BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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

REPLY IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT

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 for Summary Judgment. BPM states as follows in support:

Introduction

Respondent 2U Ranch, LLC (2U) objects to BPM's Motion for Summary Judgment because of perceived substantive and technical deficiencies with BPM's proposed reclamation plan. To overcome summary judgment, 2U must provide admissible evidence showing there are genuine issues of material fact which, if proved, would have the effect of establishing or refuting an element of the Order in Lieu of Consent analysis. However, 2U's substantive and technical objections to BPM's proposed reclamation plan are beyond the scope of this proceeding and inadmissible at hearing. Because 2U fails to present any admissible evidence refuting the statutory elements of the Order in Lieu of Consent analysis, the EQC should grant summary judgment as a matter of law.

Argument

The EQA grants BPM a statutory right to petition the EQC for and Order in Lieu of Consent in the absence of obtaining surface owner consent to proposed mining and reclamation operations. Wyo. Stat. § 35-11-406(b)(xii). It is well-established that the scope of an Order in Lieu of Consent proceeding is narrow and limited to four statutory elements: the EQC is tasked with determining whether (1) the proposed mining and reclamation plans have been submitted to

2U; (2) the proposed mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress; (3) that the proposed surface use does not substantially prohibit the operations of the surface owner; and (4) the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible. *Id.*; August 21, 2018 Order of Schedule at 1. As recognized by the Hearing Examiner, this proceeding does not concern (1) whether the permit application is technically correct or (2) whether DEQ/LQD should issue the permit. August 21, 2018 Order of Schedule at 1-2.

The reason that substantive and technical aspects of the proposed mining and reclamation operations are beyond the scope of an Order in Lieu of Consent proceeding is self-evident**: the mining and reclamation plans are only proposals**. The issuance by the EQC of an Order in Lieu of Consent simply allows DEQ/LQD to process BPM's permit application and determine whether the mining and reclamation operations, as proposed by BPM in the permit application materials, comply with the EQA and its implementing regulations. After DEQ/LQD processes the permit amendment application and makes its decision on BPM's proposed mining and reclamation operations, 2U will have the opportunity to challenge any aspect of the permit it deems unlawful, including substantive and technical reclamation obligations.

All told, 2U's litany of grievances detailed in its response are irrelevant to the Order in Lieu of Consent elements enumerated above. 2U will have an opportunity to challenge the substantive and technical reclamation obligations of the permit amendment that 2U perceives deficient or otherwise unlawful, but only after DEQ/LQD processes the permit amendment application. If 2U is sincere in its opposition to the proposed reclamation of the subject lands, it is obligated to pursue its legal challenge in accordance with the administrative rules and after DEQ/LQD has completed its processing of BPM's application.

A. BPM has met its burden of establishing a prima facie case that no genuine issue of material fact exists with respect to Elements 1, 2, 3 and 4 of the Order in Lieu of Consent analysis and summary judgment should be granted as a matter of law.

BPM has met its burden of establishing a prima facie case that no genuine issue of material fact exists with respect to the four statutory elements at issue in this proceeding. As detailed in its Motion for Summary Judgment, BPM has established each element of the Order in Lieu of Consent analysis. In contrast, 2U has not identified any relevant evidence establishing or refuting an element of the Order in Lieu of Consent analysis. In fact, 2U has conceded – both through Mr. Ericsson's sworn testimony and by failing to present admissible evidence – each element of the Order in Lieu of Consent analysis.

With respect to Element 1, 2U testified under oath that it does not contest that it received the proposed mining and reclamation plans from BPM. Ronald Dep.[1] 41:12-18. Nonetheless, BPM provided documentation confirming that 2U received the proposed mining and reclamation plans on multiple occasions – beginning on January 8, 2016 and as recently as May 24, 2018. MSJ Ex. B; MSJ Ex. E. With respect to Element 2, 2U again testified under oath that it does not contest whether the proposed mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress. Ronald Dep. 41:19-24. Nonetheless, BPM provided evidence that it worked closely with 2U in developing the proposed mining and reclamation plans, including routes of ingress and egress, surface disturbance, mining progression, and reclamation. MSJ at 3. The proposed mining and reclamation plans reflect BPM's negotiations with 2U and adequately detail the proposed surface use, including routes of ingress and egress. **Exs. I and J**, Proposed Mining Plan and Map; **Exs. K and L**, Proposed Reclamation Plan and Map.

[1] Deposition of Ronald Ericsson ("Ronald Dep.") is attached as Exhibit B to BPM's Motion to Limit Testimony and Evidence at Hearing.

With respect to Element 3, BPM satisfied its burden by demonstrating that the proposed operations will not substantially prohibit 2U's existing use of the subject lands. Throughout the discovery process, BPM requested and 2U did not identify any existing uses of the subject lands by 2U, much less any existing uses that will be substantially prohibited by BPM's proposed operations. BPM's Request for Production sought all documentation evidencing 2U's existing uses of the subject lands that 2U alleges will be adversely impacted by the proposed operations. MSJ Ex. G at 5. 2U produced no documents responsive to the request. At deposition, Mr. Ericsson refused to identify or discuss 2U's existing uses of the subject lands and testified that existing uses, if any, were "beyond the scope of the proceedings."[2] Ronald Dep. 43:13-17; 44:16-45:10.

Lastly, Element 4 of the analysis concerns whether the proposed reclamation plan reclaims the disturbed lands as soon as feasibly possible. This is a temporal and economic analysis that does not implicate substantive or technical reclamation proposals. Here, the proposed reclamation plan recommends the identical reclamation methods and schedules for the subject lands as those previously approved for Mine Permit 267C, namely, concurrent back-casting. **Ex. I**, Proposed Mining Plan; **Ex. K**, Proposed Reclamation Plan; **Ex. M**, Hartman Declaration, ¶ 3. The proposed reclamation methods and schedules have previously been approved for and implemented on surface lands covered by Mine Permit 267C, including 2U's immediately adjacent lands impacted by BPM's mining operations and are consistent with the

[2] 2U alleges in its response that the subject lands have been used for recreation, hunting, wildlife and grazing. Response at 11. At deposition, counsel for BPM specifically inquired about 2U's use of the subject lands for hunting, wildlife, reclamation and grazing. Mr. Ericsson refused to respond to the inquiries. See Ronald Dep. 52:4-55:7. Notwithstanding, even if true, 2U offers no evidence that its existing uses of the subject lands will be "substantially prohibited" as contemplated by Element 4 of the Order in Lieu of Consent analysis.

industries' best practices. *See*, **Ex. M**, Hartman Declaration, ¶¶ 2-4. To date, 2U has not contested BPM's proposed reclamation schedules and methods, much less identified admissible evidence demonstrating that BPM's proposed reclamation plan will not reclaim the disturbed lands as soon as feasibly possible.

Because BPM presented admissible evidence establishing a prima facie case for Elements 1, 2, 3 and 4, the burden shifts to 2U to provide "competent evidence admissible at trial showing there are genuine issues of material fact" to overcome summary judgment. *Jones v. Schabron*, 2005 WY 65, ¶ 10, 113 P.3d 34, 37 (Wyo. 2005). As demonstrated below, 2U fails to satisfy its burden by raising no genuine issues of material fact.

B. 2U's opposition to summary judgment rests entirely on evidence and allegations that are not related to any of the elements of an Order in Lieu of Consent.

Throughout the course of this proceeding, 2U has made clear that it has **one** objection to BPM's proposed permit amendment application: that the proposed reclamation plan does not require the replanting of trees disturbed by the proposed mining operations. At his December 12, 2018 deposition, Mr. Ericsson testified repeatedly that 2U's basis for withholding consent and objecting to the issuance of an Order in Lieu of Consent rests with the replanting of trees disturbed by the proposed operations. Mr. Ericsson summarized 2U's refusal to consent to the proposed operations and its objection to BPM's request for and Order in Lieu of Consent as follows:

> 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.

Ronald Dep. 57:12-19.

2U, disavowing Mr. Ericsson's sworn testimony, now objects to multiple 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. However, 2U's newfound grievances are of no consequence for purposes of this proceeding. As detailed in BPM's Motion for Summary Judgment, 2U's objections regarding perceived deficiencies in the proposed reclamation plan are premature and beyond the scope of this proceeding. MSJ at 12. The Order in Lieu of Consent analysis does not implicate substantive or technical reclamation obligations prescribed by the EQA and its implementing regulations. Wyo. Stat. § 35-11-406(b)(xii); *see also*, August 21, 2018 Order of Schedule at 1-2 (precluding testimony at hearing regarding (1) the technical aspects of the permit amendment or (2) whether LQD/DEQ should issue the permit amendment as proposed).

The reason that substantive and technical aspects of the proposed mining and reclamation operations are beyond the scope of an Order in Lieu of Consent proceeding is self-evident**: the mining and reclamation plans are only proposals**. The issuance by the EQC of an Order in Lieu of Consent simply allows DEQ/LQD to process the permit application and determine whether the mining and reclamation operations, as proposed by BPM in the permit application materials, comply with the EQA and its implementing regulations. After DEQ/LQD processes the permit amendment application and makes its decision on BPM's proposed mining and reclamation operations, 2U will have the opportunity to challenge any aspect of the permit it deems unlawful, including substantive and technical reclamation obligations. Wyo. Stat. § 35-11-406.

2U's reliance on the *LeFaivre* and *Klover* EQC decisions demonstrates their misunderstanding of the law. *See* Response at 6 and 11. Significantly, the *LeFaivre* and *Klover* matters were not Order in Lieu of Consent proceedings. Rather, both cases concerned challenges before the EQC to mine permit applications after DEQ/LQD had processed the permit application and published the decision for public comment. *In the Matter of Objections to the Application of a Mining Permit Amendment by Robert LeFaivre, Permit No. 503, TFN 1 1/338* (1986) at FOF ¶¶ 4-5 ("Public notice of the permit amendment application was accomplished by publication in the Green River Star" and interested parties "filed timely objections to a portion of the mine permit amendment application."); *In the Matter of Objections to the Permit Application of George W. Klover, J.W.K. and T. Mining Company, TFN 1 6/281* (1982) at FOF ¶ 2 ("During the statutory prescribed time limit objections were filed by interested persons to the Land Quality Division."). In both matters, the EQC entertained a variety of challenges to the substantive and technical aspects of the processed permit applications deemed unlawful by the objecting parties. These cases clearly demonstrate that challenges to the substantive and technical aspects come after DEQ/LQD has had a chance to review the permit and complete its review of the permit.

Here, BPM's permit amendment application has not been processed by DEQ/LQD. 2U's desire to litigate the substantive and technical aspects of BPM's proposed reclamation plan in an Order in Lieu of Consent proceeding is untimely and constitutes an end-around of the EQA's permitting and appeal process. 2U – by relying solely on inadmissible substantive and technical objections to BPM's proposed reclamation plan – does not meet its evidentiary burden to overcome summary judgment. Wyo. Stat. § 35-11-406(b)(xii); *see also*, August 21, 2018 Order of Schedule at 2 (precluding testimony regarding technical aspects of BPM's permit amendment

application). Because 2U fails to present any facts related to or disputing Elements 1, 2, 3 or 4 of the Order in Lieu of Consent analysis, summary judgment is appropriate as a matter of law.

C. 2U provides no relevant evidence contesting Elements 1, 2, 3 or 4, rather stating only that Mr. Ericsson's deposition testimony conceding Elements 1, 2, 3 and 4 is not binding on 2U.

2U provides no relevant or admissible evidence contesting Elements, 1, 2, 3 or 4. Rather, 2U simply objects to BPM relying on the deposition testimony of Mr. Ericsson in support of its Motion for Summary Judgment 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 provides no factual or legal basis for the proposition that Mr. Ericsson's deposition testimony is not binding on 2U, and 2U's newfound position conflicts directly with Mr. Ericsson's sworn deposition testimony, countless representations made by Mr. Ericsson throughout the course of this proceeding on behalf of 2U, and past dealings between Mr. Ericsson and BPM on matters concerning 2U and the subject lands.[3]

Given Mr. Ericsson's extensive involvement in this proceeding, 2U's assertion (for the first time and on the eve of the evidentiary hearing) that Mr. Ericsson lacks the authority to act on its behalf is nothing short of egregious. Mr. Ericsson (1) formed 2U in 2011 and acts as 2U's registered agent; (2) accepted BPM's Order in Lieu of Consent petition on behalf of 2U; (3)

[3] Two unrecorded warranty deeds addended to 2U's response suggest that 2U conveyed portions of the subject lands to related parties on December 10, 2018, two days prior to Mr. Ericsson sitting for the deposition. 2U's attempt to convey the subject lands to related parties on the eve of the evidentiary hearing suggests a bad faith intention to further frustrate this proceeding. Notwithstanding, such conveyances have no bearing on whether Mr. Ericsson's sworn testimony is binding on 2U and only bring into question whether 2U and Mr. Ericsson have any role in this proceeding moving forward. *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 549 (Wyo. 1988) (holding that the EQA's "surface landowner" or "surface owner" protections are limited to the owner in fee of the surface estate).

agreed to service of pleadings on behalf of 2U; (4) requested and attended mediation on behalf of 2U; (5) filed approximately forty pleadings on behalf of 2U; (6) participated in multiple hearings on behalf of 2U; (7) is named as a witness by 2U for the upcoming evidentiary hearing; and (8) made innumerable representations to both counsel for BPM and the Hearing Examiner regarding his ownership interest in the subject lands and his authority to act on behalf of 2U.[4] Moreover, 2U – by and through Mr. Ericsson - has attempted to derail this proceeding on multiple occasions by (1) demanding an indefinite stay of this proceeding; (2) filing an unsupported motion to dismiss; (3) frivolously leveling claims regarding mineral ownership, lease validity and data trespass; (4) avoiding discovery; and (5) refusing to meaningfully participate in a deposition. 2U's effort to divorce itself from Mr. Ericsson's sworn testimony constitutes but another ploy to frustrate BPM's statutory right to obtain an Order in Lieu of Consent from the EQC.

Throughout the course of this proceeding, BPM has made every effort to determine the ownership and management structure of 2U and to involve all interested parties in this proceeding. Without exception, Mr. Ericsson has held himself out as the primary contact, owner and representative of 2U, and at no point has Mr. Ericsson denied having the requisite authority to act on 2U's behalf. For this reason, BPM noticed Mr. Ericsson to provide deposition testimony on behalf of 2U for purposes of this proceeding. MSJ Ex. G, Notice of Deposition at 1. Mr. Ericsson accepted service of the Notice of Deposition in early November (*id.*) and did not object to either being the named deponent or providing deposition testimony on behalf of 2U. Mr. Ericsson subsequently participated in a hearing and represented to the Hearing Examiner a willingness to sit for the deposition and provide deposition testimony for purposes of this

[4] *See for example*, **Ex. N**, 2U Surface Owner Consent Forms for BPM mining operations executed by Mr. Ericsson.

proceeding. *See* December 3, 2018 Hrg. Tr. On December 12, 2018, at the outset of his deposition, Mr. Ericsson acknowledged under oath that he was providing sworn testimony on behalf of 2U and represented that he had the requisite authority to testify on behalf and bind 2U:

Q: Ronald, we're going to go on the record now and begin this deposition and try to get through this as smoothly as we can. My name is Samuel Yemington. I'm an attorney for Bentonite Performance Minerals, and you've been noticed to provide oral deposition testimony today on behalf of 2U Ranch in the Environmental Quality Council proceeding that is ongoing in the State of Wyoming. Do you understand your role in this deposition?

A: Yes.

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Q: Mr. Ericsson, do you remember receiving this deposition notice?

A: Yes.

Q: And did you read this deposition notice?

A: Yes.

Q: And attached to the deposition notice was an Exhibit A. Do you remember that Exhibit A?

A: Yes.

Q: And as part of the Exhibit A, there was instructions and definitions. Do you remember that portion?

A: Not in detail.

Q: Okay. Well, what I would like to do then is remind you by reading into the record what those instructions and definitions were, because through the course of this deposition, I would like to use these definitions, and I want to make sure you understand when I say something like the "subject lands" what I'm referring to. Do you understand?

A: Yes.

Q: All right. So if I use the term "you" or "your," I mean 2U Ranch, LLC and its predecessor-in-interest, Lonesome Country Limited. I also mean you, Ronald. Okay?

A: Okay.

Ronald Dep. 5:15-24; 16:6-17:5.

Throughout the course of the deposition, counsel for BPM provided Mr. Ericsson ample opportunities to contest his authority to provide sworn testimony on behalf of 2U and to discuss the ownership and management structure of 2U. While Mr. Ericsson testified that 2U owns the subject lands and confirmed a personal ownership interest in 2U, he refused to respond to questions specific to the ownership and management structure of 2U:

Q: . . . When you bought the lands, and I understand that you and a group of individuals purchased the lands in 1979, and certainly correct the record if I'm wrong, did you understand that you weren't purchasing the mineral estate, that you were only purchasing the surface lands?

A: We bought it in 1969.

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Q: Do you recognize any of these lands, Mr. Ericsson?

A: I recognize the ranch, yes.

[...]

Q: And I'll represent to you that that black outline is the lease outline for Wyoming State Lease 42804, which is the subject of this matter. Would you agree with that?

A: Yes.

Q: Okay. And are you familiar with those lands?

A: Yes.

Q: And are those lands owned by 2U Ranch, LLC?

A: Yes.

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Q: Let's talk a little bit about 2U Ranch, LLC. Can you describe to me the ownership structure of 2U Ranch?

A: Beyond the scope of the proceedings as ordered by the hearing examiner or confidential business information.

Q: And Ronald, I'm just trying to understand if there maybe are –

A: No, you're not trying to understand. You're trying to get at information that's not relevant.

Q: I'm trying to understand, just like my question regarding your family, whether there's other owners or members or managers of 2U Ranch that might be impacted by the proposed mining?

A: Everybody will be impacted, not just owners, the whole landscape. The County of Crook. The environment, the CEO [sic], the wildlife, the habitat, the water, long term, years and decades. Beyond the scope of the proceedings as ordered by the hearing examiner or confidential business information.

Q: Who manages 2U Ranch?

A: Beyond the scope of the proceedings as ordered by the hearing examiner or confidential business information.

Q: And let's focus on the subject lands for a minute. When did you purchase the subject lands?

A: Beyond the scope of the proceedings as ordered by the hearing examiner or confidential business information.

Ronald Dep. 65:21-66:2; 18:2-4; 18:23-19:6; 63:10-64:13.

Mr. Ericsson continued in this combative and unresponsive manner until ending the deposition by abruptly terminating the telephone call after approximately two hours. Ronald Dep. 107:10-23. Mr. Ericsson's refusal to answer questions and abrupt termination of the deposition foreclosed BPM of the opportunity to better understand the ownership and management structure of 2U as noted by counsel for BPM:

Q: I'd like to note for the record that Ronald is no longer on [sic] phone, that he has hung up and is no longer participating in the deposition, and with that, I would like to move forward with a few notes and questions that I would have hoped [to raise].

… With respect to 2U ranch specifically, I would have liked to speak with Mr. Ericsson regarding the ownership structure and the owners, members and managers for the purposes of further understanding who uses those lands, who has the right to use those lands, and how those lands are used. Furthermore, there was an effort to speak with Mr. Ericsson regarding the purchase by him and I understand it would be Lonesome Country in 1969 of the subject lands and a

> better understanding of how it's been owned throughout the years and how those subject lands have been utilized throughout the years.

Ronald Dep. 109:14-18, 113:14-25.

Setting aside whether Mr. Ericsson's sworn testimony is binding on 2U, 2U's disavowing of Mr. Ericsson, in and of itself, is insufficient to meet its burden to survive summary judgment. As the party opposing BPM's motion for summary judgment, 2U must establish genuine issues of material fact to overcome summary judgment. *Jones*, 2005 WY at ¶ 10, 113 P.3d at 37. Beyond disavowing Mr. Ericsson's sworn deposition testimony either conceding or refusing to address Elements 1, 2, 3 and 4, 2U fails to present any relevant facts disputing BPM's prima facie case. Because 2U fails to establish genuine issues of material fact with respect to whether (1) the proposed mining and reclamation plans have been submitted to 2U, (2) the proposed mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress, (3) that the proposed surface use does not substantially prohibit the operations of the surface owner, and (4) the proposed reclamation plan reclaims the surface lands to their approved future use as soon as feasibly possible, summary judgment is appropriate as a matter of law.

Conclusion

BPM has met its burden by providing competent and admissible evidence that BPM has taken the steps necessary to mandate the issuance of an Order in Lieu of Consent as prescribed by Wyo. Stat. § 35-11-406(b)(xii). The evidence supports the conclusion that (1) the proposed mining and reclamation plans have been submitted to 2U; (2) the proposed mining and reclamation plans adequately detail the proposed surface use, including routes of ingress and egress; (3) the proposed surface use does not substantially prohibit the operations of 2U; and (4) the proposed reclamation plan reclaims the surface lands to their approved future use as soon as

feasibly possible. Because BPM has established each element of the Order in Lieu of Consent analysis, and because 2U raises no genuine issue as to any material fact, BPM is entitled to judgment as a matter of law.

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 FOR SUMMARY JUDGMENT by email to:

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c/o Ronald Ericsson
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Jim Ruby
Executive Secretary, Wyoming Environmental Quality Council
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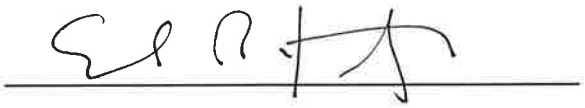

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