

February 2, 2018

Re: Rationale for Recommendation to Approve a 112c Permit Amendment Application with Objections, Fox #1 Clay Mine, Permit No. M-1977-219, AM-03

Introduction

Herein, all references to the Act and Rules refer to the Colorado Land Reclamation Act for the Extraction of Construction Materials, 34-32.5-101 *et seq.*, C.R.S. (Act), and to the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials (Rule). Copy of the Act and Rules are available through the Division's web site at www.mining.state.co.us.

On January 30, 2018, the Division of Reclamation, Mining and Safety (Division or Office) issued its recommendation to approve the 112c Construction Materials Reclamation Permit Amendment Application (AM-03) for the Fox #1 Clay Mine, File No. M-1977-219, over objections. This rationale document is intended to explain the process by which the Division arrived at its recommendation to approve, over objections, and respond to the issues raised by the objecting parties. The Division reserves the right to further supplement, amend, modify, or clarify this document and recommendation with additional details as necessary.

Summary of the Review Process

Summit Brick & Tile Co. (Applicant) submitted a 112c permit amendment application (AM-03) with the Division on June 30, 2017. The application was considered filed for review on August 1, 2017. All comment and review periods began August 1, 2017. The application describes a construction materials mining operation with clay, sandstone, and borrow material being the primary commodities to be mined. The permit amendment application encompasses 1,006.5 acres, increasing the currently approved 40.3 acre permit to 1,046.8 acres. The application states that affected lands will be reclaimed to support rangeland post-mining land use. Notice of the filing occurred in accordance with the requirements of the Act and Rules. The public comment period closed on September 14, 2017. During the public comment period the Division received written comments from the following individuals and agencies:

Timely Letters of Objection:

- 1) Ron Miller, not dated, received September 11, 2017
- 2) Frasca, Joiner, Goodman and Greenstein, P.C. on behalf of Shelley Stuart-Bullock, dated September 14, 2017, received September 14, 2017, signed by Zachary A. Grey

Timely Agency comments:

- 1) History Colorado, dated August 16, 2017, received August 21, 2017.
- 2) Colorado Division of Water Resources, dated and received August 24, 2017.
- 3) Pueblo County, dated and received August 25, 2017.



The Division forwarded copies of all objections and comments to the Applicant and scheduled the application for a hearing before the Colorado Mined Land Reclamation Board (Board) and a Pre-hearing Conference. The Division provided notice of the scheduled Board hearing and Pre-hearing Conference to all parties and interested persons. Due to the timely objections, on the decision date the Division would not make a decision on the application, but rather a recommendation to the Board.

During the review period the Division generated four adequacy letters. The Applicant addressed all adequacy issues to the Division's satisfaction. Therefore, on January 30, 2018, the Division determined the amendment application satisfied the requirements of Section 34-32.5-115(4) C.R.S. and issued its recommendation to approve the amendment application.

Issues Raised by the Objecting Parties

In these proceedings, the Division's jurisdiction over a 112c amendment application is limited to enforcement of the specific requirements of the Act and Rules. The Division considered all timely submitted comments in its review, but can address only the issues that directly relate to the specific requirements of an application as stated in the Act and Rules.

The issues raised by the objecting parties and commenting agencies are represented by italic bold font. The last names of the objecting parties who raised the issue are listed after the issue. The Division's response follows in standard font.

- 1. Concerns regarding additional truck traffic. Concerns regarding compromised safety and security of the worksite and neighboring properties. Concerns for devaluation of nearby property. Concerns regarding noise pollution and quality of life.***
(Stuart-Bullock)

The Act and Rules do not specifically address issues of off-site truck traffic, potential security concerns, property values, noise pollution, and quality of life. Therefore, these concerns are not within the purview of the Division's jurisdiction and are not a basis to deny the permit. Such issues are typically addressed at the local government level and not at the State government level. These issues should be addressed through the Pueblo County permitting process.

According to Section 34-32.5-115(4)(d) C.R.S., the Board or Office may deny an application if the proposed operation is contrary to the laws or regulations of Colorado or the United States, including but not limited to all federal, state, and local permits, licenses, and approvals, as applicable to the specific operation. On August 1, 2017, the Division provided notice of the amendment application to the Pueblo County Commissioners and the Pueblo County Department of Planning and Development. On August 25, 2017, the Division received a copy of a letter from Pueblo County which did not indicate any conflict with local zoning or local regulations for areas of the amendment within the area of the existing Certificate of Non-Conformance No. 91-10, but noted a special use permit is required for areas outside of the non-conforming area. The applicant has acknowledged Pueblo County's comments and indicated the necessary permit will be obtained prior to entering those areas outside of the non-conformance exemption area.

2. Concerns regarding dust and air pollution resulting from the operation.
(Stuart-Bullock)

The Act and Rules do not specifically address air quality issues. Such issues are under the jurisdiction of Pueblo County and the Air Pollution Control Division of the Colorado Department of Public Health and Environment. These issues should be addressed through the permitting process of Pueblo County and the Air Pollution Control Division of the Colorado Department of Public Health and Environment.

The Applicant has indicated the appropriate permit from Pueblo County may be necessary prior to operations commencing on some of the new parts of the mine. The Applicant has also indicated Air Pollution Permit #101/0257/001 is held for the mining operation and the contractor which does the processing has the appropriate equipment permits.

On August 1, 2017, the Division provided notice of the amendment application to the Pueblo County Commissioners, Pueblo County Department of Planning and Development, and to the Air Pollution Control Division of the Colorado Department of Public Health and Environment. As indicated earlier, the Division received comment from Pueblo County, however, this comment did not pertain to issues regarding dust or air pollution. The Division received no comment from the Air Pollution Control Division.

3. Concerns regarding impacts to the quantity and quality of surface water and possible damage to water rights from altering the topography.
(Miller)

Pursuant to Rule 3.1.6(1)(a), the application must demonstrate compliance with applicable Colorado water laws and regulations governing injury to existing water rights. Colorado water laws and regulations governing injury to existing water rights are enforced by the Division of Water Resources of the Office of the State Engineer. The application has been reviewed by the Division of Water Resources and the Division of Water Resources has submitted their conditions for approval within the comment letter dated and received August 24, 2017. The conditions for approval include that if stormwater is contained on-site, it must infiltrate into the ground or be released to the natural stream system within 72 hours, or all work must cease until a substitute water supply plan, or argumentation plan approved by water court, is obtained. The Applicant has concurred with the conditions provided by the Division of Water Resources and commits to not retaining stormwater for more than 72 hours. Therefore, the application satisfies the requirements of Rule 3.1.6(1)(a) and C.R.S. 34-32.5-116(4)(h).

Pursuant to Rule 3.1.6(1)(b), the application must demonstrate compliance with applicable federal and Colorado water quality laws and regulations, including statewide water quality standards and site-specific classifications and standards adopted by the Water Quality Control Commission. The Applicant has affirmatively stated a Storm Water Discharge Permit and Plan COG-501796 from the Water Quality Control Division of the Colorado Department of Public Health and Environment, addressing water quality issues resulting from storm water, has been approved for the operation, however will need to be amended or updated to cover the amendment area.

The application indicated surface water will be diverted around the operation by utilizing berms and isolation ditches to prevent stormwater runoff from entering the active mining area. The application indicates the mining and reclamation plans were developed to retain the natural historic drainage patterns across the affected lands, avoid the major drainage canyons on the site, maintain positive drainage, and not impact the prevailing hydrologic balance.

The application demonstrated compliance with the applicable performance standards of Rules 3.1.5(3), 3.1.6(1)(b), 3.1.6(3) and C.R.S. 34-32.5-116(4)(h), (i) and (j).

4. Concerns regarding the exposure of ground water. Concerns regarding an outstanding April 30, 2010 compliance letter from the Division regarding the exposure of groundwater
(Stuart-Bullock)

The operation is not authorized to use groundwater. The Applicant has affirmatively stated groundwater will not be exposed. The application has been reviewed by the Division of Water Resources and the Division of Water Resources has submitted their conditions for approval. These include that the proposed operation does not anticipate exposing groundwater and therefore exposure of groundwater must not occur during or after the mining operation. The Applicant has concurred with the conditions provided by the Division of Water Resources.

The April 30, 2010 letter, titled *Mining Operations with Exposed Groundwater*, was sent to all mining operators in the State regardless of whether their mining operations had exposed groundwater or not. The letter clarifies the Division's exposed groundwater policy and informed operators on four methods to comply with applicable Colorado water laws and ensure minimization of disturbances to the prevailing hydrologic balance. After a thorough review of the Fox #1 Clay Mine's permit file, the Division cannot find any evidence which indicates groundwater has ever been exposed by the operation nor has the Division ever cited a compliance problem or found a violation regarding the exposure of groundwater. Materials submitted with the application demonstrate the groundwater table is significantly below the maximum depth of the operation.

5. Concerns regarding Mr. Daniel W. Hanratty was not noticed of the application in accordance with Rule 1.6.2(1)(e). Concerns regarding the Applicant failing to meet applicable notice requirements.

(Stuart-Bullock)

Pursuant to Rule 1.6.2(1)(e), the Applicant shall mail or personally serve a copy of the published public notice to all Owners of Record of the surface and mineral rights of the affected land. The application identified Daniel W & Cheryl L Hanratty as an owner of surface and subsurface of the affected lands. On September 21, 2017, the Applicant submitted proof of publication and proof of all required notices. Within the September 21, 2017 submittal, the Applicant provided a copy of the Certified Return Receipt (Article Number 7010 2780 0002 2063 2608) signed by a Dan Hanratty on August 7, 2017, demonstrating proof of notice.

Pursuant to Rule 1.6.2(1)(a), the Applicant was required to send a notice, prior to submitting the amendment application, to the local Board of County Commissions and to the Board of Supervisors of

the local soil conservation district. The Applicant submitted proof on June 30, 2017 in the form of a date-stamped copy of the notice acknowledging receipt by the Pueblo County Board of County Commissioners and the South Pueblo County Soil Conservation District, both on June 26, 2017.

Pursuant to Rule 1.6.2(1)(b), the Applicant was required to post notices (signs) at the location of the proposed mine site of sufficient size and number to clearly identify the site as the location of a proposed mining operation. The Applicant posted 10 notices around the proposed mine site with eight along Siloam Road. During the October 25, 2017, pre-operational inspection, the Division observed multiple site notices which were determined to meet the requirements of Rule 1.6.2(1)(b).

Pursuant to Rule 1.6.2(1)(c), the Applicant placed a copy of the application for public review at the local Clerk and Recorder and kept the public review copy current with adequacy responses and revisions in accordance with Rule 1.6.2(2).

Pursuant to Rules 1.6.2(1)(d) and (e), the Applicant was required to publish a public notice for the application in a local newspaper for four consecutive weeks and personally serve or provide a copy of the public notice to surface and mineral owners or record of the affected land and adjacent surface owners of record within 200 feet of the affected lands. As discussed earlier, the Applicant provided proof of the publication and proof of noticing owners of record on September 21, 2017.

The Applicant demonstrated compliance with all applicable notice requirements of Rule 1.6.2.

6. Concerns regarding the application fails to provide a description of the general effect the operation will have on wildlife. Concerns regarding the application fails to provide the raptor guidelines and buffer zones document as referenced in the Colorado Parks and Wildlife letter in Exhibit H materials.

(Stuart-Bullock)

Pursuant to Rule 6.4.8, the Applicant shall include a description of the game and non-game resources on and in the vicinity of the application area, including: a) a description of the significant wildlife resources on the affected land, b) seasonal use of the area, c) the presence and estimated population of threatened or endangered species from either federal or state lists, and d) a description of the general effect during and after the proposed operation on the existing wildlife of the area, including but not limited to temporary and permanent loss of food and habitat, interference with migratory routes, and the general effect on the wildlife from increased human activity, including noise.

Through adequacy review responses, the Applicant provided information in Exhibit H which meets the requirements of Rule 6.4.8, including the referenced raptor guidelines and buffer zones document as referenced in the December 27, 2016 Colorado Parks and Wildlife (CPW) letter.

On August 1, 2017, the Division provided notice of the amendment application to CPW. The Division received no comment from CPW, however, the Applicant contacted CPW prior to submitting the amendment and received a recommendation letter from the Area Wildlife Manager, Michael Trujillo, on December 27, 2016. During the review period of the amendment application, the Applicant contacted the local CPW conservation biologist, Ed Schmal, to discuss possible impacts to raptors. Mr. Schmal

requested observations be made by the Applicant to identify and locate active nests, nightly roosts, and active hunting areas that may exist in the area to be disturbed through the life of mine and to contact CPW if raptors are observed. The Applicant has committed to contacting CPW for help mitigating or eliminating possible impacts should raptors be observed in the proximity of the active mining operations. The Division confirmed this discussion and verified CPW's acceptance of this commitment.

The Applicant further addressed concerns regarding wildlife in the adequacy review responses. The Division determined the permit application satisfied the wildlife requirements of Rules 6.4.8 and 3.1.8.

7. Concerns regarding the application fails to include the blasting plan. Concerns regarding the application does not demonstrate off-site areas will not be adversely affected by blasting.
(Stuart-Bullock)

The application states that explosives will be used in conjunction with the mining operation, and all blasting will be conducted by Buckley Powder or another local certified, licensed blasting contractor. Through adequacy review responses, the application includes a blasting plan, prepared by Buckley Powder and Michael Leidich, P.E., which details the proposed pre-blast survey plan, blast design and layout, blasting procedures, blast monitoring and limitations, a flyrock control plan, misfire procedure, and blasting report documentation protocols.

According to the pre-blast survey plan provided in Exhibit D, the Applicant is obligated to offer pre-blast surveys to all landowners with structures located within one-half mile from the active mining area where blasting operations are planned, at no cost to the property owner. The mining plan is broken into nine areas and prior to opening a new area, a survey will be conducted to determine all habitable structures within one-half mile of the new mining area. This distance matches the pre-blast survey protocols established by the U.S. Department of the Interior, Office of Surface Mining, Reclamation, and Enforcement. The surveys will include photographic and video documentation of the condition of existing structures. The Applicant will provide a copy of the final pre-blast survey report to the structure owners and to the Division.

All blasts will be monitored. The blast monitoring procedures will include seismic monitoring to measure ground vibration and peak particle velocity and microphones to measure air over pressure and noise. Both the seismic instrument and microphone will be placed in the same location and will be located between the blast and the closest structure. If the closest structure is off the property, the instruments will be located next to the property line. Blasts will be monitored in three mutually perpendicular directions from the blast site. Additional seismographs and microphones will be placed in line with other nearby structures if deemed necessary. The levels desired for ground vibrations and air over pressure have been set below that of the State of Colorado requirements; the current explosives regulations (7 C.C.R. 1101-9) state the maximum allowable particle velocity measured as inches/second (ips) in vertical, transverse, or longitudinal directions shall not exceed 2 ips within 300 feet of the blast, and air of pressure measured in decibels (dB) at the nearest dwelling shall not exceed 133 dB. The Applicant has committed to conducting blasting operations which exhibit a maximum peak particle velocity not exceeding 1 ips and air over pressure not exceeding 130dB at the nearest dwelling; these limitations are set below industry standard and State regulations.

The blaster will prepare a blasting report within 24 hours of each blast. The blasting report will include various blast information and measurements from seismographic and air blast monitoring. Copies of each blast report will be kept on file at the Applicant's main office in Pueblo, Colorado. All records, including blast statistics and blast monitoring, will be kept on file for a minimum of three years.

Exhibit D includes a mitigation plan, describing how the operation will respond to complaints from surrounding structure owners regarding potential impacts from blasting activities. The mitigation plan details the measures to be implemented and their associated timeframes.

The Division has determined that the blasting plan submitted in Exhibit D demonstrates that off-site areas will not be adversely affected by blasting, as required by Rule 6.5(4).

8. Concerns regarding alleged EPA violations associated with blasting.
(Stuart-Bullock)

The information presented in the September 14, 2017 objection, refers to two EPA blasting violations at the site, however the accompanying materials from the EPA's website does not indicate any such violations under the Enforcement and Compliance section. The Applicant has responded to this by stating the credentials of the blasting contractor are up to date and the EPA report provided by the objector does not indicate there are violations at the mine. After a thorough review of the Fox #1 Clay Mine's permit file, the Division cannot find any evidence of these EPA violations nor any notification by the EPA regarding these alleged violations. Additionally, the Division has never received a complaint, cited a compliance problem, or found a violation regarding blasting. Based on information received within the objection letter, statements from the Applicant, and a review of the permit file, these concerns are not a basis to deny the permit pursuant to Section 34-32.5-115(4) C.R.S. Please note, pursuant to Section 34-32.5-109(2)(a) C.R.S., it is the duty of the operator to comply with other applicable statutes and rules, including any EPA requirements.


Conclusion

Therefore, on January 30, 2018, the Office determined the amendment application satisfied the requirements of Section 34-32.5-115(4) C.R.S., and issued its recommendation to approve the 112c Construction Materials Reclamation Permit Amendment Application for the Fox #1 Clay Mine, File No. M-1977-219, over objections.

Certificate of Service

I, Elliott Russell, hereby certify that on this 2nd day of February, 2018, I deposited a true copy of the foregoing Notice to Parties and Interested Persons, dated February 2, 2018, **Rationale for Recommendation to Approve a 112c Permit Amendment Application with Objections, Fox #1 Clay Mine, Permit No. M-1977-219, AM-03**, in the US Mail, addressed to the following:

Matthew Welte Summit Brick & Tile Co. P.O. Box 533 Pueblo, CO 81002	Steve O'Brian Environment, Inc. 7985 Vance Dr., #205A Arvada, CO 80003
Ron Miller 5184 Siloam Rd Beulah, CO 81023	Frascona, Joiner, Goodman and Greenstein, P.C. 4750 Table Mesa Drive Boulder, CO 80305
Steve Turner History Colorado 1200 Broadway Denver, CO 80203	Caleb Foy, P.E. Division of Water Resources 1313 Sherman St, Suite 821 Denver, CO 80203
Dominga Jimenez-Garcia Pueblo County 229 West 12 th Street Pueblo, CO 81003	Pueblo County Commissioners 215 W. 10th Street Pueblo, CO 81003
South Pueblo County Conservation District 200 S. Santa Fe Ave., 4 th Floor Pueblo, CO 820003	



Signature and date

2/2/2018

EC: Tony Waldron, DRMS; Wally Erickson, DRMS; James Stark, DRMS; John Roberts, Esq., AGO for the MLRB; Charles Kooyman, Esq., AGO for the MLRB; Scott Schultz, AGO for DRMS