

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

FILED

STATE OF WYOMING

APR 11 2019

IN RE: BENTONITE PERFORMANCE)
MINERALS, LLC)

DOCKET 18-160 Ruby, Executive Secretary
Environmental Quality Council

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The final contested case hearing in this matter occurred before the Environmental Quality Council 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 Secretary and Hearing Officer John Corra, Chairwoman Meghan Lally, Vice-Chairwoman Deborah Baumer, and Council members Dr. David Bagley, Tim Flitner, and Shane True. Council member Baumer participated by Google Hangout. Council member Steve Lenz did not take part in this matter.

Present at the hearing representing Petitioner, Bentonite Performance Minerals, LLC (BPM) was Samuel R. Yemington and Matt J. Micheli from Holland & Hart LLP. Appearing on behalf of Respondent, 2U Ranch, LLC (2U Ranch), was Scott Ericsson. Mr. Ericsson participated via telephone. Ronald Ericsson and Roland Ericsson were also present by telephone.

Present and testifying for BPM was Tyler Tetrault, BPM's mineral resource coordinator and Jennifer Hartman, BPM's environmental specialist. BPM's exhibits 1-7, 18, 61-81, 85, 90, 95, 99-125, and 127-134 were admitted into evidence. 2U Ranch's exhibits 1 and 2 were admitted into evidence. 2U Ranch did not call any witnesses.

Immediately following the hearing, the Council deliberated. 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, finds and concludes (by a 5-1 vote)¹ that the Council shall issue an order in lieu of consent.

II. JURISDICTION

This case arises from BPM's request to the Council for the issuance of an order in lieu of surface owner consent. BPM was unable to obtain surface owner consent for its mining and reclamation plans from 2U Ranch. Under Wyoming Statute § 35-11-406(b)(xii), if consent cannot be obtained, BPM may request a hearing before the Council. 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

BPM is petitioning the Council for an order in lieu of consent under Wyoming Statute § 35-11-406(b)(xii). 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 the following four elements:

- (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;

¹ All six Council members participating in this matter found that BPM met its burden regarding the third element in Wyoming Statute § 35-11-406(b)(xii)(C). However, five members found that BPM met its burden regarding the fourth element in subsection 406(b)(xii)(D)—one member voted that BPM failed to meet its burden concerning this fourth element.

(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 BPM has proven all four elements. BPM claims that it has, while 2U Ranch disagrees.

IV. PRELIMINARY MATTER

BPM filed a motion for summary judgment on December 21, 2018, requesting that the Council grant it summary judgment on its petition. After considering all relevant filings, the Council heard oral argument on January 16, 2019, and granted BPM's motion in part. The Council concluded that summary judgment for BPM was appropriate only as to the first two elements under Wyoming Statute § 35-11-406(b)(xii). (*See* Council's order granting BPM partial summary judgment, filed January 30, 2019).

The Council concluded that the materials attached to the parties' filings, viewed in the light most favorable to 2U Ranch, revealed that no genuine issues of material fact existed as to the elements outlined in Wyoming Statute § 35-11-406(b)(xii)(A) and (B) and BPM was entitled to judgment as a matter of law. Based upon the filings and attachments, it was undisputed that the mining and reclamation plans had been submitted to 2U Ranch², the surface owner, for approval and that those plans were detailed so as to illustrate the full proposed surface use including proposed routes of egress and ingress. (*See* Ex. B, D, E, and F attached to BPM's motion for

² 2U Ranch, for the first time, on January 14, 2019, contended that BPM failed to satisfy this first element. However, as stated in the Council's order denying 2U Ranch's motion to dismiss, that argument is wholly without merit.

summary judgment; *see also* deposition transcript of Ronald Ericsson, p. 41, attached as Ex. B to BPM's motion to limit testimony and evidence at hearing).

However, the Council found and concluded that there were disputed material facts that related to the third and fourth elements in subsections 406(b)(xii)(C) and (D). As a result, summary judgment was not appropriate as to those two elements.

Accordingly, during the contested case, the Council heard and considered evidence relevant to the third and fourth elements, specifically whether BPM's use would substantially prohibit the operations of the surface owner and whether the proposed plan reclaimed the surface to its approved future use, in segments if circumstances permit, as soon as feasibly possible.

V. FINDINGS OF FACT³

1. On May 24, 2018, BPM provided its mining and reclamation plans to 2U Ranch concerning an amendment to BPM's underlying original permit and current mining operations. (BPM Ex. 71, 74).

2. While BPM submitted the amended mining and reclamation plans to 2U Ranch, BPM also requested surface owner consent from 2U Ranch for the lands contained within the amendment area. (BPM Ex. 71). 2U Ranch refused to give its consent. (BPM Ex. 74).

3. At the time the amended mining and reclamation plans were provided to 2U Ranch, 2U Ranch was the surface owner of all the lands within the amendment area. (BPM Ex. 105; Tr. – Tetrault testimony, 66). 2U Ranch is owned by members of the Ericsson family. After receiving the plans and after BPM's request for an order in lieu of consent, 2U Ranch transferred some of the lands within the amendment area to two other related entities (Cinquefoil and

³ 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.

Valkyrie) that are also owned by members of the Ericsson family. (Tr. – Tetrault testimony, 34-36, 66; BPM Ex. 105).

4. As part of the amendment, BPM seeks to increase the number of acres that it is permitted to mine under the underlying original permit titled “Permit to Mine No. 267C.” (BPM Ex. 1-4, 71, 105; Tr. – Hartman testimony, 170).

5. BPM’s new amended permit application incorporates an additional 600 acres into the existing underlying permit area. (BPM Ex. 1-4, 71, 105).

6. These additional 600 acres are known as the “WY State Lease 42804 Amendment.” (BPM Ex. 1, 3, 105). BPM has the right to mine for bentonite on all the lands within the amendment area. (BPM Ex. 74, 78, 103; Tr. – Tetrault testimony, 65).

7. The bentonite deposits that are part of the amendment are a continuation of the bentonite deposits in the adjacent Jolley Edsall claim which is also mined by BPM. (Tr. – Tetrault testimony, 64-65; BPM Ex. 1, 81). The Jolley Edsall claim is located on lands owned by members of the Ericsson family. (Tr. – Tetrault testimony, 35).

8. The lands within the amendment area are immediately adjacent to two different mines where BPM has current bentonite mining operations on lands owned by members of the Ericsson family. (Tr. – Tetrault testimony, 35-36, 40-42; BPM Ex. 105).

9. Although the amendment seeks to add 600 acres to the overall permitted area, BPM’s mining operations, at most, would only disturb 177 acres. However, the actual land disturbance will most likely be less than 177 acres. (BPM Ex. 3; Tr. – Tetrault testimony, 66-67, 94).

10. Like other adjacent lands owned by members of the Ericsson family, grazing takes place on the lands within the amendment area. 2U Ranch has a grazing lease with a rancher

(Muleshoe Ranch) —the grazing lease encompasses 6,335 acres. Under the lease, the lands may be grazed for six months each year from May through October and the lease expires in 2020. (BPM Ex. 95; Tr. – Tetrault testimony, 37-39, 41-42, 66).

11. There is occasional deer hunting during the month of November on the lands in the amendment area. (Tr. – Tetrault testimony, 37-40, 42, 66, 121).

12. There could also possibly be some logging on the lands in the amendment area. (Tr. – Tetrault testimony, 39; 74).

13. As part of its mining operations, BPM plans to disturb anywhere from 10 to 20 acres on an annual basis. (Tr. – Tetrault testimony, 68, 107; Hartman testimony, 176).

14. The disturbed lands will be reclaimed on an annual basis as BPM advances with its mining. (Tr. – Tetrault testimony, 68, 117). BPM will reclaim the disturbed lands using the cast-back mining method. As BPM mines one pit cut, BPM will reclaim the previous pit cut at the same time. BPM's reclamation is a continuous process where it will continuously reclaim while it is mining. (Tr. – Hartman testimony, 172; BPM Ex. 107).

15. As a result, combining the disturbed acreage and the reclaimed acreage, a total of only 20 to 40 acres will not be available for grazing at any one time. (Tr. – Tetrault testimony, 120; Hartman testimony, 183).

16. BPM's mining plan describes the mining method, mining sequence, the pit locations, the disturbance boundary, and the proposed roads. (BPM Ex. 2, 106, 121; Tr. – Tetrault testimony, 93-94).

17. As part of its mining operations, BPM will mine through one small reservoir, which is about a quarter acre in area size and around a couple feet deep; however, BPM will rebuild that reservoir and increase its size. (Tr. – Tetrault testimony, 97-98, 106-107, 119). Although the

reservoir will be rebuilt, that reservoir will not be useable for about two years. (Tr. – Tetrault testimony, 106, 151-152).

18. Although the reservoir will not be useable for around two years, there are several other reservoirs located nearby for livestock use. (Tr. – Tetrault testimony, 108, 114). There are three other reservoirs within the amendment boundary and there are other reservoirs adjacent to the permit boundary that are accessible. (Tr. – Tetrault testimony, 108-109, 114-115, 117; BPM Ex. 130, 131). In addition, the Belle Fourche River is accessible at certain increments. (Tr. – Tetrault testimony, 111-113; BPM Ex. 131).

19. BPM will construct fences around the disturbed lands, so the mining operations do not affect the grazing operations. In addition, BPM agrees to stop its mining operations during the deer rifle hunting season. (Tr. – Tetrault testimony, 76-80, 90, 99, 122).

20. Although logging operations have not occurred on the lands within the underlying general permit or the amendment area, BPM agrees to work with 2U Ranch if logging operations occur within the amendment boundary area. (Tr. – Tetrault testimony, 77-78). If 2U Ranch conducts logging in the amendment area, it will occur prior to BPM's mining. (Tr. – Tetrault testimony, 88-89).

21. A total of one or two animal unit months (AUMs) will be lost on an annual basis due to the disturbances in the permit amendment area. (Tr. – Tetrault testimony, 119-120). The number of AUMs for the summer grazing period for each year is 375 per month, or 2,250 for the six-month summer grazing season. (BPM Ex. 95; Tr. – Tetrault testimony, 119).

22. The same plans and processes that were written into BPM's adjacent Jolley Edsall claim's mine and reclamation plans are written into the mine and reclamation plans for this amendment. (Tr. – Hartman testimony, 165).

23. There are a substantial number of trees within the proposed disturbance area. (BPM Ex. 2, 117, 118).

24. Grazing is the current and approved future use for the underlying general mining permit which this amendment is part of. (Tr. – Hartman testimony, 167, 171, 184).

25. BPM’s reclamation plan proposes to reclaim the lands in the amendment area to grazing land. (Tr. – Hartman testimony, 165, 180, 184; BPM Ex. 3). The approved future use in the amendment area is grazing land. (Tr. – Hartman testimony, 169, 183-184).

VI. 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 BPM’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.” *Horse Creek Conservation Dist.*, ¶ 14, 221 P.3d at 312 (citations omitted). “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. Bldg. 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. Dep’t of Family Servs.*, 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, BPM, 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 BPM's petition, the Council is required to determine whether BPM 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 (and as part of the Council's order granting partial summary judgment), BPM has proven, by a preponderance of the evidence, all four elements.

35. As previously stated in its order granting BPM partial summary judgment, the Council finds that BPM has proven the first element—that its mining and reclamation plans were submitted to 2U Ranch.

36. As previously stated in its partial summary judgment order, the Council also finds that BPM 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. The Council finds that BPM has proven the third element—that BPM's use does not substantially prohibit 2U Ranch's operations.

38. 2U Ranch claims that BPM's use of its land in the amendment area will substantially prohibit its grazing operations, hunting, and potential logging.

39. However, the undisputed evidence shows that out of the 600 acres that make up the amendment area, at most, only 20 to 40 acres will be inaccessible for grazing at any one time. Further, it is undisputed that BPM will construct fences around the disturbed area to prevent livestock from wandering into that area. A total of only one or two AUMs would be lost on an annual basis due to the disturbances in the permit amendment area, however, the number of AUMs for the summer grazing period for each year is 375 per month, or 2,250 for the six-month summer grazing season.

40. Further, the undisputed evidence shows that although one reservoir will be mined through, the reservoir will only be inaccessible for two years, and there are other nearby reservoirs available for the livestock.

41. Further, the testimony shows that hunting could still occur on the land during the mining and that BPM agrees to work with 2U Ranch and stop its mining operations during the hunting season, if necessary.

42. Lastly, during this case, 2U Ranch makes a vague and speculative claim that BPM's mining would affect logging operations within the amendment boundary. However, 2U Ranch provided no evidence of any kind that logging would occur. Nonetheless, the undisputed evidence shows that logging can still occur on the lands within the amendment boundary prior to BPM's mining if 2U Ranch, in fact, wants to conduct logging. Indeed, it is undisputed that BPM is willing to work with 2U Ranch and any potential timber sales contractor to make sure that timber harvesting would occur prior to BPM's mining.

43. Based upon the evidence, the Council concludes that BPM's operations will not substantially prohibit 2U Ranch's livestock, hunting, or potential logging operations within the amendment area.

44. 2U Ranch presented no testimony or other evidence that showed how BPM's mining operations will substantially prohibit any of 2U Ranch's operations, including grazing, hunting, or potential logging operations.

45. The Council also finds that BPM 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. BPM'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 amendment area.

46. The disturbed lands will be reclaimed on an annual basis as BPM advances with its mining. BPM will reclaim the lands using the cast-back mining method—as BPM mines one pit cut, BPM will reclaim the previous pit cut at the same time. BPM’s reclamation is a continuous process where it will continuously reclaim while it is mining. BPM’s reclamation reclaims the land in the amendment area as soon as feasibly possible to the approved future use—BPM’s reclamation plan requires that the lands be reclaimed to grazing land.

VII. ORDER

IT IS HEREBY ORDERED that Bentonite Performance Minerals, LLC’s petition for an order in lieu of consent as to its mining plan and reclamation plan for the amendment area is granted and issued against 2U Ranch and all its successors, grantees, and assignees (including, but not limited, to Cinquefoil and Valkyrie).

ENTERED this 11th day of April, 2019.


John Corra, Hearing Officer
Environmental Quality Council