

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

IN RE BENTONITE PERFORMANCE)
MINERALS LLC) DOCKET 18-1601

**PETITIONER BENTONITE PERFORMANCE MINERALS, LLC'S MOTION TO
COMPEL COMPLIANCE WITH DISCOVERY REQUESTS AND SANCTIONS**

Petitioner Bentonite Performance Minerals, LLC (BPM), pursuant to Chapter 2, Section 11(a) of the Rules of the Wyoming Department of Environmental Quality (DEQ) and the Hearing Examiner's August 21, 2018 Order of Schedule, hereby moves the Hearing Examiner to compel Respondent 2U Ranch, LLC (2U) to (1) comply with and respond to discovery requests served in the above-captioned proceeding and (2) order sanctions as mandated by the Wyoming Rules of Civil Procedure. BPM states as follows in support:

BACKGROUND AND FACTS

1. The deadline for service of discovery in this proceeding was November 16, 2018. Order of Schedule at 2.
2. On November 5, 2018, prior to the discovery period closing, BPM served a Notice of Deposition on Mr. Ronald Ericsson, the President of 2U, by electronic mail. BPM sent a courtesy copy of the Notice of Deposition by certified letter to 2U's mailing address, c/o Mr. Ericsson, at 426 Lonesome Country Road, Alzada, Montana. Ex. 1, Notice of Deposition at 3.
3. On November 8, 2018, Mr. Ericsson received, accepted, and signed for the certified letter at the Alzada, Montana address. Ex. 2, Return Receipt. At no point has Mr. Ericsson informed BPM that the Alzada, Montana mailing address is inconvenient or that Mr. Ericsson was not at or planned to leave the 2U property in the near future.
4. To accommodate Mr. Ericsson, the Notice of Deposition requested that Mr. Ericsson appear for an oral deposition on November 19, 2018 in Sundance, Wyoming, the

closest locality to the 2U property with facilities to accommodate a deposition. Sundance, Wyoming is an approximate 4.5 hour drive from the Cheyenne, Wyoming offices of counsel for BPM. Ex. 1, Notice of Deposition at 1.

5. The Notice of Deposition further requested that Mr. Ericsson produce certain documents pertaining to the subject matter of this proceeding. Ex. 1, Notice of Deposition at Exhibit A.

6. Pursuant to the Order of Schedule, parties are obligated to respond to discovery production requests no later than thirty days after receipt. Order of Schedule at 2.

7. The Notice of Deposition requested Mr. Ericsson advise counsel for BPM of any conflict with the proposed deposition date, time, or location, or whether there existed a preferential date, time, or location to conduct the deposition. Ex. 1, Notice of Deposition at 2.

8. The Notice of Deposition included contact information of counsel for BPM which Mr. Ericsson has repeatedly utilized throughout the course of this proceeding to contact both BPM and counsel for BPM with various requests and concerns.

9. Counsel for BPM and a court reporter attended the deposition in Sundance, Wyoming on November 19, 2018 at the arranged time and location.

10. Mr. Ericsson did not appear for his deposition or produce responsive documents. Ex. 3, Certificate of Non-Appearance at 3.

11. At no time did Mr. Ericsson contact counsel for BPM regarding the Deposition Notice or otherwise advise counsel for BPM of any conflict with the noticed deposition date, time, or location, or that there existed a preferential date, time, or location to conduct the deposition. Ex. 3, Certificate of Non-Appearance at 4.

12. At no time did Mr. Ericsson move the Hearing Examiner for a protective order.

13. Multiple attempts to contact Mr. Ericsson on the day of the deposition were unsuccessful. Ex. 3, Certificate of Non-Appearence at 3.

14. To date, Mr. Ericsson has provided no justification for his failing to appear at his deposition on November 19, 2018 or produce responsive documents.

15. On November 28, 2018, 2U responded to BPM's subsequent efforts to confer and reschedule the deposition and informed counsel for BPM that Mr. Ericsson would be made available for an oral deposition on December 22, 2018 in Alpine, Texas (located in southwest Texas approximately 1,200 miles from the 2U property), and that documents responsive to the Deposition Notice would be produced at that time and place. Ex. 4, Roland Ericsson Email.

16. 2U provided no basis for either its proposed date or location of the rescheduled deposition.

17. 2U provided no basis for delaying the production of responsive documents.

18. 2U's proposed deposition date is not arbitrary: December 22, 2018 is **one day** after the final prehearing deadline to file dispositive motions and motions in limine, and weeks after the deadlines to identify witnesses for hearing. Order of Schedule at 2.

19. Conducting a deposition after the expiration of all prehearing deadlines is of no value to BPM and frustrates the EQC's fact finding exercise.

20. BPM has the right to discover the factual basis for 2U's refusal to consent to the proposed mining and reclamation plans and review documents responsive to the Deposition Notice prior to the deadlines to name witnesses and file motions.

21. 2U's actions throughout the course of this proceeding have frustrated the discovery process and unfairly prejudiced BPM.

22. BPM incurred costs and expenses preparing for and attending the November 19, 2018 deposition in Sundance, Wyoming, including but not limited to attorney's fees, court reporter and meeting room rental costs, and travel expenses.

ARGUMENT

1. The EQC conducts contested case proceedings in accordance with the Wyoming Rules of Civil Procedure. DEQ Rules, Chapter 2, Section 2.

2. Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. Wyo. R. Civ. P. 26(b)(1).

3. A party may, by oral questions, depose any person, including a party. Wyo. R. Civ. P. 30(a)(1).

4. A party who wants to depose a person need only give reasonable written notice prior to the deposition date. Wyo. R. Civ. P. 30(b)(1).

5. The party who notices a deposition may request the production of documents at the deposition. Wyo. R. Civ. P. 30(b)(2).

6. The Hearing Examiner may order sanctions if a party fails, after being served with proper notice, to appear for his deposition. Wyo. R. Civ. P. 37(d)(1)(A)(i).

7. Available sanctions include but are not limited to (1) directing that factual matters be resolved against the disobedient party; (2) prohibiting the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence; or (3) rendering a default judgment against the disobedient party. Wyo. R. Civ. P. 37(d)(3); 37(b)(2)(A)(i)-(vi).

8. In addition, the Hearing Examiner is required to order the party failing to appear for his deposition “to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Wyo. R. Civ. P. 37(d)(3).

9. Ordering 2U to pay BPM’s reasonable expenses caused by Mr. Ericsson’s failure to attend his deposition (including attorney’s fees accrued in drafting and filing this motion) is mandatory and not discretionary. Wyo. R. Civ. P. 37(d)(3); *Winsor v. Young*, No. 12-CV-35-J, 2013 WL 870253, at *2 (D. Wyo. Jan. 23, 2013).

10. BPM has the right to discover the factual basis for 2U’s refusal to consent to the proposed mining and reclamation plans, and 2U’s actions frustrate the discovery process, unfairly prejudice BPM, and constitute sanctionable conduct under the Wyoming Rules of Civil Procedure.

11. Pursuant to Wyo. R. Civ. P. 37(a)(1), the undersigned counsel for BPM certifies that the movant has in good faith conferred or attempted to confer with the 2U and Mr. Ericsson in an effort to obtain the discovery sought without EQC intervention.

WHEREFORE, the movant requests the Hearing Examiner order as follows:

1. Mr. Ericsson shall appear for a deposition at the offices of Holland & Hart, LLP in Cheyenne, Wyoming at 9:00 a.m. on December 7, 2018.
2. Mr. Ericsson shall produce documents responsive to the November 5, 2018 Notice of Deposition on or before December 5, 2018 in compliance with the Order of Schedule.

3. 2U shall remit those reasonable expenses, including attorney's fees accrued in preparing for and attending the November 19, 2018 deposition and drafting and filing this motion, caused by Mr. Ericsson's failure to appear for his November 19, 2018 deposition.
4. Such further relief as the Hearing Examiner may deem just and equitable.
5. A proposed Order is submitted with this Motion.

DATED this 30 day of November 2018.



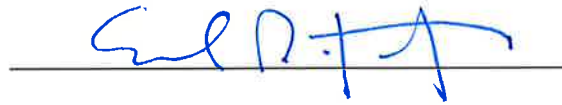
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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I served a true and correct copy of the foregoing PETITIONER BENTONITE PERFORMANCE MINERALS, LLC'S MOTION TO COMPEL COMPLIANCE WITH DISCOVERY REQUESTS AND SANCTIONS by email to:

2U Ranch, LLC
c/o Ronald Ericsson
ericsson@childselect.com

Jim Ruby
Executive Secretary, Wyoming Environmental Quality Council
jim.ruby@wyo.gov



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