

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

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

**BENTONITE PERFORMANCE MINERALS, LLC'S RESPONSE IN OPPOSITION TO  
MOTION TO COMPEL AND REQUEST FOR PROTECTIVE ORDER**

Petitioner Bentonite Performance Minerals, LLC (BPM) responds in opposition to Respondent 2U Ranch, LLC's (2U) Motion to Compel and requests the Hearing Examiner issue a protective order. BPM states as follows in support:

1. The EQC conducts contested case proceedings in accordance with the Wyoming Rules of Civil Procedure. DEQ Rules, Chapter 2, Section 2.
2. The Wyoming Rules of Civil Procedure govern the discovery process. Wyo. R. Civ. P. 26.
3. Rule 26 limits the scope of discovery to information relevant to the proceeding. Wyo. R. Civ. P. 26(b)(1) ("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") (emphasis added).
4. Rule 26 further authorizes the Hearing Examiner to protect confidential business information from discovery by issuing a protective order. Wyo. R. Civ. P. 26(c)(1)(g).
5. The scope of this proceeding is necessarily narrow and limited to two straightforward inquiries: (1) whether BPM's proposed mining and reclamation operations substantially prohibit 2U's existing operations on the subject lands and (2) whether BPM's reclamation plan, as proposed, reclaims the surface as soon as feasibly possible. Wyo. Stat. § 35-11-406(b)(xii)(C) and (D); January 17, 2019 Order Setting Final Hearing.

6. 2U served BPM with requests for production and interrogatories, the majority of which sought information not relevant to 2U's putative claims that (1) BPM's proposed mining and reclamation operations will substantially prohibit 2U's existing operations on the subject lands and (2) BPM's reclamation plan, as proposed, will not reclaim the surface as soon as feasibly possible.

7. Rather, 2U's discovery requests largely sought irrelevant and/or confidential business information, including but not limited to bonding documentation and amounts, BPM's production and refining capabilities, confidential contractual agreements existing between BPM and third-party landowners, and the names and address of third-party landowners. 2U's following requests are offered to demonstrate this point:<sup>1</sup>

- **RFP No. 2** - Bond for payment to surface owner for damages to surface estate, forage, trees, roads, reservoirs, water well, and disruption to the surface owner operations.
- **RFP No. 3** - Reclamation bond for the cost of reclaiming the damage caused by mining.
- **RFP No. 4** - Mining agreements with other surface owners in Crook County, Wyoming, or Carter County, Montana, which were in, or are in, existence at any time during the past five years.
- **RFP No. 5** - Bonds for payment to surface owners for damages for any of the above mining agreements set forth in paragraph number 4 above.
- **IROG No. 1** - The approximate tonnage of bentonite which lies under the area where the 10,936 trees are located.
- **IROG No. 2** - The depth in feet below the surface where the bentonite is located under the area where the 10,936 trees are located.
- **IROG No. 3** - The number of property owners with which Bentonite Performance Minerals, LLC has had, or now has, mining agreement within the past five years, and the term in years of each of these agreements.

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<sup>1</sup> BPM intentionally omits Request for Production No. 1 and Interrogatories Nos. 7 and 8 as they are likely relevant to this proceeding and answered fully by BPM.

- **IROG No. 4** - How many of the property owners referred to in Interrogatory Number 3 have only the surface ownership and not the mineral ownership, including their names and addresses.
- **IROG No. 5** - The tonnage of bentonite which Bentonite Performance Minerals, LLC has mined on an annual basis over the past five years.
- **IROG No. 6** - Did Bentonite Performance Minerals, LLC have any type of bond protecting the surface owners in these mining agreements from damage resulting from mining activities.
- **IROG No. 9** - Please name each of the property owners which BPM must travel across to reach the proposed mining area; and please name each of the property owners which have provided BPM permission to cross their property.

8. BPM objected to 2U's requests for production and interrogatories that sought irrelevant information and/or confidential business information.

9. Nonetheless, BPM responded fully to each of 2U's discovery requests (including discovery requests seeking irrelevant information) and, to the extent possible, produced responsive documents and answered interrogatories. BPM's following responses are offered to demonstrate this point:

- **Response to RFP No. 2** - BPM objects to Request for Production No. 2 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. Notwithstanding, BPM understands Request for Production No. 2 to request documentation of a surface damages bond for the Proposed Mining Operations. Surface damages bonding requirements are set by the Administrator of the Wyoming Department of Environmental Quality, Land Quality Division after the issuance of a surface mining permit as provided by Wyoming statutes and regulations. The Administrator of the Wyoming Department of Environmental Quality, Land Quality Division has not yet required BPM post a surfaces damages bond for the Proposed Mining Operations as the permit application is pending. As such, no surface damages bonding documents exist for the Proposed Mining Operations.
- **Response to RFP No. 3** - BPM objects to Request for Production No. 3 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. Notwithstanding, BPM understands Request for Production No. 2 to request documentation of a reclamation bond for the Proposed Mining Operations. Reclamation bonding requirements are set by the Administrator of the Wyoming Department of Environmental Quality, Land Quality Division after the issuance of a surface mining permit as provided by Wyoming statutes and regulations. The Administrator of the Wyoming Department of Environmental

Quality, Land Quality Division has not yet required BPM post a reclamation bond for the Proposed Mining Operations as the permit application is pending. As such, no reclamation bonding documents exist for the Proposed Mining Operations.

- **Response to RFP No. 4** - BPM objects to Request for Production No. 4 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. Notwithstanding, it is unclear what the term “mining agreements” means as used in the request. Insofar as Request for Production No. 4 requests contractual agreements with surface owners concerning the Proposed Mining Operations, no such documents exist.
- **Response to RFP No. 5** - BPM objects to Request for Production No. 5 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. BPM incorporates and adopts its responses to Request for Production Nos. 2, 3 and 4.
- **Response to IROG No. 1** - It is unclear what “the area where the 10,936 trees are located” means as used in this request. BPM understands Interrogatory No. 1 to request the approximate tonnage of recoverable bentonite deposits existing under the Subject Lands. Based on available data, BPM approximates the tonnage of recoverable bentonite deposits under the Subject Lands to be 979,972 tons, with 974,040 tons being low-grade blue and yellow bentonite.
- **Response to IROG No. 2** - It is unclear what “the area where the 10,936 trees are located” means as used in this request. BPM understands Interrogatory No. 1 to request the approximate depth of recoverable bentonite deposits existing under the Subject Lands. Based on available data, BPM approximates the depth of recoverable bentonite deposits under the Subject Lands to range from 0 feet (outcrop) to 69 feet, with an average depth of 38 feet from surface to the bottom of the bentonite deposits.
- **Response to IROG No. 3** - BPM objects to Interrogatory No. 3 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. Notwithstanding, it is unclear what the term “mining agreements” means as used in the request. BPM understands Interrogatory No. 3 to request contractual agreements granting BPM the right to conduct the Proposed Mining Operations. The State of Wyoming is the owner of the mineral estate of the Subject Lands. BPM has a leasehold right to conduct the Proposed Mining Operations by virtue of a June 2, 2011 lease agreement by and between BPM and the State of Wyoming, whereby the State of Wyoming granted BPM the exclusive right and privilege to strip-mine, extract, remove and dispose of the bentonite deposits existing under the Subject Lands.
- **Response to IROG No. 4** - BPM objects to Interrogatory No. 4 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. Notwithstanding, the property owners of the Subject Lands are 2U (surface estate) and the State of Wyoming (mineral estate). Bpm has no contractual relationship with 2U.

- **Response to IROG No. 5** - BPM objects to Interrogatory No. 5 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. Notwithstanding, BPM understands Interrogatory No. 5 to request the tonnage of bentonite mined and hauled to BPM's Colony, Wyoming plant on a per annum basis. The tonnage of bentonite mined and hauled to BPM's Colony, Wyoming plant on a per annum basis varies because of unpredictable market forces, bentonite quality and availability, and extraction and refining limitations. The bentonite deposits existing under the Subject Lands are predominantly low-grade blue and yellow bentonite. Over the past five years, BPM has mined and hauled an average of 67,000 tons of low-grade blue and yellow bentonite per year to the Colony, Wyoming plant.
- **Response to IROG No. 6** - BPM objects to Interrogatory No. 6 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. Notwithstanding, BPM is required to post bonds prior to initiating surface mining operations. Bonding requirements are set by the Administrator of the Wyoming Department of Environmental Quality, Land Quality Division after the issuance of a surface mining permit as provided by Wyoming statutes and regulations. The Administrator of the Wyoming Department of Environmental Quality, Land Quality Division has not yet required BPM post bonds for the Proposed Mining Operations as the permit application is pending.
- **Response to IROG No. 9** - BPM objects to Interrogatory No. 9 to the degree that it seeks information beyond the scope of the proceeding as ordered by the Hearing Examiner or confidential business information. Notwithstanding, access to the Subject Lands for purposes of conducting the Proposed Mining Operations has not been finalized. Points of ingress to and egress from the Subject Lands for purposes of conducting the Proposed Mining Operations are identified in the Mining and Reclamation Plans, as is proposed road construction and use on and over the Subject Lands.

10. BPM declined to identify the names and addresses of third-party landowners (i.e., IROG No. 4) or produce confidential contractual agreements existing between BPM and third-party landowners (i.e., RFP No. 4).

11. 2U acknowledges in its Motion to Compel that BPM responded to its discovery requests; however, for the first time and without factual or legal support, 2U alleges that "it clearly appears that BPM did not comply with this discovery in good faith" and moves the Hearing Examiner to compel BPM to comply with 2U's discovery requests. Motion to Compel at 1.


12. 2U's Motion to Compel fails to identify the specific requests for production and/or interrogatory responses that it deems insufficient or undertaken in bad faith.

13. Absent additional information, it appears that 2U objects to BPM withholding the requested irrelevant and confidential business information (i.e., "The number of property owners with which Bentonite Performance Minerals, LLC has had, or now has, mining agreement within the past five years, and the term in years of each of these agreements.").

14. BPM stands by its responses and objections to 2U's discovery requests and opposes 2U's Motion to Compel production of confidential business information not relevant to this proceeding.

WHEREFORE, Petitioner Bentonite Performance Minerals, LLC respectfully requests the Hearing Examiner (1) deny Respondent 2U Ranch LLC's Motion to Compel production of confidential business information not relevant to this proceeding and (2) grant BPM a protective order insofar as 2U seeks confidential business information not relevant to this proceeding.

DATED this 21st day of January 2019.



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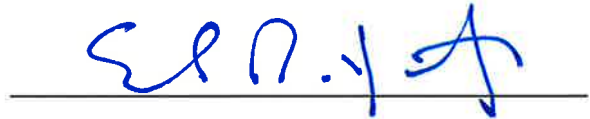
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 21, 2019, I served a true and correct copy of the foregoing BENTONITE PERFORMANCE MINERALS LLC'S RESPONSE IN OPPOSITION TO MOTION TO COMPEL AND REQUEST FOR PROTECTIVE ORDER to the following by email:

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

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

A handwritten signature in blue ink is written over a horizontal line. The signature is stylized and appears to read "J. Ruby".