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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
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)

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

COMES NOW, Brook Mining Co., LLC, (“Brook”) by and through its attorneys Patrick J. Crank, Abbigail C. Forwood, and Jim D. Seward of the firm Crank Legal Group, P.C., and hereby submits Brook’s Reply to the PRBRC’s Response to Brook’s Brief in Support of *Brook Mining Co., LLC’s Motion to Strike 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.*

The Powder River Basin Resource Council (“PRBRC”) now understands the very fatal nature of its decision to not disclose the July 30, 2020 report of its expert Dr. Marino, in accordance with the previous order of this body. It is now asking the Environmental Quality Council (“EQC”) to ignore the mandatory disclosure of expert opinions required by the Wyoming Rules of Civil Procedure and by the Wyoming Supreme Court.

The PRBRC has attempted to file the Affidavit of Gennaro G. Marino with a new undisclosed report in violation of clearly established law. This new opinion was in the hands of the PRBRC on July 30, 2020. It was in the hands of the PRBRC in early August 2020 when the PRBRC filed its Petition challenging the Permit granted to Brook. This new opinion was in the hands of the PRBRC on September 30, 2020 when the PRBRC filed its expert disclosure. Finally, this new opinion was in the hands of the PRBRC when attorneys for Brook offered the PRBRC a chance to cure its woefully deficient expert witness designation. *See*, email chain, attached as Exhibit D to *Brook Mining Co., LLC's Brief in Support of Motion to Strike 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*. At none of the critical junctures above did counsel for the PRBRC disclose the new Marino expert report.

Brook relied on the reports that were disclosed by the PRBRC and is now highly prejudiced and harmed by inclusion of this new surprise report that was attached to the Marino Affidavit. Brook relied on the PRBRC expert witness designation when it filed summary judgment motions with this body. Brook relied on the disclosed expert reports of Marino when Brook filed its own expert witness designation. Because Brook had no notice of the new undisclosed Marino report, Brook could not ask its experts to provide reports or opinions in response to this new undisclosed Marino report or opinions contained therein. Brook also relied on the PRBRC expert witness designation disclosures in preparing and filing Brook's Motion for Summary Judgment and its briefs in support and in response. Brook has been highly prejudiced by the refusal of the PRBRC to disclose the new undisclosed Marino report in accord with the

EQC's Order and the Wyoming Rules of Civil Procedure. The failure of the PRBRC to disclose the new report is not harmless.

On November 9, 2020, the PRBRC finally realized the extreme error of not disclosing the Marino report and now urges the EQC to rely on the only case the PRBRC cited in its Opposition brief. The PRBRC cites, without any explanation of the case, *In re Paternity of HLG*, 2016 WY 35, 368 P.3d 902 (Wyo. 2016). The PRBRC cites the *HLG* case without discussing the facts of the case or explaining how the court ruled in that case. In the case of *Paternity of HLG*, the **mother challenged the district court's exclusion of testimony** because the mother had **not disclosed the opinions of her expert witness**. *Id.*, ¶ 1. 903-904. "JN (Mother) appeals from the district court's order granting RFSG (Father) custody of their son, HLG (the child). **She claims the district court abused its discretion by refusing to allow the child's therapist to give opinion testimony at the custody hearing. We conclude the district court properly applied the rules of civil procedure and, therefore, affirm.**" *Id.* [emphasis added].

Now the PRBRC argues that all of Dr. Marino's opinions were disclosed in the record prior to and during the informal conference. Unfortunately for the PRBRC, the *In re Paternity of HLG* case cited by PRBRC declined to accept a similar argument in excluding the undisclosed expert opinions. *Id.*, ¶ 11-13, 905. In that case the attorney for the Mother had provided all the medical records of the expert but had **failed to include the opinions of the expert in the expert witness designation**. The Wyoming Supreme Court explained it as follows:

However, given the challenged part of Ms. Parrish's testimony was expert, not lay, in nature, **Mother was required to " provide a summary of the facts or opinions to which the witness is expected to testify and disclose the subject matter on which the witness is expected to present evidence** under Rules 702, 703 or 705 of the Wyoming Rules of Evidence." W.R.C.P. 26(a)(2)(B)(ii). **Mother argued to the district court that she complied with her discovery obligation by providing Ms. Parrish's treatment records. Mother's position is not consistent with the rule. It is well settled that general production of a**

provider's medical or therapy records does not comply with the requirement for producing a summary of the provider's opinions. See, e.g., *Smother's v. Solvay Chemicals, Inc.*, 2014 WL 3051210, *5 (D.Wyo. 2014) (interpreting F.R.C.P. 26(a)(2)(C) which contains the same disclosure obligations as W.R.C.P. 26(a)(2)(B)(ii)). In *Brown v. Providence Medical Center*, 2011 WL 4498824, *1 (D.Neb. 2011), a federal district court explained that the plaintiffs' disclosure of medical records was insufficient to meet the summary requirement under Rule 26 because the court " will not place the burden on [the defendants] to sift through medical records in an attempt to figure out what each expert may testify to." **Mother's pretrial disclosure did not include a summary of Ms. Parrish's opinions, and production of the counselor's medical records did not meet that requirement. Thus, the district court properly ruled that Mother had failed to disclose Ms. Parrish's expert opinion.**

Id., ¶ 23, 908. [emphasis added].

To sanction Mother for failing to comply with her discovery obligation, the district court refused to allow Ms. Parrish to testify about her opinion. That ruling was consistent with the remedy in W.R.C.P. 37: (c) Failure to disclose; false or misleading disclosure; refusal to admit. (1) **A party that without substantial justification fails to disclose information as required by Rule 26(a) or 26(e)(1) ...is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. . . .** [¶25] 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. *Dishman*, ¶¶ 28-29, 362 P.3d at 369-70. **The party seeking to avoid exclusion has the burden of establishing its failure to comply with the discovery obligations was harmless.** See *Black Diamond*, ¶ 45, 326 P.3d at 916. The district court has discretion in determining the proper sanction. *Dishman*, ¶¶ 28-29, 362 P.3d at 369-70.

Id., ¶ 24, 908. [emphasis added].

The only exceptions that could prevent “automatic exclusion” of the Marino Affidavit from the record in this case are “substantial justification for the failure to disclose” or “the failure is harmless.” W.R.C.P. Rule 37(c)(1). The PRBRC has not argued there is a substantial justification for the failure to disclose and as such has waived the same. Frankly, it would be impossible for the PRBRC to argue that there is a “substantial justification . . . to disclose” an expert opinion and report they possessed on October 2, 2020.

The PRBRC argues, without providing legal analysis or authority, that the failure was harmless. As discussed above, Brook relied on the expert designation and assurances from Shannon Anderson that Marino would offer no opinions beyond the two referenced in the expert witness designation of the PRBRC. Those two reports were provided prior to the informal conference and neither of the reports, nor Marino's testimony at the informal conference, could have addressed the Permit as granted or the June 9, 2020 report by WDEQ expert Mr. Daniel Overton.

Marino's analysis, reports and opinions that were disclosed all predate the informal conference. Brook was not aware that Marino had reviewed the June 9, 2020 report of Mr. Overton. Brook was also not aware that Marino had written a new report in July wherein he "reviews" the Overton report and the Permit.

Marino's new undisclosed report that is included in the Affidavit in question is entitled, *Review of EAI [Engineering Analytics, Inc.] Memo Dated June 9, 2020*. Marino reviewed the June 9, 2020 report of Mr. Overton and provided Shannon Anderson, counsel for PRBRC a report. All details set forth therein are Mr. Marino's new undisclosed opinions that were never provided to WDEQ or Brook until the PRBRC included the report in Dr. Marino's Affidavit. These new opinions go to great length to attack the subsidence plan in the Permit and specifically, Conditions 9 & 10 of the Permit. The failure to disclose the new report and the new opinions are not harmless; it is fatal to the PRBRC and highly prejudicial to WDEQ and Brook.

WDEQ and Brook relied on the expert designation and assurances from Ms. Anderson that Dr. Marino had no opinions to offer on the Permit as granted, especially on Conditions 9 & 10, and on the subsidence plan as delineated by WDEQ in the Permit. In addition to the failure

to disclose the new opinions in the expert designation, Ms. Anderson provided the following assurances to WDEQ counsel and Brook Counsel:

From: Patrick Crank

Sent: Friday, October 2, 2020 1:29 PM

Shannon:

The expert designation you filed this week is woefully deficient. **Pursuant to Rule 26, WRCP, an expert designation must at a bare minimum disclose all opinions that an expert will offer.** Your statement that:

“At the hearing, Dr. Marino plans to present the opinions discussed in the report and other opinions related to subsidence he has drawn from reviewing the permit application. . . .” is fatally deficient under Rule 26.

We are writing to give you a chance to disclose what opinions Mr. Marino will offer rather than just informing us that he will offer some opinion. If you plan to comply with the rule, please advise us today. I will hold off filing an objection with the EQC asking you to follow one of the most basic rules of the WRCP until you share your plans with me today.

How would you like to handle this? Pat

On Fri, Oct 2, 2020 at 1:54 PM Shannon Anderson
<sanderson@powderriverbasin.org> wrote:

Pat: **Dr. Marino’s report lays out in detail the opinions he will offer in testimony. He spoke at the informal conference to these opinions and findings and his testimony at the hearing will be consistent with what is already available on the record. . . .** “ Thanks, Shannon

From: Matt VanWormer

Sent: Friday, October 2, 2020 2:53 PM

Shannon -

I share Pat's concern about the expert designation. I don't see a problem with generally referencing the opinions expressed in Dr. Marino's report. **However, because of the report's timing, it sheds no light on Dr. Marino's opinions regarding Conditions 9 and 10 of Brook's permit. Do you expect Dr. Marino to offer opinions regarding these conditions?**

Thanks,
Matt

From: Shannon Anderson <sanderson@powderriverbasin.org>

Sent: Friday, October 2, 2020 3:42 PM

Thanks, Matt – that helps to clarify the concern. We see our objection to condition 10 as a legal issue. Regarding condition 9, **I do not anticipate Dr. Marino testifying about what is being required . . .** “ Hope that helps, and please let me know if further clarification is needed.

Thanks, Shannon

From: Patrick Crank

Sent: Friday October 2, 4:13 PM

“ . . . We accept your clarification. **We will rely on the fact that Dr. Marino will not offer any opinions as to conditions 9 and 10 of the permit and the adequacy of the subsidence plan other than the opinions that he has previously expressed in written reports and during the informal conference.**

Thanks

Pat

Exhibit D, Brook’s Brief in Support of Motion to Strike Affidavit. [emphasis added]. No further responsive email was received from Ms. Anderson. *Id.*

It is clear from the email discussion above that both WDEQ and Brook have been harmed by the failure to disclose and the assurances of PRBRC counsel. Both WDEQ and Brook filed their own expert witness designations after October 2, 2020, the date of the above email conversation. Both WDEQ and Brook filed their Motions for Summary Judgment and Briefs after the date of this email conversation. It would be extremely prejudicial to now allow this Affidavit to be considered by the EQC after WDEQ and Brook have relied on the opinions that were disclosed in order to defend this challenge of the Permit as granted. The late disclosure of the new report by Marino attacking the subsidence plan in the Permit is far from harmless to the opposing parties of the PRBRC.

The PRBRC argues further that it did not rely on the new undisclosed opinions of Dr. Marino in its summary judgment motion. *See*, PRBRC Brief in Opposition to Motion to Strike, 5-6. This is an admission that Marino’s new opinions on Conditions 9 and 10 of the Permit and

the subsidence plan are not relevant to issues involved in the Petition. Given that admission by the PRBRC the Affidavit of Marino contains evidence that is not competent and not admissible in a summary judgment proceeding. If the PRBRC did not rely on the undisclosed opinions, in response to summary judgment motions, the opinions and the affidavit must be struck from this case.

The Affidavit of Marino also includes legal conclusions that are not admissible and for which he is not competent to testify. *See*, Exhibit C, Brook Brief in Support of Motion to Strike Affidavit. Specifically, the Marino Affidavit contains inadmissible evidence in the form of legal conclusions, as follows:

5. Following the Environmental Quality Council hearing in which I participated in 2017, Ramaco **had the obligation to revise its mine plan and conduct additional testing and analysis to evaluate subsidence.**

10. In the Conditions for the Brook Mine Permit, DEQ has required that Ramaco perform additional geotechnical borings and testing for mine design. This is a definite improvement from previous DEQ reviews. **However, the promise of future testing does not forgive the lack of testing prior to permit issuance.**

11. Additionally, there are several concerns which can make these imposed Conditions by DEQ essentially meaningless. These concerns are provided below.

a. To my knowledge, there is no one qualified at DEQ to review the geotechnical aspect of the mine design. ... **This is problematic as this regulatory agency does not comply with the intent of their own Administrative Code.**

See, Exhibit C, Brook Brief in Support of Motion to Strike Affidavit, ¶¶ 5, 10, 11. [emphasis added].

Dr. Marino may have expertise on mining issues; he has no expertise on legal issues, including interpretation of statutory regulatory schemes. The Wyoming Supreme Court has stated soundly that “[t]he Wyoming Rules of Civil Procedure were adopted to promote an orderly and efficient means for the handling and **disposing of litigation.** Compliance with these rules of procedure in summary judgment matters is mandatory.” *Greenwood v.*

Wierdsma, 741 P.2d 1079, 1084 (Wyo.1987) (quoting *Hickey v. Burnett*, 707 P.2d 741, 745 (Wyo.1985)).” *Id.* [emphasis added]. Not only did the PRBRC violate WRCP Rule 26 by failing to disclose the report, **but the WRCP also require affidavits to set out facts admissible in evidence.**¹ *See*, WRCP Rule 56 (c)(4). **This affidavit is not admissible.** WRCP, Rule 37 (c).

The Marino Affidavit must be stricken from the record. The Affidavit includes an undisclosed expert report and undisclosed expert opinions. Those facts are not admissible. The Affidavit and the undisclosed report provide expert opinions and analysis of Marino regarding the Mine Permit that was granted to Brook in July 2020. The Marino reports provided in the expert disclosure discuss the status of the application and permit as of April or May 2020. Marino’s Affidavit contains undisclosed expert opinions from July 2020. Those facts and opinions are not admissible. By PRBRC’s own admission, the Affidavit contains information that is not relevant to this proceeding and information that the PRBRC did not rely on for summary judgment. None of those facts are admissible in evidence. The Affidavit includes numerous legal conclusions for which Marino is not competent to testify. Those legal opinions are not admissible.

The undisclosed report of Marino has now taken countless hours of time for counsel for Brook and WDEQ. Brook relied on the deficient expert witness designation and the possibly deceitful assurances from the PRBRC in defending this Permit. Brook relied on the complete absence of the PRBRC opinion regarding the actual Permit in seeking summary judgment and Brook relied on that fatal deficiency in responding with Brook’s expert opinions in its

¹ “Affidavits or Declarations. — An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, **set out facts that would be admissible in evidence**, and show that the affiant or declarant is competent to testify on the matters stated.” WRCP Rule 56 (c)(4). [emphasis added].

designation. The surprise Marino Affidavit is not harmless, nor has the PRBRC argued the relevant standard of review for the same.² If Brook were now required to defend against this Affidavit Brook would need to have its experts review the new undisclosed report and prepare reports in response. Further, Brook would need to review its summary judgment filings and revise those filings to defend against the new expert opinions of Marino. This Affidavit is incredibly prejudicial to both WDEQ and Brook. Hundreds of hours of legal work would be wasted, and hundreds of hours of briefing would need to be repeated.

The Wyoming Rules of Civil Procedure require the disclosure of expert reports and opinions to be filed with the expert designation, and as explained in detail above, the PRBRC failed to comply with the mandatory Wyoming Rules of Civil Procedure. Based on the PRBRC's complete failure to comply with basic rules of civil procedure, the Marino Affidavit must be stricken from the record in this appeal.

Respectfully submitted this 16th day of November, 2020.



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²The Wyoming Supreme Court standard for "harmless violations" under Rule 37 is [T]he following factors ... guide the district court's discretion: " (1) **the prejudice or surprise to the party against whom the testimony is offered**; (2) **the ability of the party to cure the prejudice**; (3) **the extent to which introducing such testimony would disrupt the trial**; and (4) **the moving party's bad faith or willfulness.**" *In re Paternity of HLG*, 2016 WY 35, ¶ 28, 368 P.3d 902, 909 (Wyo. 2016). [emphasis added].

CERTIFICATE OF SERVICE

This is to certify that on the 16TH day of November, 2020, a true and correct copy of the foregoing was served upon the following:

Shannon Anderson
Powder River Basin Resource Council
934 N. Main Street
Sheridan, WY 82801
sanderson@powderriverbasin.org

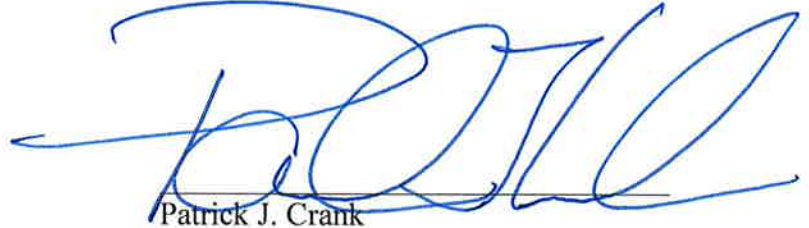
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