

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

**In Re: Asphalt Specialties Co. Inc.
Permit P0024615**

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) **Docket No. 22-2801**
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The final contested case hearing in this matter occurred before the Environmental Quality Council on June 14, 2022, in Room 5, Capitol Extension, State Capitol, Cheyenne, WY 82002.

I. APPEARANCES

Present for the Council was Hearing Officer Steve Lenz¹, Chairman John Corra, and Council members Stan Blake, Ryan Greene, JD Radakovich, and Marjorie Bedessem. Council member Radakovich participated by video. Council member Shane True did not participate in this matter.

Carolyn Rowe was present at the hearing and represented herself as petitioner. Present at the hearing representing the Air Quality Division (Division) of the Wyoming Department of Environmental Quality (DEQ) was James Kaste, Deputy Attorney General and Matt Nadel, Assistant Attorney General from the Wyoming Attorney General’s Office. Present at the hearing representing the permittee, Asphalt Specialties Co., Inc. were Michael D. Smith and Kasey J. Schlueter from Holland & Hart LLP.

Ms. Rowe testified on her own behalf. Jack Burton (Natural Resource Program Principal for the Air Quality Division), Nancy Vehr (Administrator of the Air Quality Division), and

¹ Council member Steve Lenz became Chairman of the Council following the contested case.

Jennifer Zygmunt (Administrator of the Water Quality Division) testified on behalf of the Division. Asphalt Specialties did not call any witnesses.

The following exhibits were admitted into evidence: DEQ exhibits 1 through 14 and Rowe exhibit 1. Asphalt Specialties did not offer any exhibits.

Immediately following the evidentiary hearing on June 14, 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 the Division's issuance of Air Quality Permit No. P0024615 to Asphalt Specialties is upheld and affirmed in its entirety.

II. JURISDICTION

This case arises from written objections and a request for a hearing challenging the Division's issuance of an air quality permit (Permit No. P0024615) to Asphalt Specialties. 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 [] days of notification of such action.” DEQ rules, Practice and Procedure, Chapter 1, Section 8(a).

The challenged permit was issued on December 6, 2021. Ms. Rowe filed written objections to the issuance of the permit on January 4, 2022 along with a request for 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 the Division's issuance of an air quality permit to Asphalt Specialties to operate a small surface gravel mine (Lone Tree Creek Quarry) approximately 20 miles west of Cheyenne, Wyoming. Following the issuance of the permit, Ms. Rowe filed written objections to the permit and requested a hearing before the Council. The issue before the Council is whether Ms. Rowe has met her burden of proof by presenting sufficient evidence that the Division acted in an arbitrary or unlawful manner when it issued the permit to Asphalt Specialties.

IV. FINDINGS OF FACT²

1. On May 1, 2018, Asphalt Specialties filed an application with the Division requesting an air quality permit for its 15-acre gravel mine (Lone Tree Creek Quarry) approximately 20 miles west of Cheyenne, Wyoming. (Transcript – Burton testimony, 19-20; DEQ Ex. 2).

2. The application described and contained the Quarry's construction activities, blasting plan, mining operations, and ambient air quality. The application also contained numerous calculations about the expected emissions. (Tr. – Burton testimony, 20-21; DEQ Ex. 2).

3. The Quarry's emission estimate was 8.8 tons per year, PM10. PM10 is particulate matter that is less than 10 microns. (Tr. – Burton testimony, 21-22; DEQ Ex. 2).

4. On June 13, 2018, the Division issued a letter explaining that the application was complete and that the Division would proceed with its technical review. (Tr. – Burton testimony, 23-24; DEQ Ex. 3).

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.

5. Although the Division issued the completeness letter, it did not issue the permit at this time because the application was missing the land use planning document from the Laramie County Planning Office. (Tr. – Burton testimony, 24).

6. Subsequently, on March 1, 2021³, Asphalt Specialties submitted its first revised application. (Tr. – Burton testimony, 25; DEQ Ex. 4).

7. The only difference between the applications was that Asphalt Specialties was planning to pave the haul road within ninety working days. (Tr. – Burton testimony, 25-26; DEQ Ex. 4).

8. On the same day, March 1, 2021, Asphalt Specialties submitted its second revised application—this revised application included an ambient impact demonstration. The demonstration included calculations and confirmed that the expected emissions from the Quarry would be 8.8 tons per year, PM10. (Tr. – Burton testimony, 26-27, 29; DEQ Ex. 5). The demonstration also compared the Lone Tree Creek Quarry to the Harriman Quarry. The Harriman Quarry is sixty acres and its annual emissions are 50 tons per year, PM10. At 50 tons per year (PM10), the Harriman Quarry does not exceed the EPA’s air quality standards. (Tr. – Burton testimony, 26-27; DEQ Ex. 5).

9. Based upon the application materials and calculations, Asphalt Specialties’ facility was not going to exceed the EPA’s air quality standards. In fact, the 8.8 tons per year, PM10, were well below the applicable ambient air standards. However, to make sure that the facility would not exceed the air quality standards, Asphalt Specialties planned to pave the haul road and treat the fugitive dust with chemical dust suppressants. (Tr. – Burton testimony, 26-30; DEQ Ex. 5).

³ The delay between Asphalt Specialties’ application and first revised application occurred because of litigation between Asphalt Specialties and Laramie County. (Tr. – Burton testimony, 25; DEQ Ex. 6).

10. On April 26, 2021, Asphalt Specialties submitted to the Division its third and final revised air quality permit application. This application included the land use planning document from the Laramie County Planning Office. (Tr. – Burton testimony, 30; DEQ Ex. 6).

11. After receiving the final permit application, the Division began its permit analysis. As part of its analysis, the Division confirmed that the application met all the requirements outlined in the DEQ's statutes and the Air Quality Division's rules, specifically, Chapter 6, Section 2. For instance, the Division analyzed and examined the estimated emissions, the best available control technology, the major source applicability, the prevention of significant deterioration, the ambient air quality, and the land use planning. The Division also performed its own independent calculations to confirm Asphalt Specialties' analysis. The Division's calculations matched those from Asphalt Specialties. The Division concluded that the Quarry's operations would not exceed the EPA's air quality standards and complied with all other applicable requirements. (Tr. – Burton testimony, 32-36; DEQ Ex. 7).

12. The Division's analysis went through three separate internal reviews to confirm it was correct. (Tr. – Burton testimony, 36-37, Vehr testimony, 73; DEQ Ex. 7).

13. Following the Division's analysis dated May 3, 2021, the application proceeded to a public comment hearing. Several commenters were concerned about fugitive dust emissions. Another commenter was concerned about selenium contamination in the area. (Tr. – Burton testimony, 37-38, Vehr testimony, 75-76; DEQ Exs. 8, 11).

14. Because the selenium comment, in part, concerned water quality, the Water Quality Division of the DEQ reviewed the comment and concluded that there were not any current concerns about selenium contamination in the water. (Tr. – Burton testimony, 38-39, Zygmunt testimony, 100-104, 112-113; DEQ Exs. 8, 9).

15. Following the public comment hearing, the Division reviewed each comment and created a decision document wherein it compiled all the comments and responded to each one. Concerning the selenium contamination comment, the Division responded that the commenter would need to contact the Water Quality Division because the Air Quality Division did not have jurisdiction over water quality concerns. However, the Division reiterated that “[b]ased on the surface water and groundwater quality data available for this area, the WDEQ Water Quality Division is not aware of any current concerns with selenium contamination. The surface water samples from the closest tested sources has shown total selenium surface water concentrations of <1 ug/L which are below [the] most stringent surface water numeric criterion of 5 ug/L, which is protective of aquatic life. The available groundwater quality data ranges from <1 ug/L near the Quarry to 3.7 ug/L several miles to the west. These groundwater concentrations are well below Wyoming’s groundwater standard for domestic use of 50 ug/L, which is also the EPA drinking water standard. The Water Quality Division is responsible for addressing water contaminant and water quality issues.” (Tr. – Burton testimony, 40-41, Vehr testimony, 68-73; DEQ Ex. 9).

16. The decision document concluded that Asphalt Specialties’ application “complies with all applicable Wyoming Air Quality Standards and Regulations and that a permit will be issued to Asphalt Specialties Co., Inc.” (DEQ Ex. 9).

17. On December 6, 2021, the Division issued to Asphalt Specialties an air quality permit (P0024615) for the Lone Tree Creek Quarry. (Tr. – Burton testimony, 41-42, Vehr testimony, 74; DEQ Ex. 11). The permit contained thirteen conditions—some conditions represented best available control technologies such as treating all disturbed areas within sixty days of stripping the topsoil, application of chemical dust suppressants, and paving the haul road

within ninety days. The conditions were inserted into the permit to protect the ambient air. (Tr. – Burton testimony, 41-43, Vehr testimony, 78-80; DEQ Ex. 11).

18. The analysis and process used to issue the permit followed the Air Quality Division’s applicable rules. (Tr. – Burton testimony, 43; DEQ Ex. 11). All the requirements in Chapter 6, Section 2 of the Division’s Air Quality rules and Wyo. Stat. Ann. § 35-11-801 were followed. (Tr. – Vehr testimony, 73-74, 82).

19. Prior to the issuance of the air quality permit, on April 1, 2018, the Water Quality Division issued to Asphalt Specialties a letter of authorization and general permit with coverage under the Wyoming Pollutant Discharge Elimination System (WYPDES) for mineral mining activities for storm water discharges. (Tr. - Zygmunt testimony, 93-94; DEQ Exs. 13, 14). The Water Quality Division does not issue a general permit or letter of authorization if there is any potential for danger to public health. (Tr. - Zygmunt testimony, 97). The letter and permit were sufficient for water quality protection and to uphold the Water Quality Division’s rules. The coverage under the general permit expires March 31, 2023. (Tr. - Zygmunt testimony, 107-08; DEQ Exs. 13, 14).

V. CONCLUSIONS OF LAW

A. Principles of Law

20. Paragraphs 1 through 19 of the findings of fact are fully incorporated herein.

21. Facilities in Wyoming that have the potential to emit air contaminants are required to obtain a construction permit from the Air Quality Division before operating. Wyo. Stat. Ann. §§ 35-11-201, 203; DEQ rules, Air Quality, Chapter 6, Section 2(a)(i).

22. Facilities not subject to the provisions of Chapter 6, Section 3 [major source] of the Air Quality rules must obtain an operating permit from the DEQ under Chapter 6, Section 2 of the Air Quality rules. DEQ rules, Air Quality, Chapter 6, Section 2(a)(iii).

23. When a facility applies for a construction permit it must provide the Air Quality Division with the details of its expected emissions. *Id.* at Section 2(b)(i).

24. “No approval to construct [a facility] shall be granted unless the applicant shows, to the satisfaction of the Administrator of the Division of Air Quality that . . . [t]he [] facility will comply with all rules and regulations of the Wyoming Department of Environmental Quality, Division of Air Quality[.]” *Id.* at Section 2(c)(i).

25. The facility must not prevent the attainment or maintenance of any ambient air quality standard. *Id.* at Section 2(c)(ii).

26. The facility must “utilize the Best Available Control Technology with consideration of the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility.” *Id.* at Section 2(c)(v).

27. “When the [DEQ] has, by rule or regulation, required a permit to be obtained it is the duty of the director to issue such permits upon proof by the applicant that the procedures of this act and the rules and regulations promulgated hereunder have been complied with. In granting permits, the director may impose such conditions as may be necessary to accomplish the purpose of this act which are not inconsistent with the existing rules, regulations and standards.” Wyo. Stat. Ann. § 35-11-801(a).

28. In this matter, the petitioner is responsible for producing sufficient evidence showing that the Division’s issuance of the air quality permit was incorrect and not in accordance with law. “The burden of proving arbitrary, illegal or fraudulent administrative action is on the

complainant [or 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

29. The Council finds and concludes that it has jurisdiction over this matter.

30. The Council is required to determine whether the petitioner has proved by a preponderance of the evidence that the Division's issuance of the permit to Asphalt Specialties was in error and not in accordance with law.

31. The Council finds and concludes that based upon the testimony and exhibits admitted during the contested case hearing, the petitioner has failed to meet her burden of proof. Instead, the Division (although it does not have the burden of proof in this case) has proved that the permit was appropriately granted under Wyoming law and the Division's rules.

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

33. The Council finds and concludes that there was no evidence presented proving that the issuance of the permit to Asphalt Specialties was improper or not in compliance with law. In fact, there was no evidence that the Quarry will endanger public health or safety or that the emissions would exceed the applicable air quality standards.

34. The evidence presented by the Division proves that the emissions from this Quarry are well below the ambient air standards and that the dust control measures as part of this permit are consistent with the same measures required for other quarries.

35. Furthermore, the Council finds and concludes that the water quality concern raised by the petitioner is not within the regulatory authority or jurisdiction of the Air Quality Division, and therefore, cannot be considered by the Council in this matter. Water quality issues are a matter for the Water Quality Division. However, it is important to note that during the contested case, the administrator of the Water Quality Division testified and concluded that there was not any current concerns about selenium contamination from this site.

36. While the Council appreciates the petitioner's comments, the Council finds that she failed to provide sufficient evidence that proved the permit was not issued in accordance with law.

37. The Council finds and concludes that the Division properly processed and analyzed the permit application and that the permit complies with all applicable rules and statutes. The Division properly and professionally issued the permit to Asphalt Specialties.

VI. ORDER AND DECISION

IT IS HEREBY ORDERED that the Division's issuance of Air Quality Permit No. P0024615 to Asphalt Specialties Co. Inc. is upheld and affirmed in its entirety.

IT IS FURTHER ORDERED that the petitioner's request to reverse the Division's issuance of the permit is denied.

ENTERED this 13 day of September, 2022.



Steve Lenz, Chairman
Environmental Quality Council