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

**IN THE MATTER OF THE APPEAL OF )  
THE RENEWAL BOND AMOUNT FOR ) EQC DOCKET NO. 16-4601  
BENTONITE MINING PERMIT NO. 624 )**

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**DEQ'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY  
OFFERED BY PETITIONER'S WITNESSES**

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Respondent, the State of Wyoming, Department of Environmental Quality, through its undersigned counsel, and under Wyoming Rule of Civil Procedure 26 and the Department of Environmental Quality Rules of Practice and Procedure, Chapter 2, Sections 3(a) and 14(a), hereby moves for the Council to exclude expert testimony offered by the petitioner or his witnesses because the petitioner did not timely designate any expert witnesses pursuant to the *Order of Schedule* entered in this proceeding.

Following a pre-hearing conference, the Council may enter a pre-hearing order that "will control the [course] of the hearing unless modified by the presiding officer to prevent manifest injustice." *Wyo. Dep't of Env'tl. Quality, Practice & Procedure*, ch. 1, § 9(b). The Council entered the pre-hearing order for this proceeding on March 8, 2016. (*See Order of Schedule* at 1-2). Among other deadlines, the order required that, "Expert witnesses must also be designated no later than May 13, 2016. The last day for depositions shall be May 20, 2016." (*Order of Schedule* at 1). On

May 13, 2016, the Department designated Mr. Brian Wood as a potential expert witness. (*See* DEQ's Designation of Expert Witnesses at 1-2). The petitioner did not designate any expert witness by May 13th.

An expert witness is a witness qualified to provide testimony about "scientific, technical, or other specialized knowledge." *See* Wyo. R. Evid. 702. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Wyo. R. Evid. 702. Providing an opinion expressing scientific, technical, or other specialized knowledge constitutes providing an expert opinion.

Under the Wyoming Rules of Civil Procedure, a party must disclose the identity of any expert witness the party intends to call at trial. Wyo. R. Civ. P. 26(b)(2)(A). Depending on the nature of the expert witness being called, the party must include additional information to allow the other party to understand the information and opinions the expert witness is likely to provide, the basis for those opinions, and the qualifications of the expert witness to provide the opinions. *See* Wyo. R. Civ. P. 26(b)(2)(B)-(C). Without that information, the other party would be unable to challenge items such as the witness's qualifications as an expert, the accuracy or reliability of the witnesses' opinions, the basis for the witness's opinions, and the reliability of the information on which the witness bases the opinions.

The Council adopted the requirements of Wyoming Rule of Civil Procedure 26(b)(2) by adopting an expert designation deadline the *Order of Schedule*. *See Wyo. Dep't of Env'tl. Quality, Practice & Procedure*, ch. 2, § 14(a).

In this proceeding, the petitioner challenges whether the Department required the proper amount of renewal bond in its letter dated December 16, 2015. (Petition at 4-5). The amount the Department determined was appropriate was higher than the amount that the petitioner proposed in his annual report, filed on or about August 14, 2016. (Petition at 3). The petitioner's consultant, ECS Engineers, assisted with preparing the annual report and calculated the proposed bond amount. (*See* Petition Ex. B at 8-11). As an employee of ECS, the petitioner has designated Mr. Shawn Gustafson as a potential witness who "may testify as to his knowledge of this matter and any facts pertaining thereto." (*See Plaintiff's Witness Designation and Exhibit List* at 1). The petitioner did not state that Mr. Gustafson may provide any opinion testimony.

It is likely that the petitioner will ask Mr. Gustafson to testify as a fact witness about the contents of the annual report, the proposed bond amount, and the basis for that proposed amount. The Department recognizes that this kind of testimony of the facts about the annual report would not necessarily constitute an expert opinion or require disclosure of Mr. Gustafson as an expert witness. To the extent that he authored the annual report and the estimated bond amount, he would have first-hand knowledge of their contents and creation.


However, the petitioner *would* elicit an expert opinion from Mr. Gustafson if he is asked to testify about the appropriateness or accuracy of the Department's conclusions stated in the Department's inspection report or the Department's own calculations establishing the bond amount. This is clearly opinion testimony to convey "scientific, technical, or other specialized knowledge" to the Council, provided by "a witness qualified as an expert by knowledge, skill, experience, training, or education." *See* Wyo. R. Evid. 702; *Smith v. Paiz*, 84 P.3d 1275-79, 2004 WY 14, ¶¶ 8-18 (Wyo. 2014).

By failing to timely disclose him as an expert witness by the May 13 deadline set in the *Order of Schedule*, the petitioner failed to comply with the Council's order and denied the Department the right to have advance notice of Mr. Gustafson's potential expert testimony. *See* Wyo. R. Civ. P. 26(b)(2)(A)-(C). This prevented the Department from being able to choose to depose Mr. Gustafson about his likely expert opinions. *See* Order of Schedule at 1 (setting deposition deadline on May 20, 2016).

The petitioner has not designated Mr. Gustafson as an expert and has not stated that his testimony is intended to provide any opinions. However, the sparse witness description makes the Department unsure whether the petitioner will seek to have Mr. Gustafson testify about his opinions of the Department's inspection report and bond calculations. If the petitioner asks Mr. Gustafson to testify about his expert opinions, the Council should exclude those opinions as a matter of compliance with the Council's order and of fairness to the Department. Similarly, the Council should exclude any other expert testimony offered by the petitioner for which no expert designation was filed.

THEREFORE, the Department respectfully requests that the Council exclude any expert testimony offered by petitioner or his witnesses for whom he did not file an expert witness disclosure.

DATED this 10<sup>th</sup> day of June 2016.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of June, 2016, a true and correct copy of the foregoing document was filed electronically with the Wyoming Environmental Quality Council's online docket system and served electronically through that system on the following:

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