

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

IN RE: WILSON BROTHERS  
CONSTRUCTION TFN 56/125

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DOCKET 18-4804

**FILED**

APR 11 2019

Jim Ruby, Executive Secretary  
Environmental Quality Council

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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The final contested case hearing in this matter occurred before the Environmental Quality Council on January 29, 2019, at the Yellowstone Conference Center, Northwest Community College, 331 West 7<sup>th</sup> Street, Powell, Wyoming. The hearing concluded on February 11, 2019, in the basement conference room of the Hathaway Building, 2300 Capitol Avenue, Cheyenne, Wyoming.

**I. APPEARANCES**

Present for the Council was Hearing Officer Tim Flitner and Council members John Corra, Dr. David Bagley, and Shane True. Council members Dr. Bagley and True participated by telephone. Chairwoman Meghan Lally and Council members Steve Lenz and Deborah Baumer did not participate in this matter.

Present at the hearing representing Petitioner, Wilson Brothers Construction, Inc. (Wilson Brothers), was S. Joseph Darrah of Darrah Law Office. Present at the hearing representing the Land Quality Division (Division) of the Wyoming Department of Environmental Quality (DEQ) was James Kaste, Deputy Attorney General from the Wyoming Attorney General's Office. Also present at the hearing were interested persons/objectors Stephen Freeman, Robert and Diane

Hicks, and Warren Murphy. Mr. Murphy was the representative for the Diamond View Subdivision Homeowners Association (Diamond View).

Testifying on behalf of Wilson Brothers were Myron Durtsche and Nick Wilson. Testifying on behalf of the Division was Craig Smith, natural resource program principal. Testifying on behalf of Diamond View were Warren Murphy, Kelly Hunt, Yehan Wijesena, Lorna Anderson, and Brian Edwards. Robert Hicks and Stephan Freeman also testified.

The following exhibits were admitted into evidence: DEQ exhibits 1 through 4; Freeman exhibits 1 through 36; Murphy (Diamond View) exhibits 1 through 2; and Hicks exhibit 1.

Following the evidentiary hearing, the Council deliberated and decided this matter on February 11, 2019, in Cheyenne. At that time, the hearing was officially closed. 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 (4-0) finds and concludes that the Division's decision that the permit application was technically complete is affirmed. Accordingly, the Council finds and concludes that the director of the DEQ should issue the proposed bentonite mine permit to Wilson Brothers.

## **II. JURISDICTION**

This case arises from filed written objections and requests for hearing on the Land Quality Division's decision that the Wilson Brothers' proposed permit application to operate a small bentonite mine near the town of Cody was technically complete. Under Wyoming Statute § 35-11-406(k) and the DEQ's rules (chapters 1 and 2, Practice and Procedure), if written objections to a proposed permit are filed and a request for hearing is made, a contested case before the Council is required. In this case, written objections to the issuance of the permit application were filed

(following the second publication) along with a request for hearing by several interested persons/objectors necessitating a contested case before the Council.

### **III. STATEMENT OF THE CASE/ISSUES AND CONTENTIONS**

On September 21, 2018, after reviewing Wilson Brothers' bentonite mine permit application and following subsequent submissions and revisions, the Division declared the permit application technically complete and ready for its second publication. In finding the permit application technically complete, the Division concluded that the permit application was in compliance with all applicable statutes and rules, and as a result, should be granted. Following the second publication, several interested persons/objectors filed written objections to the permit application with the Division and requested a hearing before the Council. The issue before the Council is whether the interested persons/objectors have met their burden of proof by presenting sufficient evidence to justify the Council denying or modifying the proposed permit.

### **IV. FINDINGS OF FACT<sup>1</sup>**

1. In 2009, Wilson Brothers originally filed its bentonite mine permit application with the Division. (Tr. – Smith testimony, 31, 46; DEQ Ex. 1).
2. The proposed mine is located on Bureau of Land Management (BLM) land about six miles from the town of Cody and is adjacent to County Road 6UU which is a paved county road. (Tr. – Smith testimony, 33-34, 84; DEQ Ex. 1, bates 439).
3. The mine permit boundary is about 2,000 feet from the Diamond View Subdivision. (Tr. – Smith testimony, 34). The subdivision is on the opposite side of County Road 6UU from the

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

proposed mine. (Tr. – Smith testimony, 76; DEQ Ex. 1, bates 439). The land in the mine site that will be disturbed cannot be seen from the subdivision. (Tr. – Smith testimony, 75).

4. Wilson Brothers proposes an open-pit mine of about 55 acres of total disturbance. Wilson Brothers proposes to produce approximately 30,000 tons of bentonite a year for five years. (Tr. – Smith testimony, 35; DEQ Ex. 1, bates 419-431).

5. Wilson Brothers is going to use traditional mining equipment, front-end loaders, scrapers, and off-road haul trucks. Wilson Brothers will dry the bentonite on-site and haul it off-site in over-the-road trucks to market. (Tr. – Smith testimony, 35-36; DEQ Ex. 1, bates 419-431).

6. The mine will operate generally from sunrise to sunset with maximum hours of 5:00 a.m. to 9:00 p.m. The traffic associated with the mine will occur during daylight hours. (Tr. – Smith testimony, 36; DEQ Ex. 1, bates 419-431).

7. The haul road leaves the southern portion of the mine site and proceeds to the west down a ridge and joins County Road 6UU. The haul road is about one-half mile long. (Tr. – Smith testimony, 36-37; DEQ Ex. 1, bates 419-431, 439).

8. Overburden and bentonite stockpiles will be located within the mine site. (Tr. – Smith testimony, 37; DEQ Ex. 1, bates 419-431).

9. In relation to other bentonite mines, Wilson Brothers' proposed mine is small. (Tr. – Smith testimony, 37; DEQ Ex. 1, bates 419-431).

10. There will be no blasting at the mine and the average depth of the mine will be fifteen feet. (Tr. – Smith testimony, 37; DEQ Ex. 1, bates 419-431).

11. Wilson Brothers' reclamation plan proposes to return the land to essentially the condition it is in now—the plan calls for the backfilling, recontouring, top soiling, and revegetation of the site. (Tr. – Smith testimony, 37-38; DEQ Ex. 1, bates 432-436).

12. The permit was not granted when it was initially filed, mainly because the Division was waiting for the BLM to perform its review and provide its consent as landowner. (Tr. – Smith testimony, 32-33, 46-49, 77-78; DEQ Ex. 1, bates 174, 198-201, 203).

13. As part of its review, the BLM required Wilson Brothers to perform additional analysis and work relating to a new road route. (Tr. – Smith testimony, 32-33). While waiting for BLM approval, Wilson Brothers revised the mine permit boundary that adjusted the acreage and necessitated a correction to the original permit application. Wilson Brothers filed that correction with the Division on February 13, 2018. (Tr. – Smith testimony, 31-32; DEQ Ex. 1, bates 1-4).

14. The BLM approved Wilson Brothers' proposed mine and plan of operations on July 27, 2018. As part of its analysis, the BLM conducted an environmental analysis and issued a finding of no significant impact. (Tr. – Smith testimony, 41-42; DEQ Ex. 1, bates 31-52).

15. In 2009, the Air Quality Division of the DEQ issued Wilson Brothers an air quality permit. The permit required that the disturbed areas and stockpiles be treated with water and chemical dust suppressant on a schedule sufficient to control fugitive dust. However, the permit expired because construction of the mine did not occur within twenty-four months. (Tr. – Smith testimony, 38-39; DEQ Ex. 1, bates 469-470).

16. In 2017, Wilson Brothers asked the Air Quality Division for a permit waiver for the mine. (Tr. – Smith testimony, 39; DEQ Ex. 1, bates 453). The Air Quality Division has not yet acted upon that request. (Tr. – Smith testimony, 40).

17. Wilson Brothers received a building permit in 2010 from the Park County Planning Office authorizing the company to proceed with the mine. The building permit is null and void because construction was not started within one year. (Tr. – Smith testimony, 44-45; DEQ Ex. 1, bates 449-450).

18. In 2017, Wilson Brothers requested the Park County Planning Office to re-issue the building permit. (Tr. – Smith testimony, 45; DEQ Ex. 1, bates 445). It is not necessary for Wilson Brothers to have a building permit before the DEQ issues its permit. A building permit is only necessary before Wilson Brothers begins mining. (Tr. – Smith testimony, 45).

19. The Land Quality Division does not regulate any kind of dust emitted from mine sites—emissions from mine sites are regulated by the Air Quality Division. (Tr. – Smith testimony, 29).

20. The Land Quality Division is without regulatory authority to control or regulate traffic off the mine site. (Tr. – Smith testimony, 29).

21. As part of its approval, BLM required Wilson Brothers to control fugitive dust generated by haul trucks on the roads in the active mine area using water and to move the stockpiles away from County Road 6UU. (Tr. – Smith testimony, 42-43; DEQ Ex. 1, bates 31-52).

22. The Land Quality Division is not legally authorized to impose additional fugitive dust control measures. (Tr. – Smith testimony, 43-44).

23. The trucks leaving and entering the mine will use County Road 6UU. Park County has authority over that county road. The Land Quality Division does not have the authority to require trucks to be covered or tarped on county roads. The Land Quality Division’s regulatory authority generally ends at the mine permit boundary. (Tr. – Smith testimony, 45-46).

24. On September 21, 2018, after many rounds of reviews, comments, and revisions, the Land Quality Division determined that the permit application was technically complete and authorized Wilson Brothers to proceed with its second public notice. (Tr. – Smith testimony, 32-33, 46-50, 77-78; DEQ Ex. 1, bates 27, 174, 198-201, 203). The second public notice was published on October 2, 9, 16, and 23, 2018. (DEQ Ex. 2).

25. Based on the Division's review of the permit application, Wilson Brothers has met all the requirements in the statutes and rules as well as all other technical requirements. The application is complete and not contrary to any law or policy of the State of Wyoming or the United States. (Tr. – Smith testimony, 51).

26. The Division does not believe that the proposed mining operation will adversely affect the neighboring agricultural operations. (Tr. – Smith testimony, 51).

27. The Division does not believe the proposed mining operation will constitute a public nuisance or endanger the public's health or safety. (Tr. – Smith testimony, 52).

28. Bentonite dust at a bentonite mine is not toxic. When the Land Quality Division employees inspect bentonite mines, they do not wear masks or other protective gear to avoid inhaling bentonite dust. (Tr. – Smith testimony, 53). Further, workers at bentonite mines are not required to wear masks, respirators, or other protective gear to avoid inhaling bentonite dust. (Tr. – Smith testimony, 52).

29. The dust control and erosion measures proposed by Wilson Brothers for this permit are consistent with the same measures required for other bentonite mines. (Tr. – Smith testimony, 76-77).

30. The neighbors to the proposed mine are concerned that the proposed mine will create a public nuisance. Several neighbors speculated that bentonite dust could be harmful to the surrounding neighborhood if it would blow from the mine site or haul trucks. Further, neighbors were concerned about potential truck traffic issues on the county road. (Tr. – Smith testimony, 54; Freeman Ex. 35; *see also* Murphy objection and Hicks objection, filed as part of this docket).

31. The neighbors want the bentonite haul trucks to be covered or tarped on County Road 6UU. (Tr. – Murphy testimony, 98-99).

## V. CONCLUSIONS OF LAW

### A. Principles of Law

32. Paragraphs 1 through 31 of the findings of fact are fully incorporated herein.

33. Wyoming Statute § 35-11-406 states, in part:

(k) Any interested person has the right to file written objections to the application with the administrator within thirty (30) days after the last publication of the above notice. For surface coal mining operations, the director may hold an informal conference if requested and take action on the application in accordance with the department's rules of practice and procedure, with the right of appeal to the council which shall be heard and tried de novo. A conference shall be held if the director determines that the nature of the complaint or the position of the complainants indicates that an attempt to informally resolve the disputes is preferable to a contested case proceeding. An informal conference or a public hearing shall be held within twenty (20) days after the final date for filing objections unless a different period is stipulated to by the parties. The council or director shall publish notice of the time, date and location of the hearing or conference in a newspaper of general circulation in the locality of the proposed operation once a week for two (2) consecutive weeks immediately prior to the hearing or conference. The hearing shall be conducted as a contested case in accordance with the Wyoming Administrative Procedure Act, and right of judicial review shall be afforded as provided in that act.

(m) The requested permit, other than a surface coal mining permit, shall be granted if the applicant demonstrates that the application complies with the requirements of this act and all applicable federal and state laws. The director shall not deny a permit except for one (1) or more of the following reasons:

(i) The application is incomplete;

(ii) The applicant has not properly paid the required fee;

(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;

(iv) The proposed mining operation would irreparably harm, destroy, or materially impair any area that has been designated by the council a rare or uncommon area and having particular



historical, archaeological, wildlife, surface geological, botanical or scenic value;

(v) If the proposed mining operation will cause pollution of any waters in violation of the laws of this state or of the federal government;

(vi) If the applicant has had any other permit or license issued hereunder revoked, or any bond posted to comply with this act forfeited;

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

(viii) The affected land lies within three hundred (300) feet of any existing occupied dwelling, home, public building, school, church, community or institutional building, park or cemetery, unless the landowner's consent has been obtained. The provisions of this subsection shall not apply to operations conducted under an approved permit issued by the state land commissioner in compliance with the "Open Cut Land Reclamation Act of 1969";

(ix) The operator is unable to produce the bonds required;

(x) If written objections are filed by an interested person under subsection (g) of this section;

(xi) If information in the application or information obtained through the director's investigation shows that reclamation cannot be accomplished consistent with the purposes and provisions of this act;

(xii) through (xiv) Repealed by Laws 1980, ch. 64, § 3.

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

(xvi) No permit shall be denied on the basis that the applicant has been in actual violation of the provisions of this act if the violation has been corrected or discontinued.

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(p) The director shall render a decision on the application within thirty (30) days after completion of the notice period if no informal conference or

hearing is requested. If an informal conference is held, all parties to the conference shall be furnished with a copy of the final written decision of the director issuing or denying the permit within sixty (60) days of the conference. If a hearing is held, the council shall issue findings of fact and a decision on the application within sixty (60) days after the final hearing. The director shall issue or deny the permit no later than fifteen (15) days from receipt of any findings of fact and decision of the environmental quality council.

Wyo. Stat. Ann. § 35-11-406(k), (m), (p).

34. 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)).

35. Before the Council, the objectors are responsible for producing sufficient evidence that the Division’s decision that the application was technically complete and ready for its second publication is incorrect. “The burden of proving arbitrary, illegal or fraudulent administrative action is on the complainant, and this burden includes not only the clear presentation of the question, but also placement of evidence in the record to sustain the complainant’s position.”

*Knight v. Envtl. Quality Council*, 805 P.2d 268, 273 (Wyo. 1991) (citing *Wyo. Bancorporation v. Bonham*, 527 P.2d 432 (Wyo. 1974)).

## **B. Applications of Principles of Law**

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

37. The Council is required to determine whether the objectors have proved by a preponderance of the evidence that the permit should not be issued to Wilson Brothers.

38. The Council finds and concludes that based upon the testimony and exhibits provided during the contested case hearing, the objectors have failed to meet their burden of proof. In fact, based on the evidence, the Division has proved that the application was technically complete.

39. The Council finds and concludes that the Division properly and professionally processed and analyzed the proposed permit application—the application contained all the legal and necessary requirements.

40. The Council finds and concludes that there was no evidence presented proving that the proposed mine will be a public nuisance or endanger the public health or safety. In fact, the evidence presented by the Division proves that this bentonite mine will operate like other bentonite mines in Wyoming and that it will not create a public nuisance or endanger the public health or safety. It is undisputed that the dust control and erosion measures proposed by Wilson Brothers for this permit are consistent with the same measures required for other bentonite mines. It is also undisputed that the BLM approved Wilson Brothers' proposed mine and plan of operations and as part of its analysis, the BLM conducted an environmental study and issued a finding of no significant impact.

41. Furthermore, the Council finds and concludes that dust emissions from the mine site are not within the regulatory authority of the Land Quality Division, and therefore, cannot be considered by the Council in this matter. Dust emissions from the mine site are a matter for the Air Quality Division. However, it is important to note that the Council finds and concludes that based upon the evidence in this matter, bentonite dust from this proposed mine site is not toxic and will not create a public nuisance or endanger the public health or safety. While several neighbors speculated during the hearing that bentonite dust from this mine could be toxic and harmful, the undisputed evidence proves that bentonite dust from a bentonite mine is not toxic or harmful. Indeed, when the Land Quality Division employees inspect bentonite mines, they do not wear masks or other protective gear. Further, workers at bentonite mines are not required to wear masks, respirators, or other protective gear to avoid inhaling dust.

42. Further, the Council finds and concludes that any complaints of truck traffic or other county road issues outside of the mine site are not within the regulatory authority of the Land Quality Division and, therefore, cannot be considered by the Council in this matter. Traffic and other county road issues outside the mine site are a matter for Park County officials.

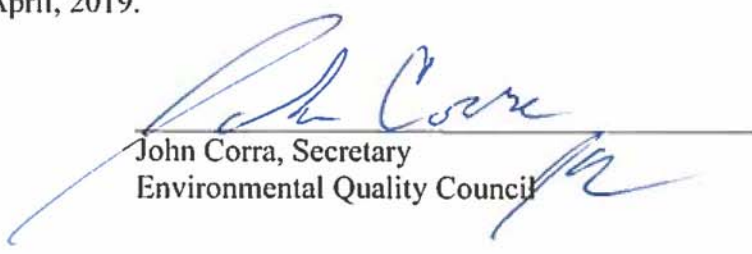
43. The Council finds and concludes that the Division properly processed and analyzed the permit application and that the application complies with all applicable laws. The Division properly and professionally determined that the permit application was technically complete.

## VI. ORDER AND DECISION

**IT IS HEREBY ORDERED** that the Division's decision that the bentonite mine permit application was technically complete is affirmed.

**IT IS FURTHER ORDERED** that Wilson Brothers' bentonite mine permit should be granted by the director of the DEQ.

ENTERED this 11<sup>th</sup> day of April, 2019.

  
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John Corra, Secretary  
Environmental Quality Council