

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

IN THE MATTER OF THE APPEAL OF A)
GRANT OF A SMALL MINE PERMIT TO)
STRID MARBLE & GRANITE)
COMPANY BY THE ADMINISTRATOR OF)
THE WYOMING DEPARTMENT OF)
ENVIRONMENTAL QUALITY, TFN 5 6/121)

Docket No. 12-4801

FILED

JUL 13 2012

Jim Ruby, Executive Secretary
Environmental Quality Council

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

APPEARANCES

Jeff Falkenburg, George Falkenburg and Phyllis Falkenburg, *pro se*.

Luke Esch, Assistant Attorney General, for the Wyoming Department of Environmental Quality (DEQ).

Steve Freudenthal, Freudenthal & Bonds, P.C., for Strid Marble and Granite Company.

JURISDICTION

“The [Environmental Quality Council] shall act as the hearing examiner for the department [of environmental quality] and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” Wyo. Stat. Ann. § 35-11-112(a).

Jeff Falkenburg, George Falkenburg and Phyllis Falkenburg (hereinafter the “Petitioners”) challenge the grant of a mining permit to Strid Marble and Granite Company (sometimes referred to as “Strid” or “the company”) for the construction of a sandstone mine on land near Douglas, Wyoming, that belongs to the State of Wyoming. The Environmental Quality Council (also referred to as the “Council”) has jurisdiction to hear this appeal pursuant to Wyo. Stat. Ann. § 35-11-112(a)(iv) (“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 [the Environmental Quality Act].”).

The Council held a hearing on this matter on May 11, 2012, in Sheridan, Wyoming. Council member Rich Fairservis served as hearing officer. Other council members present included Chairman Tom Coverdale, Vice-Chairman David Searle, Tim Flitner, Dennis Boal and Dr. David Bagley. Council member John Morris was absent.

The following individuals filed comments critical of the small mine permit, but did not

appear at the Council's hearing on May 11, 2012, and were therefore dismissed from this matter: Mary Falkenburg, Garrett Falkenburg, Wagonhound Land and Livestock, Pamela Harr, Lyndon Fink, Kenneth Taylor, Darren Fink, and Benny and Pauline Middleton. Strid Marble and Granite Company, the permit applicant, previously filed a Motion to Strike and a Motion to Make More Definite and Certain with the Council; these motions were withdrawn at the beginning of the Council's hearing.

The Department of Environmental Quality called as its witness Anna Krzyszowska-Waitkus, the permit coordinator for the Strid mining permit application. Ms. Waitkus is a soil scientist with the Land Quality Division of the Department of Environmental Quality [the "DEQ"]. Eldon Strid, President of Strid Marble and Granite Company, testified on behalf of the mine permit applicant and as a witness called by the Petitioners. The Petitioners also presented testimony by Lowell Spackman, District 1 Supervisor for the Land Quality Division of the Wyoming DEQ; Jeff Falkenburg, a General Partner in the Falkenburg Ranch and neighbor of the proposed mine; and Keith Schoup, a terrestrial habitat biologist with the Wyoming Game and Fish Department. The following Exhibits were offered and received: DEQ 1 & 2, Strid 1 to 17, and Falkenburg 9 & 13.

STATEMENT OF THE CASE

Strid Marble and Granite Company applied for a permit to operate a small surface mine to extract sandstone from state land. The Department of Environmental Quality determined that Strid's mining permit application was complete and met the requirements of Wyoming environmental law. *See* Wyo. Stat. Ann. § 35-11-406. Petitioners, who are general partners in a ranch that abuts the proposed sandstone quarry, and who have leased grazing rights on the same parcel of state land, contest the grant of the mining permit.

FINDINGS OF FACT

1. On June 2, 2006, Strid Marble and Granite Company leased the right to mine for dimensional stone on 120 acres of land belonging to the State of Wyoming. [Strid Ex. 1]. The leasehold is located along Wagonhound Road, 12 miles south of Douglas, Wyoming, in section 32 of Township 31 North, Range 72 West. [Transcript at 22; DEQ Ex. 1 at 10a]. Strid intends to use the red sandstone mined from this land to create and sell dimensional stone blocks for the restoration of historic buildings. [Transcript at 49 & 75].

2. The Petitioners – Jeff Falkenburg, Phyllis Falkenburg, and George Falkenburg – are general partners in Falkenburg Ranches Limited Partnership. [Strid Ex. 10]. The Falkenburg Ranch has leased surface grazing rights from the State of Wyoming for the same land leased to Strid. [Transcript at 78].

3. Strid investigated other sources of sandstone in the Rocky Mountain region, but the company concluded that the quality and color of sandstone on the leased property best match material used over the past 100 years in historic buildings throughout the western United States. [Transcript at 49-50]. The original sandstone quarries appear to be no longer available. [Transcript at 50]. Restoration of historic buildings is a gradual process, and Strid's intent is to

compete in this limited market over a period of time. [Transcript at 49 & 75].

4. Strid Marble and Granite Company submitted an application for a small mine permit to the Department of Environmental Quality on August 23, 2010. [Transcript at 21; DEQ Ex. 1]. The permit application was reviewed by officials with the Land Quality Division of the Wyoming Department of Environmental Quality, including a soil scientist, a vegetation specialist, a bonding specialist, and a geologist. [Transcript at 19]. In addition, permit reviewers corresponded with officials with the Wyoming Game and Fish Department. [Transcript at 42 & 63; DEQ Ex. 1].

5. As part of the review process, DEQ required modifications to the Strid permit application to ensure better quality maps and a better understanding of topography after mining is complete, to specify how the company will control weeds on disturbed land, and to understand how the company will ensure that the operations do not impact winter habitat for mule deer. [Transcript at 23]. DEQ had 44 comments, and all were addressed to the agency's satisfaction by the company. [Transcript at 23].

6. On March 7 and March 14, 2012, the Department of Environmental Quality published notice of its review of the company's mining permit. On April 12, 2012, the Petitioners and other persons objected to the grant of a mining permit by the Department to Strid.

7. Petitioners, through the testimony of Jeff Falkenberg, testified to the following concerns about the proposed mining permit:

a. The land to be mined is scenic, and the proposed mining operation will detract from the land and detract from the view on neighboring land. For example, lichen growing on the rock to be mined will be destroyed. [Transcript at 71, Falkenberg Ex. 10].

b. The mine permit area is adjacent to Upper Wagonhound Road, a county road, and that Upper Wagonhound Road is less than 100 yards from existing ranch buildings. Petitioners believe the mine will result in increased dust and dust-related issues, as well as potential traffic hazards on Wagonhound Road. [Transcript at 8, 66-67]

c. Petitioners are concerned that precipitation will transport dust and dirt from the mine into the nearby creek, damaging water quality. [Transcript at 66-67]

d. Petitioners are concerned that this area, which provides winter habitat for mule deer, will be unable to fill this purpose if Strid is permitted to mine in the proposed area. [Transcript at 67].

8. The Mining plan approved by DEQ would be for a total permit area of 35 acres. The actual mining area will only consist of seven acres. [Transcript at 77]. Eventually, a total of 12 acres would be disturbed over the 30 years that the mine is in operation, but no more than 10 acres can be disturbed by mining-related activity at any one time. [Transcript at 35]. The remaining 22 acres are part of the buffer for the mine. [Transcript at 24].

9. Each year, Strid intends to remove about 1,000 tons of sandstone from its mine. [Transcript at 23-24]. The stone is on the surface of the land and only two to six inches of topsoil would be removed. [Transcript at 32]. Fifty to one hundred blocks of stone would be quarried each year, with each block being approximately four feet wide, four to six feet tall, and twenty-five feet long. [Transcript at 56]. The approved mine plan envisions the mined stone would affect an area of about 100 feet wide and 100 feet long per year. [Transcript at 33]. Reclamation is to proceed with the mining activity. [Transcript at 32].

10. The mine permit stipulates that there will be no permanent facilities at the mine. [Transcript at 25]. Rather, temporary mobile equipment will be brought after May 1st of each year. *Id.* Sandstone blocks will be cut from the exposed sandstone with specialized saws, and the water needed for the mining saws will be brought by truck from Douglas, Wyoming. *Id.* No blasting will take place. The mine will operate for one to two months each year. [Transcript at 57].

11. The Water Quality Division for the DEQ authorized the discharge of stormwater runoff by Strid, in conjunction with the proposed mining activities. [Transcript at 25-26; Strid Ex. 7]. Compliance with the DEQ water quality permit requires that Strid build berms or other structures to protect against water traveling across the disturbed permit area into Wagonhound Creek. [Transcript at 51-52; Strid Ex. 7].

12. The Air Quality Division for the DEQ declined to require a permit because the impact of the mine on ambient air quality would be insignificant. [Transcript at 26; Strid Ex. 6]. If Strid wishes to conduct crushing or screening of rock at the site, the Air Quality Division requires a new permit application and approval process to address air-related impacts. [Strid Ex. 6]. Strid is required to treat all disturbed areas, including roads, with chemicals to reduce dust. [Transcript at 27; Strid Ex. 6].

13. Strid is required to build a temporary fence to protect livestock during the mining season. [Transcript at 25]. In order to conserve the habitat for mule deer during the winter, no mining activities will occur from November 15th through April 30th. [Transcript at 96].

14. At the request of Strid, the Wyoming State Historic Preservation Office has reviewed the relevant land, and the Office's records do not reflect any previous judgment that the land in the mining permit has cultural or historical significance. [Transcript at 51].

15. Strid is currently working to adopt a road-use agreement with Converse County, Wyoming. [Transcript at 81-82]. The mining permit envisions about sixty truck trips to the mine per year. [Transcript at 87-88, Strid Ex. 14]

16. The proposed mining permit is not in an area that has been designated as rare or uncommon by the Environmental Quality Council. [Transcript at 28-29].

17. There are no occupied structures within 300 feet of the proposed permit area, [Transcript at 29], and this conclusion was verified with the maps in the application, [Transcript at 41-42]. The Petitioners' buildings are more than 400 feet from permit boundary, [Transcript

at 30], and more than 800 feet from disturbed area, [Transcript at 30].

18. When DEQ recommended public notice of permit approval, DEQ concluded the permit was complete, the fees paid, the appropriate bond would be set at \$20,400, and the mine would not be contrary to law or public policy. [Transcript at 29-30].

19. The lead reviewer referred to the Strid mine as having “the smallest impact I ever reviewed through the small mine operation” permitting in her twelve years of experience with the State of Wyoming. [Transcript at 32-33].

20. DEQ concluded there was no basis to deny the mining permit application. [Transcript at 31].

CONCLUSIONS OF LAW

21. The Legislature has provided specific criteria for the review and permitting of non-coal mining permits:

(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;

* * *

(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.

Wyo. Stat. Ann. § 35-11-406(m).

22. The statute provides that a mining permit "shall be granted" if the application complies with federal and state law, and the Director of the Wyoming DEQ "shall not deny a permit" except for certain listed reasons. Wyo. Stat. Ann. § 35-11-406(m). The use of the term "shall" limits the ability of the Director to consider issues beyond the listed factors. The Wyoming Supreme Court has "repeatedly found the word 'shall' in a statute to be mandatory" and removes discretion from the decisionmaker. *In re MN*, 171 P.3d 1077, 1080 (Wyo. 2007). If the DEQ concludes that the statutory criteria have been met, a mining permit must be granted.

23. The Petitioners are responsible for producing evidence that the Director's decision to grant the mining permit 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. Environmental Quality Council*, 805 P.2d 268, 273 (Wyo. 1991) (quoting *Wyoming Bancorporation v. Bonham*, 527 P.2d 432 (Wyo. 1974)).

24. The Department of Environmental Quality has adopted separate regulations for the review and approval of mining permits for small mines, which are defined as "involving not more than 10,000 cubic yards of overburden and ten acres of affected land in any one year." [Transcript at 22, 36]. DEQ Regulations, Land Quality Division, Noncoal Small Mining Operations, Ch. 9, § 1(a) (2012).

DECISION

25. Wyoming law favors the issuance of mining permits. If the statutory criteria are met, then the Wyoming DEQ *shall* issue a mining permit. Indeed, the statute's obligation not only requires issuance of permits, but it carefully limits the factors that can be considered when deciding whether to approve a completed application for a mine permit. *Conclusions of Law*, ¶¶ 21-22.

26. The Wyoming DEQ concluded that all relevant criteria have been met. *Findings of Fact* ¶¶ 5, 6, 18-20.

27. The Petitioners must provide evidence that the DEQ erred with its conclusion that Strid's mine permit application satisfies the statutory criteria. The evidence and argument provided by the Petitioners in this case are not sufficient to overrule the Department's decision. *Conclusions of Law* ¶ 23.

28. While Petitioners provide evidence that the location of the mine and the nearby property is "scenic" in the sense that such a term is commonly used, the Director cannot deny a permit on this basis. Wyoming law prevents mining only on land "*that has been designated by the [Environmental Quality Council] a rare or uncommon area and having particular historical, archaeological, wildlife, surface geological, botanical or scenic value.*" Wyo. Stat. Ann. § 35-11-406(m)(iv) (emphasis added). The Council has not designated this permit area as rare or uncommon, so damage to its scenic or historic value cannot be a basis for permit denial. Nor can the Council provide such a designation in this proceeding. *See* Wyo. Stat. Ann. § 35-11-112(a)(v) (2012) (as amended). *Findings of Fact* ¶¶ 7,14,16; *Conclusions of Law* ¶ 21.

29. While the Petitioners' concerns for mule deer habitat and the Falkenburg Ranch's prior actions to preserve winter range are to be encouraged, the Wyoming Game and Fish Department is the ultimate expert on wildlife management. The Game and Fish Department, in its official comments on the mining permit, recommended that no mining take place between November 15th and April 30th of each year. The permit applicant has agreed to this request, and the Wyoming Game and Fish Department has not invoked regulatory authority or otherwise directed any further wildlife management. In the absence of such a request from the regulatory agency, the Council declines to place further restrictions on the mining permit. *Findings of Fact* ¶ 5, 13.

30. At the May hearing, the Petitioners expressed concern about the effect of stormwater runoff into Wagonhound Creek. A proposed mining operation may not "cause pollution of any waters in violation of the laws of this state or of the federal government." Wyo. Stat. Ann. § 35-11-406(m)(v). During the hearing, Strid presented evidence that the Water Quality Division of the Department of Environmental Quality has issued a general permit governing stormwater runoff from mineral mining operations. Strid has received notice that any runoff of sediment from its mining activities will be authorized under this permit, provided that the company complies with the permit requirements. As a result, even if there is some possibility that the runoff protections could fail, this would not provide a reason to deny Strid's

permit. The mining statutes require that Strid prevent pollution that violates state and federal law, it does not require pollution prevention beyond that required by law and permits. *Findings of Fact* ¶¶ 7, 11; *Conclusions of Law* ¶¶ 21-22.

31. The Petitioners have also raised concerns about potential dust from the mining operation. Although the mining statute does not specifically address such concerns, the Department was required to analyze any potential effect under the state's administration of the Clean Air Act, and the Department concluded that the mining permit would not affect air quality, although the permit does require that Strid reduce the potential dust from the mine's road. To the extent that the concern about dust and traffic extends beyond the mine permit area, Strid is currently negotiating a road use agreement with Converse County, Wyoming. Although the Petitioner did raise specific concerns about dust effects, the Council did not receive evidence that would contradict otherwise negate the Department's conclusions. *Findings of Fact* ¶¶ 12 & 15.

32. Finally, Petitioners have presented testimony that nearby buildings can potentially see the mine, but – again – Wyoming law provides only a limited exception for nearby buildings. DEQ may not issue a permit when a proposed mine will be “within three hundred (300) feet of any existing occupied dwelling.” Wyo. Stat. Ann. § 35-11-406(m)(viii). The evidence presented at hearing established conclusively that the Petitioners' buildings are not within this boundary of concern, and further separation or screening is not required by statute. *Findings of Fact* ¶ 17.


33. No other grounds enumerated in W.S. 35-11-406(k) exist to deny the issuance of Strid Marble and Granite Company permit TFN 5 4/191.

34. All notice requirements have been met.

ORDER

WHEREFORE, it is HEREBY ORDERED that the issuance of small mine permit **TFN 5 6/121** to Strid Marble and Granite Company is affirmed.

DATED this 13th day of July, 2012.


Rich Fairservis, Presiding Officer
Environmental Quality Council

CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 17th day of July, 2012, I served a copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by electronic mail to the following:

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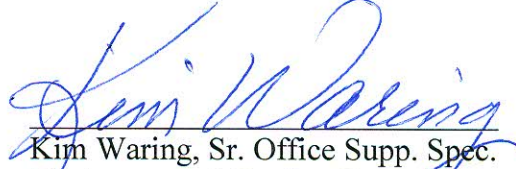
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