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

In Re Asphalt Specialties Co. Inc.) Docket No. 22-2801
Permit P0024615)

DEPARTMENT OF ENVIRONMENTAL QUALITY'S TRIAL BRIEF

The Wyoming Department of Environmental Quality (Department), Air Quality Division (Division), through its undersigned counsel and pursuant to the Environmental Quality Council's (Council) Amended Scheduling Order filed on February 23, 2022, hereby submits the following trial brief to aid the Council in its consideration of the evidence the Department expects to submit at the hearing.

INTRODUCTION

At issue in this case is the Division's issuance of an air quality permit to Asphalt Specialties to operate a small surface gravel mine. The mine in question is approximately 19 miles west of Cheyenne, WY, and has a proposed mining area of 15 acres. Asphalt Specialties initially submitted an application for an air quality permit in 2018; however, litigation over a land use permit delayed the Division's analysis of that application until 2021. Once Asphalt Specialties received approval from the Laramie County Planning and Development Department to operate the small gravel mine

in 2021, the Division processed the air quality permit application. Before approving and issuing the permit, the Division made a call for public comments and hosted a public hearing on the proposed permit. After rigorously addressing public concern surrounding the gravel mine, the Division issued an air quality permit to Asphalt Specialties. This case is an appeal of the decision to issue that air quality permit.

STANDARD OF REVIEW

The Environmental Quality Act provides that the Council shall act as the hearing examiner for the Department and shall “conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.” Wyo. Stat. Ann. § 35-11-112(a)(iv). The Council may hear appeals that challenge the final actions of the Administrator if the appeal is made within 30 days of the action. *Rules*, at Chapter 1, § 8(a). The Council conducts appeal hearings in accordance with the Wyoming Administrative Procedure Act. *Id.* at (a)(ii). The Wyoming Administrative Procedure Act and Wyoming case law requires the challenging party to prove that the agency did not adhere to the applicable statutes, or acted in an arbitrary or fraudulent manner, such that the evidence does not support the agency’s decision. Wyo. Stat. Ann § 16-3-114; *Laramie River Conservation Council v. Indus. Siting Council*, 588 P.2d 1241, 1253 (Wyo. 1978). The burden of proving arbitrary or fraudulent administrative action is on the complaining party, 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. Env’t Quality Council of State of Wyo.*, 805 P.2d 268, 273 (Wyo. 1991). In other words, the party challenging the Department’s decision to issue a permit must persuade this Council, by a preponderance of the evidence, that the Department’s decision was unlawful, arbitrary, or fraudulent.

THE DEPARTMENT'S CONTENTIONS

I. The Air Quality Division adhered to the applicable statutes and regulations when it issued a construction permit to Asphalt Specialties for the Lone Tree Creek Quarry.

Facilities in Wyoming that have the potential to emit air contaminants are required to obtain a construction permit from the Division before operating. Wyo. Stat. Ann. §§ 35-11-201, -203; *Rules Wyo. Dept. of Env'tl. Quality, Air Quality Division*, Chapter 6, § 2(a)(i)(hereinafter Rules). When a facility applies for a construction permit it must provide the Division with the details of its expected emissions. *Rules*, at Chp. 6 § 2(b)(i). Once submitted, the Division reviews the application and must notify the applicant within 30 days whether it is complete. *Rules*, § 2(g). If the application is incomplete, the Division requests the missing information so the application can be completed. *Id.* Once the application is deemed complete, the Administrator will propose to either approve, conditionally approve, or deny the application. *Id.* The Administrator then has 60 days to publish that proposed decision in a newspaper of general circulation in the county in which the source will be located. *Rules*, at § (2)(m). That publication must describe the general nature of the proposed facility and notify the public that there is a 30-day period to comment on the proposed decision. *Id.* Upon request from the public, the Administrator may also conduct a hearing for citizens to voice their comments and concerns regarding the proposed decision. *Id.* After considering all comments, including those presented at public hearings, the Administrator issues a final decision on the permit application. *Id.*

In this case, Asphalt Specialties submitted an application for a construction permit for the Lone Tree Creek Quarry, a gravel mine, in 2018. The initial application was incomplete and separate litigation regarding the Laramie County land use permit delayed the Division's processing of the application. Once that litigation was resolved, Asphalt Specialties submitted additional

information to the Administrator and the application was deemed complete in 2021. The Administrator then timely proposed to approve the application and published her decision in a newspaper of general circulation in Laramie County. The public was given the opportunity to comment on the proposed decision both online and at an in-person hearing. Appellant, Carolyn Rowe, attended the public hearing and expressed concerns about the control of fugitive dust and water-based selenium concentrations in the area surrounding the proposed quarry.

Taking these comments seriously, the Division included conditions in the proposed construction permit by which Asphalt Specialties would be bound to control fugitive dust, and researched whether selenium was a waterborne issue in the area. Finding no data to suggest that public health and welfare would be adversely affected, and after considering all public comments, the Administrator issued the air quality permit to Asphalt Specialties, with appropriate conditions to control fugitive dust emissions.

II. Selenium is not present in high concentrations at the site of the Lone Tree Creek Quarry.

Selenium is a naturally occurring element present in sedimentary rocks, shales, coal and phosphate deposits and soils. Environmental Protection Agency, *Aquatic Life Criterion – Selenium*.¹ Selenium is also a nutritionally essential element for humans and other animals in small amounts. *Id.* The Department regulates selenium pollution in Wyoming, and the most stringent surface water criterion for selenium content is that which protects aquatic life by maintaining concentrations below 5 micrograms per liter of water (ug/L). *Rules, Dept. Env'tl. Quality. Water Quality Division.* Chapter 1, Appendix B.

¹ Found online at: <https://www.epa.gov/wqc/aquatic-life-criterion-selenium> (last visited 4/1/2022).

While selenium compounds are listed as air contaminants under the Rules, there is no evidence that selenium exists in any dangerous concentration in the soils or water of the Lone Tree Creek Quarry where surface mining will occur. The Department and the United States Geological Survey (USGS) have collected and tested surface water samples at the Laramie River, Crystal Lake, and Granite Springs Reservoir, three sites in close proximity to the proposed quarry. In each of those instances, the bodies of water contained selenium which measured less than 1 ug/L, far below Wyoming's most stringent standard. United State Geological Survey, *National Water Information System: Mapper*.² Further, based on the USGS water data mapper for groundwater samples, selenium data shows groundwater concentrations of less than 1 ug/L in the vicinity of the quarry, with concentrations as high as 3.7 ug/L several miles west near Tie Siding. Again, these values are far below the most stringent standard set for selenium concentration in water in Wyoming. After considering these values, the Department concluded that neither surface nor groundwater selenium concentrations pose a threat to human or aquatic life in the area of the Lone Tree Creek Quarry.

III. The Air Quality Division does not have the authority to regulate selenium discharges into water bodies.

Even if selenium concentration levels were higher in the area of the Lone Tree Creek Quarry, which they are not, the Air Quality Division does not have the authority to regulate selenium discharges into water bodies within the State of Wyoming. Wyo. Stat. Ann. §§ 35-11-201, -203; *Rules*, Chp. 1, Sec. 3. Instead, the Water Quality Division is responsible for regulating surface water and groundwater quality. Wyo. Stat. Ann. §§ 35-11-301, -302. The Water Quality Division issued a permit to Asphalt Specialties in 2018, over three years ago, that permit was not appealed, and is not at issue in this case.

² Found online at: <https://maps.waterdata.usgs.gov/mapper/index.html> (last visited 4/1/2022).

This Council has previously recognized the distinct regulatory authority of each Division within the Department of Environmental Quality. For example, in *Wilson Brothers*, a mining company submitted an application to the Land Quality Division to operate a bentonite mine in Wyoming. *In Re Wilson Brothers*, Env'tl Quality Council, Docket 18-4804, *Findings of Fact, Conclusions of Law* ¶ 41. The Land Quality Division followed all required procedures and considered public comments before issuing a permit. *Id.* Neighboring landowners challenged the permit asserting claims based on dust emissions, but this Council found and concluded “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.” *Id.*

Similarly, in this case, Appellant’s claims are based on the assertion that the small gravel mine will adversely affect water quality and groundwater. However, the Air Quality Division only has the authority to regulate the emission of air contaminants from sources in Wyoming. Wyo. Stat. Ann. §§ 35-11-201 and -203; *Rules*, Chp. 1, Sec. 3. The Air Quality Division properly recognized the limits of its regulatory authority when it responded to the appellant’s comments about water quality by referring her to the Water Quality Division. *See* Exhibit 9, Comments 12, 29, *Dept. of Env'tl Quality Exhibits*, submitted May 23, 2022. These are matters that are solely within the regulatory authority of the Water Quality Division. *See* Wyo. Stat. Ann. §§ 35-11-301 and -302. Because those water quality concerns are not within the Air Quality Division’s regulatory authority, they are not relevant to the Council’s consideration of the air quality permit at issue in this appeal. *In Re Wilson Brothers*, Env'tl Quality Council, Docket 18-4804, *Findings of Fact, Conclusions of Law* ¶ 41.

CONCLUSION

The Department contends that the evidence will show the Division carefully and accurately adhered to all statutory and regulatory requirements when evaluating and issuing the air quality permit to Asphalt Specialties to operate the Lone Tree Creek Quarry. While the Department understands Appellant's concerns and investigated those concerns when it processed the application, the Department correctly concluded that selenium is not a threat to human or animal life in the area of the Lone Tree Creek Quarry. Moreover, Appellant's concerns are not within the jurisdiction of the Air Quality Division and would not provide sufficient grounds to deny the air quality permit. Accordingly, the Department contends that the air quality permit should be affirmed.

Dated this 7th day of June, 2022.



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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing upon the persons listed below by U.S. mail, postage prepaid, and via email, this 8th day of June, 2022:

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