

Andrew J. Kuhlmann (Wyo. Bar No. 7-4595)  
Senior Assistant Attorney General  
Wyoming Attorney General's Office  
2320 Capitol Avenue  
Cheyenne, WY 82002  
Phone: (307) 777-6946  
Fax: (307) 777-3542  
andrew.kuhlmann@wyo.gov  
*Attorney for the State of Wyoming*  
*Department of Environmental Quality*

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

**In the Matter of the Appeal of the Notice of )  
Violation and Order Issued to Good Bentonite )     Docket 17-4201A  
Company, LLC, DEQ NOV Docket 5748-17     )**

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**DEPARTMENT OF ENVIRONMENTAL QUALITY'S  
PREHEARING DISCLOSURE STATEMENT**

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The State of Wyoming, Department of Environmental Quality ("Department"), through its undersigned counsel, hereby submits this prehearing disclosure statement, list of witnesses, and list of exhibits pursuant to the *Order for Hearing and Response Order* filed in this matter.

**I.     SUMMATION OF FACTS**

This case arises out of Good Bentonite Company, LLC's ("Good Bentonite") appeal of the Notice of Violation and Order Docket No. 5748-17 ("NOV") issued by the Department to Good Bentonite on May 12, 2017. The NOV alleges that Good Bentonite violated the Wyoming Environmental Quality Act ("Act") by failing to maintain adequate reclamation performance bonding for mining permit, Permit PT-533 ("Permit 533"). Good Bentonite timely appealed the NOV in a letter dated May 12, 2017, and requested that the Environmental Quality Council ("Council") hold a hearing on the matter, pursuant to Wyoming Statute § 35-11-701(c)(ii)-(iii).

## II. LEGAL SUMMARY

Under the Act, a mine operator must provide to the Department a performance bond for each of the operator's permitted mines. Wyo. Stat. Ann. §§ 35-11-410, -411, and -417. Every year, the Director reevaluates and sets each permit's required bond amount as part of the permit's annual report and inspection process. Wyo. Stat. Ann. §§ 35-11-411(a)-(d) and -109(a)(xiii). After the Department has reviewed the operator's annual report, inspected the permit area, and produced a report for that inspection, the Director then sets a "renewal bond" amount for the following year-long renewal period. Wyo. Stat. Ann. §§ 35-11-411(d) and -417(c)(ii). The Act requires that the amount of a renewal bond shall be:

the amount equal to the estimated cost of reclaiming the land to be disturbed during that renewal period, and the estimated cost of completing reclamation of unreleased lands and groundwater disturbed during prior periods of time. The estimated cost shall be based on the operator's cost estimate, which shall include any changes in the actual or estimated cost of reclamation of unreleased affected lands, plus the administrator's estimate of the additional cost to the state of bringing in personnel and equipment should the operator fail or the site be abandoned.

Wyo. Stat. Ann. § 35-11-417(c)(ii).

The purpose of each bond is "to assure that the operator shall faithfully perform all requirements of this act and comply with all rules and regulations of the [department] made in accordance with the provisions of this act." Wyo. Stat. Ann. § 35-11-417(a). After the Director sets the renewal bond amount for a permit, the operator has an obligation to provide the Department with the required amount of reclamation bonding for the permit. Wyo. Stat. Ann. §§ 35-11-411(d), -415(a), and -417(a)-(c). Failure to provide the required bonding is a violation of the Act. *Id.*

When a violation occurs, the Director shall issue a written notice of the alleged violation and may order the person alleged to be responsible to cease and desist the violation within the time

the Director may determine. Wyo. Stat. Ann. § 35-11-701(c)(i). “Any order is final unless, not later than ten (10) days after the date the notice is served, the person or persons named therein request, in writing, a hearing before the council.” Wyo. Stat. Ann. § 35-11-701(c)(ii). When an order is appealed, the issue before the Council is whether a violation has occurred. Wyo. Stat. Ann. § 35-11-701(c)(iii).

### **III. STATEMENT OF ISSUES, CLAIMS, AND DEFENSES**

Pursuant to Wyoming Statute § 35-11-701(c)(iii), the only issue in this case is whether Good Bentonite violated the Act by failing to provide the required amount of reclamation performance bonding.

The Department argues that the Council should find that a violation of the Act occurred and affirm the NOV. The Department claims that the Director of the Department set the current required bond amount for Permit 533 in a letter dated March 15, 2017, and that Good Bentonite violated the Act, specifically Wyoming Statutes §§ 35-11-415(a) and -417(a), by failing to provide bonding to meet the required bond amount. The Department also claims that, over a month before the Director issued his letter setting the current bond amount, the Department gave Good Bentonite the opportunity to review and comment on the proposed new bond amount. The Department claims that the company did not respond. The Department further claims that Good Bentonite did not appeal the March 15, 2017 Director’s letter that officially established the current required bond amount. The Department also asserts that, even prior to the violation noted in the NOV, Good Bentonite has failed to provide full bonding for Permit 533 since signing a settlement agreement that became effective on March 19, 2013. The Department claims that it and its staff did not act arbitrarily, capriciously, in abuse of its discretion, or contrary to law in any actions taken regarding

Permit 533 or its renewal bond amount. In addition, the Department claims that the actions it took regarding Permit 533 were discretionary.

According to a letter dated July 27, 2017 filed in response the Department's motion for a more definite statement, Good Bentonite claims that the current required bond amount for Permit 533 is inaccurate and should be much lower, and that it includes lands that the Department required the company to reclaim at the "Beaver Creek site" (may have intended to refer to "Bear Creek"). However, Good Bentonite has not claimed that it did not violate the Act as alleged in the NOV, or that it has provided full bonding for Permit 533.

#### **IV. BURDEN OF PROOF**

This matter concerns the appeal of a notice of violation and order and the hearing is governed by Wyoming Statute § 35-11-701(c)(ii)-(iv). The general rule in administrative law is that, unless a statute otherwise assigns the burden of proof, the proponent of an order has the burden of proof. *JM v. Department of Family Services*, 922 P.2d 219, 221 (Wyo. 1996). The normal standard of proof in administrative hearings is the preponderance of the evidence standard. *Id.* at 223. Preponderance of the evidence is defined as "proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence." *Kenyon v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2011 WY 14, ¶ 22, 247 P.3d 845, 851 (Wyo. 2011). Therefore, the Department has the burden of proof and the standard of proof is the preponderance of the evidence.

#### **V. WITNESSES**

##### **A. WILL CALL:**

Brian Wood  
District 2 Assistant Supervisor  
Land Quality Division  
Wyoming Department of Environmental Quality

c/o Andrew Kuhlmann  
Wyoming Attorney General's Office  
2320 Capitol Avenue  
Cheyenne, WY 82002  
(307) 777-6946

Mr. Wood may testify about his duties as a permit coordinator for the Department, and specifically his work on Permit 533 and his knowledge of the facts and events supporting the NOV. Mr. Wood may testify generally about the procedures and processes involved with the Department reviewing annual reports, inspecting mine permits, drafting inspection reports, calculating bond amounts, setting bond amounts, or other related procedures. He also may testify regarding his knowledge, skill, experience, training, or education qualifying him as an expert regarding field inspections, inspection reports, and bond determinations for mining permits including, but not limited to, Permit 533. Additionally, he may testify about his knowledge, observations, and opinions regarding field inspections, annual reports, inspection reports, bond calculations, interactions and communications with Good Bentonite and its agents, or other aspects of or issues related to Permit 533 or its reclamation bonding. He may testify based upon his observations, actions, and opinions in support of the Department's inspection reports, determination of the bond amount for Permit 533, the letter from the Department setting the bond amount for Permit 533, and the NOV. Mr. Wood may also testify about his knowledge of, or actions involving, other permits that may be relevant to this matter.

**B. MAY CALL:**

Nancy Williams  
District 2 Supervisor  
Wyoming Department of Environmental Quality  
c/o Andrew Kuhlmann  
Wyoming Attorney General's Office  
2320 Capitol Avenue  
Cheyenne, WY 82002  
(307) 777-6946

Ms. Williams may testify about her knowledge of, and actions involving, Permit 533 and the calculation of its current required bond amount.

Alan Edwards  
Deputy Director (Acting as Land Quality Administrator)  
Wyoming Department of Environmental Quality  
c/o Andrew Kuhlmann  
Wyoming Attorney General's Office  
2320 Capitol Avenue  
Cheyenne, WY 82002  
(307) 777-6946

Mr. Edwards may testify about his knowledge of, and actions involving, Permit 533. Mr. Edwards may also testify regarding the Department's responsibilities and procedures related to this matter. Mr. Edwards may also testify about his knowledge of, or actions involving, other permits held by Good Bentonite that may be relevant to this matter.

The Department reserves the right to call any witnesses called or designated by Good Bentonite, as well as any other witnesses needed for the purposes of rebuttal or impeachment testimony.

## **VI. EXHIBIT LIST**

At the hearing in this matter, the Department will introduce the following exhibits:


<u>Exhibit</u>	<u>Description</u>
DEQ 1	Notice of Violation and Order No. 5748-17 and Cover Letter
DEQ 2	2016 Annual Report
DEQ 3	November 2016 Inspection Report and Cover Letter
DEQ 4	Guideline 12A (revised February 22, 2016)
DEQ 5	Director's Bond Letter (dated March 15, 2017)

In addition to the exhibits above, the Division may introduce the following other exhibits:

<u>Exhibit</u>	<u>Description</u>
DEQ 6	Permit 533 Mine Plan
DEQ 7	Permit 533 Mine Plan Map
DEQ 8	Black Hills Bentonite's Map of Permit 533 (drawn August 2011)
DEQ 9	Settlement Agreement for EQC Docket No. 11-4201A and Cover Letters (effective date March 19, 2013)

The Department has filed copies of the exhibits listed above along with this statement. The Department also reserves the right to introduce any exhibits designated by Good Bentonite or any other exhibits for the purposes of impeachment or rebuttal. The Department also reserves the right to supplement this exhibit list prior to the hearing in response to new information or documents as they may become known.

Respectfully submitted this 17<sup>th</sup> day of November, 2017.

  
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Andrew J. Kuhlmann (Wyo. Bar No. 7-4595)  
Senior Assistant Attorney General  
Wyoming Attorney General's Office  
2320 Capitol Avenue  
Cheyenne, WY 82002  
(307) 777-6946  
[andrew.kuhlmann@wyo.gov](mailto:andrew.kuhlmann@wyo.gov)  
*Counsel for the State of Wyoming Department  
of Environmental Quality*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17<sup>th</sup> day of November, 2017, a copy of the foregoing document was filed electronically with the Wyoming Environmental Quality Council's online docket system and copies were served, as indicated, on the following:

Todd Parfitt  
Director, DEQ  
todd.parfitt@wyo.gov  
*(By email)*

Alan Edwards  
Deputy Director, DEQ  
alan.edwards@wyo.gov  
*(By email)*

Brian and Danae Good  
Good Bentonite Company, LLC  
3796 Lane 32 ½  
Greybull, WY 82426  
teamrope@tctwest.net  
*(By email)*

  
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Wyoming Attorney General's Office