

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

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

**REPLY IN SUPPORT OF PETITIONER'S MOTION TO LIMIT TESTIMONY AND
EVIDENCE AT HEARING**

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 December 27, 2018 Order for Hearing, replies in support of its Motion to Limit Testimony and Evidence at Hearing. BPM states as follows in support:

Introduction

In the event the Hearing Examiner does not grant summary judgment as a matter of law, the Wyoming Rules of Civil Procedure direct the Hearing Examiner to prohibit Respondent 2U Ranch, LLC (2U) from testifying or otherwise offering evidence at hearing on (1) whether BPM's mining and reclamation plans have been submitted to 2U for approval; (2) whether BPM's mining and reclamation plans are detailed so as to illustrate the full proposed surface use, including proposed routes of ingress and egress; (3) whether BPM's surface use substantially prohibits the operations of 2U; and (4) whether the propose reclamation plan reclaims the surface to its approved use as soon as feasibly possible. Because 2U failed to respond to, much less provide a good faith basis for their discovery abuses, the relief requested by BPM is appropriate and supported by the Wyoming Rules of Civil Procedure and the EQC rules guiding this proceeding.

Argument

Throughout this proceeding, BPM has made a good faith effort to involve 2U in this process and to understand – through discovery – 2U's objections to the proposed mining and

reclamation plans and BPM's Petition for an Order in Lieu of Consent. 2U – by and through Mr. Ericsson – now seeks to divorce itself from Mr. Ericsson's sworn testimony and raise contentions previously dismissed by Mr. Ericsson's sworn testimony. The Wyoming Rules of Civil Procedure require that 2U be bound by its discovery responses and the sworn testimony of Mr. Ericsson. Moreover, because 2U failed to respond to BPM's Motion to Limit Testimony and Evidence at Hearing, much less provide a good faith basis for their discovery abuses, the relief requested by BPM is appropriate.

A. The Wyoming Rules of Civil Procedure require that 2U be bound by its discovery responses and precluded from presenting new evidence at hearing.

The EQC conducts contested case proceedings in accordance with the Wyoming Rules of Civil Procedure. DEQ Rules, Ch. 2, § 2. The Rules of Civil Procedure provide an orderly process for the determination of controversies and are intended to provide notice to a party of the other's contentions, a fair opportunity to discover and develop the entire case and meet those contentions, and to avoid surprise – all to the end that a just result is more probable. *Hickey v. Burnett*, 707 P.2d 741, 744 (Wyo. 1985). Compliance with the Rules of Civil Procedure is mandatory, not optional, and to condone a practice which permits parties to simply ignore the rules will defeat their purpose. *Macaraeg v. Wilson (Estate of Obra)*, 749 P.2d 272, 275 (Wyo. 1988). The fact that 2U is acting *pro se* or that it now seeks to distance itself from Mr. Ericsson's reprehensible behavior and sworn testimony at deposition is of no excuse, and the Rules of Civil Procedure direct the Hearing Examiner to bind 2U to its discovery responses, including the sworn testimony of Mr. Ericsson.¹ *Schott v. Chamberlain*, 923 P.2d 745, 747

¹ It should be noted that the Ericssons are not typical *pro-se* parties. Roland Ericsson has participated fully in the discovery process and has a law degree. Ronald Ericsson has held himself out to be a sophisticated individual with considerable educational background.

(Wyo. 1996) (“Lack of an attorney does not excuse compliance with the rules of civil procedure.”).

Throughout discovery, 2U has maintained a single objection to BPM’s permit amendment application: that the proposed reclamation plan does not provide for the restoration of trees disturbed by the proposed operations.² At his December 12, 2018 deposition, Mr. Ericsson summarized 2U’s position as follows:

Q: Ronald, I very much want to speak to you about any number of aspects of reclamation for the subject lands, and to do that, we need to look at some of these documents so that we can –

A: The only thing that we are concerned about are the trees. We’re not going to fight on the soil conservation, not all of that. That’s not a concern of ours. We won’t object to that. We have one objection, restoring and not taking 10,936 trees, which BPM said they will not restore unless the landowner puts it in writing that they want them restored, which we did.

Q: Right, and that’s what I’m – that’s what I’m trying to get at here is where you’re at and what your position is, and so what I would like –

A: I will tell you my position again and again and again. We do not accept that BPM can comply with the DEQ regulation, with the Wyoming statutes which requires that the trees, the land be restored to the value equal or better than prior to being mined. That’s what the issue’s all about.

A: We’ve requested for almost two years to get BPM to explain how they’re going to restore the trees, and we’ve received an answer no, no, no. Why? It’s not possible. And the law requires it, the DEQ regulations require it. BPM knows it, the attorneys know it, and we know it, and everybody’s trying to avoid it. And that’s what the Council hearing’s about, and that’s why we didn’t sign the landowner’s surface agreement.

BPM Limit Mot. Ex. B, Ronald Dep. 14:15-15:1; 39:23-40:6; 57:12-19.

² BPM maintains that substantive and technical aspects of its proposed reclamation plan are outside the scope of the proceeding as ordered by the Hearing Examiner and inadmissible at hearing.

Despite having the opportunity, 2U offered no other objections to BPM's proposed mining and reclamation plans or BPM's petition for an Order in Lieu of Consent. Now, weeks after the discovery deadline has passed and just days before the evidentiary hearing, 2U attempts to raise additional issues³ and distance itself from Mr. Ericsson's sworn testimony by alleging, for the first time, that "[t]he deposition of Ronald Ericsson is not '2U's own sworn testimony' as he was not an owner, manager and did not have authorization to make any decisions regarding 2U Ranch, LLC." Response at 1, 5.

2U's documented discovery abuses, together with its newfound efforts on the eve of the evidentiary hearing to distance itself from Mr. Ericsson's sworn testimony and raise new issues not previously identified during discovery, are the exact scenarios the Wyoming Rules of Civil Procedure are designed to prevent and punish. 2U's actions have unfairly prejudiced BPM and foreclosed BPM of the opportunity to discover and develop its case and meet 2U's contentions. *Hickey*, 707 P.2d at 744. As such, the Hearing Examiner should bind 2U to its discovery responses and prohibit 2U from testifying or otherwise offering evidence at hearing on (1) whether BPM's mining and reclamation plans have been submitted to 2U for approval; (2) whether BPM's mining and reclamation plans are detailed so as to illustrate the full proposed surface use, including proposed routes of ingress and egress; (3) whether BPM's surface use

³ 2U's response levels various objections of perceived substantive and technical deficiencies with BPM's proposed reclamation plan, including, but not limited to, objections regarding tree restoration, wetlands, wildlife habitat, soil quality, vegetation, surface and subsurface water, and overburden piles. *See generally*, Response at 2-4. BPM maintains that such substantive and technical objections remain beyond the scope of this proceeding. Notwithstanding, at no point did 2U – despite having the opportunity - raise these issues during discovery. Moreover, Mr. Ericsson expressly testified that 2U did not contest these issues. *See for example*, Ronald Dep. 14:15-15:1.

substantially prohibits the operations of 2U; and (4) whether the propose reclamation plan reclaims the surface to its approved use as soon as feasibly possible.

B. 2U failed to respond to, much less provide a good faith basis for their discovery abuses, further justifying the relief requested by BPM.

2U failed to respond to or contest the factual matters asserted or the relief requested by BPM in its Motion to Limit Testimony and Exclude Evidence at Hearing in contravention of the Hearing Examiner’s December 27, 2018 Order of Hearing and the Rules of Civil Procedure.⁴ Order of Hearing at 1. As such, 2U offers no explanation, much less a justification, for Mr. Ericsson’s combative and unresponsive behavior at his deposition, including but not limited to his (1) refusal to access and review documents at deposition; (2) refusal to discuss matters pertinent to the Order in Lieu of Consent Analysis; (3) abrupt termination of the deposition; and (4) failure to otherwise meaningfully participate in the deposition. 2U’s discovery abuses – by and through Mr. Ericsson - have frustrated this proceeding and foreclosed BPM of the fair opportunity to discover 2U’s contentions and develop its case to meet those contentions.

Where a non-moving party fails to respond to a motion, Wyoming law directs the Hearing Examiner to resolve the alleged facts in favor of the moving party and grant the relief requested. *See for example, Case v. Sink & Rise, Inc.*, 2013 WY 19, ¶¶ 9-10, 297 P.3d 762, 765 (Wyo. 2013); *Motzko Co. USA, LLC. v. A & D Oilfield Dozers, Inc.*, 2014 WY 5, ¶ 16, 316 P.3d 1177, 1181 (Wyo. 2014); *Ahearn v. Tri-Cty. Fed. Sav. Bank*, 948 P.2d 896, 897 (Wyo. 1997); *Sandstrom v. Sandstrom*, 884 P.2d 968, 970–71 (Wyo. 1994). Because 2U failed to respond to,

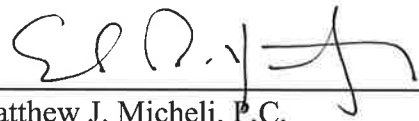
⁴ 2U’s response purports to respond to both the Motion for Summary Judgment *and* the Motion to Limit Testimony and Exclude Evidence at Hearing. Response at 1. However, 2U’s response is dedicated entirely to objecting to BPM’s Motion for Summary Judgment and fails to respond in any manner to BPM’s allegations of discovery abuses and request to exclude testimony and evidence at hearing.

much less provide a good faith basis for their discovery abuses, the relief requested by BPM is appropriate and supported by the Wyoming Rules of Civil Procedure and the EQC rules guiding this proceeding.

Conclusion

For the reasons stated herein, Petitioner Bentonite Performance Minerals, LLC respectfully requests the Hearing Examiner prohibit Respondent 2U Ranch, LLC (2U) from testifying or otherwise offering evidence at hearing on (1) whether BPM's mining and reclamation plans have been submitted to 2U for approval; (2) whether BPM's mining and reclamation plans are detailed so as to illustrate the full proposed surface use, including proposed routes of ingress and egress; (3) whether BPM's surface use substantially prohibits the operations of 2U; and (4) whether the propose reclamation plan reclaims the surface to its approved use as soon as feasibly possible.

DATED this 8th day of January, 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2019, I served a true and correct copy of the foregoing
REPLY IN SUPPORT OF PETITIONER'S MOTION TO LIMIT TESTIMONY AND
EXCLUDE EVIDENCE by email to:

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

Jim Ruby
Executive Secretary, Wyoming Environmental Quality Council
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