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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Brook Mining Co., LLC coal mine)
permit – PT0841) EQC Docket No. 20-4802
)
)
)

**RESPONSE IN OPPOSITION TO BROOK MINING CO., LLC’S MOTION TO STRIKE
AFFIDAVIT OF GENNARO G. MARINO, DATED OCTOBER 23, 2020, AND
DEPARTMENT OF ENVIRONMENTAL QUALITY’S JOINDER TO THE MOTION**

By and through its undersigned counsel, Powder River Basin Resource Council (“Resource Council” or “PRBRC”) hereby responds in opposition to Brook Mining Co., LLC’s (“Brook”) motion to strike the affidavit of Gennaro G. Marino, dated October 23, 2020, filed as Exhibit C to Powder River Basin Resource Council’s Combined Response in Opposition to Brook Mining Co., LLC’s Motion for Summary Judgment and Memorandum in Support of Powder River Basin Resource Council’s Cross-Motion for Summary Judgment (hereafter “Affidavit of Dr. Marino” or “Affidavit”), and the Department of Environmental Quality’s (“DEQ”) Joinder to Brook’s motion to strike.

INTRODUCTION

This proceeding centers on a series of questions of law, including of relevance to discussing the Affidavit of Dr. Marino, (1) whether analysis and information submitted post-permit issuance related to evaluation of subsidence risk and control (required under Condition 9 to the permit) complete a permit application; and (2) whether DEQ can pre-determine that the

required analysis and information shall be submitted as a non-significant revision to the permit application (Condition 10 to the permit). These questions of law were presented in the Resource Council's Petition for Hearing, were carried forward through the Resource Council's Motion for Summary Judgment, and remain the core questions for the proceeding going forward on the issue of subsidence evaluation and prevention.

All three parties to the proceeding contend that resolution of these issues is a matter of law and there is no dispute on any facts material to the issues. Nevertheless, all three parties have also put forward affidavits from their retained experts related to the subsidence issues. The Affidavit of Dr. Marino is one of these three affidavits.

Brook seeks to strike the Affidavit because of an alleged failure to disclose all opinions and potential testimony as part of expert witness designations required by the scheduling order for this proceeding. As discussed below, Brook's motion should be denied because all expert opinions contained with the Affidavit of Dr. Marino were previously disclosed to Brook and DEQ and any supplemental information was not relied upon in the Resource Council's Motion for Summary Judgment or the associated statement of material facts.

STANDARD OF REVIEW

The discovery process in a contested case proceeding held by the EQC "shall be in accordance with W.S. 16-3-107(g)." DEQ Rules of Practice & Procedure Ch. 2 § 15. Section 107(g) of the Administrative Procedure Act provides that "In all contested cases the taking of depositions and discovery shall be available to the parties in accordance with the provisions of Rules 26, 28 through 37 (excepting Rule 37(b)(1) and 37(b)(2)(D) therefrom) of the Wyoming Rules of Civil Procedure in effect on the date of the enactment of this act and any subsequent rule amendments thereto."

W.R.C.P. 26(a)(2) governs the requirements of expert witness designation and mandatory disclosures for expert witnesses, including especially an expert witness “retained or specially employed to provide expert testimony in the case,” such as Dr. Marino.

The Wyoming Supreme Court has held “Rule 37(c)(1) provides for automatic exclusion of undisclosed evidence unless there is substantial justification for the failure to disclose, the failure is harmless, or the district court determines another sanction is appropriate.” *In re Paternity of HLG*, 2016 WY 35 ¶ 25, 368 P.3d 902, 908 (Wyo. 2016).

CONTENTS OF THE AFFIDAVIT

The Affidavit of Dr. Marino contains twelve paragraphs, each of which will be discussed in turn below.

Paragraphs one through three contain biographical information and explain Dr. Marino’s qualifications. Such information was disclosed in the Resource Council’s expert witness designation, through the website links contained therein, and through Dr. Marino’s previous testimony in related proceedings including the hearing held by the EQC in 2017.

Paragraph four contains a review of Dr. Marino’s scope of work. This paragraph references his January 2017 report and his April 2020 reports, both of which have been previously provided and disclosed to both Brook and DEQ. Dr. Marino also provided testimony on these reports and the opinions contained therein in June 2017 before the EQC and in May 2020 before the DEQ Director as part of the informal conference process. In its motion, Brook does not take issue with the inclusion of these previously disclosed reports, nor could it because the reports had been previously disclosed. The third item referenced is a July 30, 2020 email, attached as Exhibit B to Brook’s Motion to Strike. Brook takes particular issue with the reference and inclusion of this email because it was not specifically provided to Brook and DEQ as part of

the Resource Council's expert witness designation. However, a close read of the email will confirm that the opinions cited therein are merely confirmation of previous opinions already disclosed in Dr. Marino's reports, mainly that geotechnical data supplied for the TR-1 area was inadequate and the geotechnical data supplied for the TR-1 area does not apply to greater reserve areas (other highwall mining areas included within the permit application). The email mainly quotes a memorandum dated June 9 from Dan Overton at Engineering Analytics. The June 9 Overton memo was attached as Appendix B to the Resource Council's Petition for Hearing and was quoted and discussed therein. Resource Council Petition for Hearing ¶¶ 14-17. As such, and given the memo was commissioned by the DEQ and shared with Brook, the quotations of its contents should be no surprise to any party.

Paragraphs five through nine of the Affidavit restate findings and opinions contained within the April 2020 report, and as discussed in Dr. Marino's testimony at the May 2020 informal conference. Those opinions were disclosed to Brook and DEQ through the Resource Council's expert designation because they were contained within the April 2020 report and Dr. Marino's testimony at the May 2020 informal conference.

Paragraphs ten and twelve express Dr. Marino's opinion that the permit application must contain the necessary testing and analysis prior to permit issuance. Again, this should come as no surprise to any party given Dr. Marino's previous statements that the permit application was deficient and did not contain the necessary testing and analysis. As discussed above, and as represented in the electronic mail correspondence attached as Exhibit D to Brook's motion to strike, whether the testing and analysis can be provided after permit issuance is a matter of law and one that cannot be resolved through expert testimony. Nevertheless, Dr. Marino has been on record time and time again throughout the past three plus years of this proceeding that such

testing and analysis should be provided as part of the permit application and is necessary for permit issuance. Dr. Marino's April 2020 report and his testimony at the May 2020 informal conference confirm his views on this matter. Additionally, true to the representations made in the Exhibit D electronic correspondence, Dr. Marino did not express an opinion on the testing and analysis required by Conditions 9 and 10 of the permit, but rather the timing of when that testing and analysis should be provided. Again, this is an opinion that has been presented clearly throughout the three plus years of proceedings. If anything, any opinion on the contents of Condition 9 expressed was one favorable to Brook and DEQ by stating in paragraph 10 of the Affidavit that the requirement for future testing and analysis is "a definite improvement."

Paragraph eleven of the Affidavit contains Dr. Marino's concerns about the lack of expertise of the DEQ to review the testing and analysis submitted through Conditions 9 and 10. This testimony became necessary after the expert witness designations from Brook and DEQ, both of which did not list any DEQ staff as expert witnesses in this proceeding. In paragraph eleven, Dr. Marino is recommending DEQ to hire a qualified geotechnical consultant, like Mr. Overton, going forward. Such a recommendation is not even one for the EQC, but rather the DEQ. Moreover, Dr. Marino is not expressing an opinion on the content of either Condition 9 or 10 through the contents of this paragraph but rather how DEQ will be able to implement Conditions 9 and 10 going forward. Regardless, should DEQ wish to respond to Dr. Marino's concerns about DEQ staff expertise, it certainly has the opportunity to do through its forthcoming response to the Resource Council's Motion for Summary Judgment.

ANY FAILURE TO DISCLOSE WAS HARMLESS

Under W.R.C.P. 37(c)(1), a party's failure to disclose can be excused if such failure was harmless. Here, if there was a failure to disclose, it was harmless because paragraphs ten through

twelve of the Affidavit were not relied upon in the Resource Council's Motion for Summary Judgment or the associated Statement of Undisputed Facts Material to the Issues Presented in the Resource Council's Motion for Summary Judgment. Paragraphs thirteen and fourteen of the Statement of Undisputed Facts quotes paragraphs five and six of the Affidavit. Again, the opinions expressed in paragraphs five and six were contained within the April 2020 report. No other portion of the Affidavit was expressly relied upon in the Resource Council's Motion for Summary Judgment to make any findings of fact in this proceeding. Additionally, as discussed above, Brook and DEQ have ample opportunity to respond to any opinions of Dr. Marino through their responses to the Resource Council's Motion for Summary Judgment. Unlike a trial, there is time to respond to any opinions offered by Dr. Marino and any failure to disclose, should it exist, does not create an element of unfair surprise or prejudice to any party.

THE AFFIDAVIT MEETS ALL REQUIREMENTS OF RULE 56

In arguing that the Affidavit should be struck, Brook relies on two cases regarding affidavits submitted pursuant to Rule 56, *Kibbee v. First Interstate Bank, et al.* and *Greenwood v. Wierdsma*. Both cases involved a failure to attach the documents referenced in an affidavit and relied upon in reaching their conclusions. That is not the case here, where attached to Dr. Marino's affidavit were his January 2017 report, his April 2020 report, and the July 30 email. The Affidavit of Dr. Marino meets all requirements of Rule 56.

CONCLUSION

For the forgoing reasons, Brook's motion to strike the Affidavit of Dr. Marino should be denied and the EQC should rely upon it to make any findings of undisputed material facts necessary to resolve the matters of law presented in the Resource Council's Motion for Summary Judgment.

Respectfully submitted this 9th day of November, 2020.

/s/ Shannon Anderson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of November, 2020, the foregoing **RESPONSE IN OPPOSITION TO BROOK MINING CO., LLC'S MOTION TO STRIKE AFFIDAVIT OF GENNARO G. MARINO, DATED OCTOBER 23, 2020, AND DEPARTMENT OF ENVIRONMENTAL QUALITY'S JOINDER TO THE MOTION** was served on the following parties via the Environmental Quality Council's electronic docket system.

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