land use of livestock grazing and wildlife habitat. *Transcript – Gibson testimony, pp. 23-24; Lawson testimony, p. 89; Petitioner Exh. 25.* Specifically, the plan discusses: 1) the contouring plans for the affected lands, 2) the surface preparation for topsoil replacement, 3) topsoil replacement and handling, 4) revegetation practices, 5) reclamation success criteria, 6) hydrologic restoration, 7) the reclamation schedule, and 8) the reclamation cost estimates and bonding. *Petitioner Exh. 25.* Under the plan, reclamation of disturbed areas will begin as soon as possible, and all attempts will be made to assure that reclamation occurs concurrently with the mining activities. *Petitioner Exh. 25; Transcript – Gibson testimony, p. 67.*

16. Ingress and egress to the Herco Amendment is from roads that already exist for current mining operations that adjoin the Herco Amendment. *Transcript – Gibson testimony, pp. 68-70; Lawson testimony, pp. 93-94; Petitioner Exhs. 25, 42.* Petitioner will access the Herco Amendment from Interstate 25 using historic roads, particularly the Wall Creek Road or the Tisdale Mountain Oil Field Road. Petitioner has used those roads since the early 1970s. *Transcript – Lawson testimony, pp. 93, 114; Thorson testimony, p. 161.* There is an access road that runs through the Herco Amendment and that road has been used by Petitioner as part of its mining operations on other lands within permit no. 248C. *Transcript – Gibson testimony, pp. 27, 46-47; Petitioner Exhs. 25, 42.*

17. In the past, Petitioner’s bentonite mining operations have generated dust from the roads when the haul trucks are transporting the bentonite. The dust sticks on the native grass and causes the livestock to not want to graze on that grass until moisture washes the dust off the grass. *Transcript – McGuire testimony, pp. 209-210.* The dust does not affect the Ranch’s hayfields. *Transcript – McGuire testimony, p. 210.*

18. There are approximately five or six miles of roads within the Herco Amendment that will be used by Petitioner. *Transcript – McGuire testimony, pp. 210-211.*

19. In the past, the TTT Ranch has lost two cows when they wander into Petitioner’s open pits. *Transcript – McGuire testimony, p. 213.*

20. Wildlife also tends to shy away from grass that has dust on it. *Transcript – McGuire testimony, p. 217.*

21. The TTT Ranch has a lease with an outfitter for hunting on its property. *Transcript – McGuire testimony, pp. 216- 217.*

22. Petitioner's mining operations have not prohibited or substantially prohibited in any way Respondents' ranching operations because the TTT Ranch is large enough to move the livestock to other large pastures within the Ranch. *Transcript – McGuire testimony, p. 217.*

23. TTT Ranch starts calving the first of May and calf through the first of July. The mining operations do not impact the Ranch's calving. *Transcript – McGuire testimony, p. 218.*

24. The Ranch does not do any calving within the Herco Amendment. *Transcript – McGuire testimony, pp. 229, 234.*

25. The pasture land in the Herco Amendment is grazed from the last week of June through the end of October, however, Petitioner's current mining does not prevent grazing in the area. *Transcript – McGuire testimony, pp. 230, 234.*

V. CONCLUSIONS OF LAW

A. Principles of Law

26. Paragraphs 1 through 25 of the findings of fact are fully incorporated herein.

27. This matter is properly before the Council upon Black Hills Bentonite's petition for an order in lieu of consent under Wyoming Statute § 35-11-406(b)(xii).

28. Wyoming Statutes § 35-11-406(b)(xii) provides that:

If consent cannot be obtained as to the mining plan or reclamation plan or both, the applicant may request a hearing before the environmental quality council. The council shall issue an order in lieu of consent if it finds:

(A) That the mining plan and the reclamation plan have been submitted to the surface owner for approval;

(B) That the mining plan and the reclamation plan is detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress;

(C) That the use does not substantially prohibit the operations of the surface owner;

(D) The proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible;

....

Wyo. Stat. Ann. § 35-11-406(b)(xii)(A) through (D).

29. When analyzing the language of a statute, the “paramount consideration is the legislature’s intent as reflected in the plain and ordinary meaning of the words used in the statute.” *Horse Creek Conservation Dist. v. State ex rel. Wyo. Att’y Gen.*, 2009 WY 143, ¶ 14, 221 P.3d 306, 312 (Wyo. 2009) (citing *Krenning v. Heart Mountain Irrigation Dist.*, 2009 WY 11, ¶ 9, 200 P.3d 774, 778 (Wyo. 2009)). “A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability.” *Id.* “When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction.” *Cheyenne Newspapers, Inc. v. Building Code Bd. of App. of City of Cheyenne*, 2010 WY 2, ¶ 9, 222 P.3d 158, 162 (Wyo. 2010) (quoting *BP Am. Prod. Co. v. Dep’t of Revenue*, 2005 WY 60, ¶ 15, 112 P.3d 596, 604 (Wyo. 2005)).

30. The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof. *JM v. Department of Family Services*, 922 P.2d 219, 221 (Wyo. 1996). The normal standard of proof in administrative hearings is the preponderance of the evidence standard. *Id.* at 223.

31. In this case, Petitioner, the proponent of the order in lieu of consent, has the burden of proof and the standard of proof is the preponderance of the evidence.

B. Applications of Principles of Law

32. The Council finds and concludes that it has jurisdiction over this matter under Wyoming Statute § 35-11-406(b)(xii).

33. As part of Black Hills Bentonite's petition, the Council is required to determine whether Black Hills Bentonite has proven, by a preponderance of the evidence, all four elements in Wyoming Statute § 35-11-406(b)(xii)(A) through (D).

34. The Council finds and concludes that based upon the testimony and exhibits provided during the contested case, Petitioner has proven, by a preponderance of the evidence, all four elements.

35. The Council finds that Petitioner has proven the first element—that its mining and reclamation plans were submitted to Respondents. It appears Respondents also concede this fact.

36. The Council finds that Black Hills Bentonite has proven the second element—that its mining and reclamation plans are detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress.

37. Respondents contend that Petitioner's plans are not detailed to illustrate the full proposed surface use, however, the undisputed facts prove the opposite. The plans:

- describe the mining operations and activities;
- show the location of the mining pits;
- show the location of the overall disturbance area on Respondents' land;
- show the location of the roads;
- describe the facilities;
- show how and where topsoil will be disturbed;

- show the placement of the overburden and topsoil;
- identify the years of mining operations;
- describe the reclamation activities;
- describe how soil will be replaced;
- describe how pits will be filled in; and
- describe how the land will be revegetated.

38. The Council finds that Petitioner has proven the third element—that its use does not substantially prohibit the Respondents’ operations.

39. Respondents claim that Petitioner’s use of its land will substantially prohibit its operations, specifically, the livestock operations. However, Respondents’ own witness, Mr. McGuire, who is the Ranch’s manager, admitted that Petitioner’s mining operations would not prohibit or substantially prohibit the livestock operations because the Ranch is large enough that the livestock could be moved to other large pastures. Further, Mr. McGuire admitted that the Petitioner’s operations do not prevent calving or grazing. The Council understands and acknowledges that the haul trucks will create dust which may create a nuisance and may limit grazing in some areas. However, the Council is required under the statute to evaluate and determine whether Petitioner’s operations “substantially prohibit the operations of the surface owner.” Based upon the evidence, the Council concludes that Petitioner’s operations will not substantially prohibit the Respondents’ livestock or hunting operations within the Herco Amendment.

40. The Council finds that Petitioner has proven the fourth element—that its proposed plan reclaims the surface to its approved future use, in segments if circumstances permit, as soon

as feasibly possible. Petitioner's reclamation plan is designed to reclaim the surface to its pre-mining use (and approved future use) as soon as feasibly possible within the Herco Amendment.

VI. ORDER

IT IS HEREBY ORDERED that Black Hills Bentonite, LLC's petition for an order in lieu of consent as to its mining plan and reclamation plan is granted and issued against Respondents.

ENTERED this 23 day of May 2018.



Meghan Lally, Chairwoman and Hearing
Examiner
Environmental Quality Council

CERTIFICATE OF SERVICE

I, James Ruby, certify that at Cheyenne, Wyoming, on the 24th day of May 2018, I served a copy of the foregoing **Findings of Fact, Conclusions of Law and Order** by electronic mail to the following:

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