

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

**In Re: Black Hills Bentonite
TFN 7 1/018¹**

)
) **Docket No. 22-4801**
)
)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The final contested case hearing in this matter occurred before the Environmental Quality Council on March 16, 2023, at the Gillette College Flex Space, 3251 South 4-J Road, Gillette, Wyoming.

I. APPEARANCES

Present for the Council was Hearing Officer Marjorie Bedessem, Chairman Steve Lenz, and Council member Ryan Greene. Council members JD Radakovich, Shane True, and John Corra attended by videoconference. Council member Stan Blake was excused and did not take part in this matter.

Mark Stengle and Donald Dihle were present at the hearing and represented themselves as Petitioners. Present at the hearing representing the Wyoming Department of Environmental Quality (DEQ) was David DeWald, Deputy Attorney General from the Wyoming Attorney General’s Office. Present at the hearing representing the Permittee, Black Hills Bentonite, LLC (Black Hills) were Stephen Bain and Jennifer McDowell from the law firm of Welborn Sullivan Meck & Tooley, P.C.

¹ The original caption inadvertently referenced “Permit P0024615” which is incorrect. The correct permit is TFN 7 1/018.

Mr. Stengle testified on his own behalf; Donald Dihle did not testify. DEQ employees Mark Rogaczewski (District 3 Supervisor for the Land Quality Division), Kyle Todd (Natural Resource Program Principal for the Land Quality Division), and Kyle Wendtland (Administrator of the Land Quality Division) testified.

Michael Thomas (Director of Mining and Safety for Black Hills Bentonite) testified on behalf of Black Hills.

The following exhibits were admitted into evidence: DEQ exhibits 1 through 12; Black Hills Bentonite exhibits 1 through 3; Dihle exhibits (comprising of two photographs); and Stengle exhibits (comprising of two maps).

Immediately following the evidentiary hearing, the Council deliberated and decided this matter. The Council, having heard and considered all the evidence in this case and being fully advised, pursuant to the Wyoming Administrative Procedure Act, Wyo. Stat. Ann. § 16-3-110, unanimously (6-0) finds and concludes that DEQ's issuance of Land Quality Permit TFN 7 1/018 to Black Hills Bentonite is upheld and affirmed in its entirety.

II. JURISDICTION

This case arises from written objections and requests for a contested case hearing filed by Petitioners Mr. Stengle and Mr. Dihle challenging DEQ's issuance of a land quality permit (TFN 7 1/018) to Black Hills. Wyoming Statute § 35-11-112(a)(iv) states that the Council shall “[c]onduct 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 “from final actions of the Administrators or Director [when an appeal is] made within thirty (30) days of notification of such action.” DEQ rules, Practice and Procedure, Chapter 1, Section 8(a).

The DEQ director issued Land Quality Permit TFN 7 1/018 to Black Hills on September 12, 2022. Mr. Dihle and Mr. Stengle filed written objections to the issuance of that permit on September 26 and October 5, 2022, respectively, along with a request for a hearing necessitating a contested case before the Council. Accordingly, the Council has jurisdiction to hear this appeal.

III. STATEMENT OF THE CASE/ISSUES AND CONTENTIONS

At issue in this case is DEQ's issuance of a land quality permit to Black Hills to operate a bentonite mine near Pine Haven, Wyoming. Following the issuance of the permit, Mr. Stengle and Mr. Dihle (collectively referred to as Petitioners) filed written objections to the permit and requested a hearing before the Council. The issue before the Council is whether Petitioners have met their burden of proof by presenting sufficient evidence that DEQ acted in an arbitrary or unlawful manner when it issued the permit to Black Hills. The Petitioners generally contend that the proposed mining operation will constitute a public nuisance or endanger the public health and safety.

IV. FINDINGS OF FACT²

1. On May 10, 2021, Black Hills filed its bentonite mine permit application with the Division of Land Quality (Division) of DEQ. (Tr. – Rogaczewski testimony, 31; DEQ Ex. 1). As part of the application, Black Hills also submitted an application for license to mine, a mine plan, a mine plan map, a reclamation plan, and a Wildlife Baseline report. (Tr. – Rogaczewski testimony, 31-34; DEQ Exs. 1-6).

² 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.

2. The proposed bentonite mine is located in Crook County approximately two and half miles south-southeast from the Town of Pine Haven. (Tr. – Rogaczewski testimony, 31-32; DEQ Exs. 1, 3, 11, 12).

3. Black Hills proposes to operate a small open-pit bentonite mine. The total permit area is 317 acres. Approximately 200,000 tons of bentonite will be removed from an estimated 68 acres. Approximately 72 additional acres may be disturbed by related mine disturbances such as access roads, topsoil stockpiles, equipment parking areas, and overburden stockpile areas. The mining will be completed in approximately 20 years. The mine is located on federal and state lands. (Tr. – Rogaczewski testimony, 34-35, 38-40; Thomas testimony, 129; DEQ Exs. 1, 3).

4. Black Hills received a special use permit from the Bureau of Reclamation on September 28, 2021 for the construction and use of an access road across federal lands. The special use permit had several general and special conditions. Some of those special conditions required Black Hills to control dust on the access road during the permitted activities and address hazardous materials and pollutants. Black Hills also received a lease and Form 8 (surface owner consent form) from the Office of State Lands and Investments to proceed with the proposed mine. The Form 8 was signed on November 15, 2021. (Tr. – Rogaczewski testimony, 39-40, 69; DEQ Ex. 9).

5. There are no planning and zoning permits that must be received from Crook County in advance of Black Hills submitting a bentonite mining application to the Division. It is the Division's understanding that there are no planning and zoning permits required for this type of bentonite mining in Crook County. (Tr. – Rogaczewski testimony, 40-41).

6. Black Hills' permit area is not designated by the Council as a rare or uncommon area having particular historical, archaeological, wildlife, surface geological, botanical, or scenic value. (Tr. – Rogaczewski testimony, 41).

7. No occupied dwellings, homes, public buildings, churches, community or institutional buildings, parks or cemeteries are located within three hundred feet of land which will be affected by the mining activities. The nearest occupied dwelling is located approximately four hundred feet from the nearest active mining area on the permit area. (Tr. – Rogaczewski testimony, 48, 58-59; DEQ Ex. 3).

8. Black Hills is going to use traditional mining equipment, front-end loaders, blades, scrapers, dozers, and tractors. (Tr. – Rogaczewski testimony, 35; DEQ Ex. 3).

9. There will be no blasting at the mine site. (Tr. – Rogaczewski testimony, 36; DEQ Ex. 3).

10. Black Hills will not be putting any pollutants on the ground or injecting any pollutants into the groundwater. (Tr. – Rogaczewski testimony, 37; DEQ Ex. 3).

11. There will not be any sedimentation ponds, treatment ponds, or tailings ponds associated with the mine. (Tr. – Rogaczewski testimony, 37; DEQ Ex. 3).

12. Black Hills will field dry the bentonite on-site. There will not be any processing of bentonite on-site. (Tr. – Rogaczewski testimony, 36-38; DEQ Ex. 3).

13. The mine will operate generally from 7:00 a.m. to 5:00 p.m., Monday through Friday. The traffic associated with the mine will occur during daylight hours. (Tr. – Rogaczewski testimony, 37; Thomas testimony, 129; DEQ Ex. 3).

14. Due to the shallow mining depths, no groundwater is expected to be encountered. It is expected that impacts on groundwater resources will not occur in conjunction with mining activities on the permit area. (Tr. – Thomas testimony, 129-130; DEQ Ex. 3).

15. Impacts to watershed and surface water hydrology on the permit area are expected to be minimal. Surface runoff will be directed around and away from mining activities in order to prevent unnecessary erosion and sedimentation. No springs, seeps, or perennial streams will be affected by the proposed mining activities. (DEQ Ex. 3).

16. Black Hills will have a small crew that works at the mine site usually consisting of five people. Black Hills proposes two routes for the transportation of bentonite from the mine site to its Thornton processing plant. It is estimated, based on a hauling schedule of five days per week, that approximately between four to nine trucks per day will haul bentonite to the Thornton processing plant. (Tr. – Thomas testimony, 127-130; Black Hills Ex. 2; DEQ Ex. 3).

17. The mine and reclamation plan adequately addresses the requirements necessary to grant this type of permit. The reclamation will be ongoing throughout the mining process. (Tr. – Rogaczewski testimony, 38; Thomas testimony, 131; DEQ Ex. 3).

18. On June 15, 2021, the Division determined that the permit application was complete. (Tr. – Rogaczewski testimony, 41).

19. Subsequently, the Division sent its first round of technical comments to Black Hills on September 23, 2021. (Tr. – Rogaczewski testimony, 41).

20. The Division did not have any major concerns with the contents of the application, the mine plan, or the reclamation plan. The Division, however, requested additional explanation of surface and groundwater hydrology, public safety related to the access points of the open pits, and clarification regarding the reclamation plan progressions. On April 8, 2022, Black Hills

submitted its response to the Division's round one technical review comments. Black Hills' responses addressed all of the Division's technical comments. (Tr. – Rogaczewski testimony, 42-43).

21. On May 4, 2022, the Division completed its round two technical review and submitted those comments to Black Hills. Black Hills responded to the Division's round two comments on May 23, 2022. (Tr. – Rogaczewski testimony, 43).

22. On June 9, 2022, the Division determined that the application was technically adequate. (Tr. – Rogaczewski testimony, 43).

23. Subsequently, Black Hills provided public notice of its application on June 23, 30 2022 and July 7, 14, 2022. (Tr. – Rogaczewski testimony, 44).

24. During the public comment period, the Division received 26 comments from 23 individuals. The Division held a listening session in Pine Haven on August 31, 2022 to hear concerns from the community. (Tr. – Rogaczewski testimony, 44; DEQ Ex. 11).

25. The comments concerned air quality, water quality, noise, public land use, location of the pit, wildlife, recreation, and traffic and safety. (Tr. – Rogaczewski testimony, 46; DEQ Ex. 11).

26. The Division considered and addressed all of the concerns. (Tr. – Rogaczewski testimony, 44-47; DEQ Ex. 11).

27. The Division ultimately recommended to the DEQ director that the application be granted. (Tr. – Rogaczewski testimony, 46-47; DEQ Ex. 11).

28. The director accepted the Division's recommendation and granted the permit application. (Tr. – Rogaczewski testimony, 44-47; DEQ Ex. 12).

29. Based on the Division’s review of the permit application, Black Hills met all the requirements in the relevant statutes and DEQ rules as well as all other technical requirements. The application was complete and not contrary to any law or policy of the State of Wyoming or the United States. (Tr. – Rogaczewski testimony, 47-48).

30. The proposed mining operation will not adversely affect the neighboring agricultural operations. (Tr. – Rogaczewski testimony, 47-48).

31. The proposed mining operation will not constitute a public nuisance or endanger the public’s health or safety. (Tr. – Rogaczewski testimony, 48-50; Todd testimony, 104).

32. The proposed mining operation will not cause pollution of any waters in violation of state or federal law. (Tr. – Rogaczewski testimony, 48).

33. The Division does not regulate any kind of dust emitted from mine sites—emissions from mine sites are regulated by the Air Quality Division of DEQ. (Tr. – Rogaczewski testimony, 49; Wendtland testimony, 118).

34. Black Hills is in the permitting process for an air quality permit. (Tr. – Thomas, 130).

35. Erosion and drainage control are underneath the jurisdiction of the Water Quality Division of DEQ. (Tr. – Rogaczewski testimony, 49).

36. The Division is without regulatory authority to control or regulate traffic off the mine site. (Tr. – Rogaczewski testimony, 66; DEQ Ex. 11).

37. On April 7, 2021, the United States Department of the Interior issued a letter to Black Hills confirming that based upon “the information provided, it is unlikely that the proposed work will adversely affect any threatened or endangered species. You may consider this Project,

as proposed, to be in compliance with the Endangered Species Act of 1973, as amended (ESA), 16 U.S.C. 1531 *et seq.*” (DEQ Ex. 8).

38. Subsequently, on September 8, 2022, the Division contacted the U.S. Fish and Wildlife Service following a comment from a concerned citizen related to the Northern Long-eared bat. The U.S. Fish and Wildlife Service responded and reiterated that in its April 7, 2021 correspondence, it concluded that the project was unlikely to adversely affect listed species, including the Northern Long-eared bat. However, it recommended the Division clarify that the proposed mining activities in the permit area will not remove any trees or commit that any tree removal, even one tree, will occur during the period when the Northern Long-eared bat is hibernating. If no tree removal will occur, the U.S. Fish and Wildlife Service reaffirmed its earlier decision. (DEQ Ex. 10).

39. Black Hills does not plan on disturbing any potential habitat for the bat—Black Hills will not be mining any bat habitat. Although the land quality permit was issued prior to the Northern Long-eared bat being listed as endangered by the U.S. Fish & Wildlife Service on November 29, 2022, if the U.S. Fish and Wildlife Service has further recommendations or advice regarding the Northern Long-eared bat, Black Hills will have to revise their mine and reclamation plan to be consistent with those recommendations. That revision must be completed before Black Hills commences any construction or mining on the permit land. (Tr. – Rogaczewski testimony, 50-51, 69-72; Thomas testimony, 132; DEQ Exs. 8, 10).

40. Although DEQ granted Black Hills a land quality permit, Black Hills is still required to get the necessary permits from the Air Quality Division and Water Quality Division of DEQ. If Black Hills does not receive permits from all three divisions, Land Quality, Water Quality,

and Air Quality, Black Hills will not be allowed to mine the parcel. (Tr. – Rogaczewski testimony, 76-77; DEQ Exs. 11-12).

41. The Petitioners contend that the proposed mine will create a public nuisance and endanger the public health and safety because the mining operations will create dust emissions, noise, truck traffic, water issues, and adversely affect property values. (Tr. – Stengle testimony, 80, 84-87, 92; *see also* Dihle objection and Stengle objection, filed as part of this docket).

V. CONCLUSIONS OF LAW

A. Principles of Law

42. Paragraphs 1 through 41 of the findings of fact are fully incorporated herein.

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

(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) Repealed by Laws 2020, ch. 35, § 2, eff. July 1, 2020.

(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) to (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.

....

(o) No permit shall be issued to an applicant after a finding by the director or council, after opportunity for hearing, that the applicant or operator specified in the application controls or has controlled mining operations with a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable harm to the environment as to indicate reckless, knowing or intentional conduct.

....

(q) The following objection procedure shall apply for any other mining permit application:

(i) Any interested person has the right to file written objections to the administrator within thirty (30) days after the last publication of the notice required in subsection (j) of this section. The administrator shall within five (5) business days forward any objection to the applicant and shall make objections available to the public;

(ii) The administrator shall review all objections and shall forward a report and recommendations on the objections to the director. The director shall issue to the applicant and to any objector a final written decision issuing or denying the permit within thirty (30) days after the deadline to file objections provided in paragraph (i) of this subsection;

(iii) The applicant or objector may appeal the director's written decision to the council. If a hearing is held, the council shall issue findings of fact and a decision within sixty (60) days after the final hearing;

(iv) A person who does not object as provided under this subsection has no right of appeal.

Wyo. Stat. Ann. § 35-11-406(m), (o), (q).

44. 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)).

45. Before the Council, the Petitioners are responsible for producing sufficient evidence that DEQ's issuance of the land quality permit was incorrect and not in accordance with law. "The burden of proving arbitrary, illegal or fraudulent administrative action is on the complainant [petitioner], 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 [petitioner's] position." *Knight v. Env'tl. 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

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

47. The Council is required to determine whether the Petitioners have proven by a preponderance of the evidence that the permit should not have been issued to Black Hills.

48. The Council finds and concludes that based upon the testimony and exhibits provided during the contested case hearing, the Petitioners have failed to meet their burden of proof. In fact, based on the evidence, DEQ (although it does not have the burden of proof in this matter) has proven that the application was reviewed, analyzed, and issued in accordance with law.

49. 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.

50. The Council finds and concludes that there was no evidence presented proving that the issuance of the permit to Black Hills was improper or not in compliance with law.

51. The Council finds and concludes that there was no evidence that the proposed mine will be a public nuisance or endanger the public health or safety. There was no evidence submitted that there would be any air quality or water quality issues as a result of the mining operations.

52. Furthermore, the Council finds and concludes that any 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.

53. Furthermore, the Council finds and concludes that any concerns that the mining will affect nearby surface water bodies are not within the regulatory authority of the Land Quality Division. Those matters are for the Water Quality Division.

54. 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 Crook County officials.

55. The Council finds and concludes that the Division and DEQ properly processed and analyzed the permit application and that the application complies with all applicable laws. The DEQ director properly and in accordance with law issued the permit to Black Hills.

56. While the Council appreciates the Petitioners' comments and concerns, the Council finds that the Petitioners failed to provide sufficient evidence that proved the land quality permit was not issued in accordance with law. The Petitioners ask the Council to consider many matters that fall outside the Division's jurisdiction—those matters being air quality, water quality, and traffic outside the permit area. Like the Division, the Council is limited by and bound to follow the same statutes and rules as the Division—the land quality statutes and rules. For the matters

that are properly before the Council, the Council finds and concludes that DEQ's issuance of the land quality permit was proper and in compliance with law.

VI. ORDER AND DECISION

IT IS HEREBY ORDERED that DEQ's issuance of Land Quality Permit TFN 7 1/018 is upheld and affirmed in its entirety.

IT IS FURTHER ORDERED that the Petitioners' request to reverse DEQ's issuance of Land Quality Permit TFN 7 1/018 is denied.

ENTERED this 16 day of May, 2023.



Steve Lenz, Chairman
Environmental Quality Council