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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE BOND FORFEITURE QUALITY LANDSCAPE AND NURSERY, INC. LMO ET1496	)))	**Docket No. 22-4503**

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF QUALITY LANDSCAPE AND NURSERY, INC.

THIS MATTER having come before the Environmental Quality Council ("Council") for a contested case hearing on July 19 and 20, 2023 to consider the Petition for Forfeiture of Bond filed herein ("Petition") by Petitioner Department of Environmental Quality - Land Quality Division ("Petitioner"); and Petitioner having appeared by and through counsel, David DeWald and Shannon Leininger; and Respondent Quality Landscape & Nursery, Inc. ("Respondent") having appeared by and through counsel James R. Salisbury, of The Salisbury Firm, P.C.; and the Council having received the evidence of the parties; and having considered such evidence and the pleadings on file herein, finds and concludes as follows:

I. FINDINGS OF FACT.

1. Respondent offered Exhibits QLN-1 through QLN-21, inclusive, at the hearing of this matter. Respondent's Exhibits QLN-1 through QLN-21, inclusive, have been accepted and are part of the record.

2. Petitioner has offered Exhibits DEQ-1 through DEQ-32, inclusive, at the hearing of this matter. Petitioner's Exhibits DEQ-1 through DEQ-32, inclusive, have been accepted and are part of the record.

3. At issue in the hearing was the Petitioner for forfeiture of the bond posted by Respondent for a limited mining operation ("LMO 1496ET") on the following-described real property located in Carbon County, Wyoming, more particularly described as:

> Lots One (1) through Ten (10), Block Eleven (11), Riverside Addition to the Town of Saratoga, Carbon County, Wyoming ("LMO Property").

4. Respondent was issued approval for a Limited Mining Operation on July 22, 2010. *See* DEQ-2, p. 003.

5. Upon issuance of the approval for LMO 1496ET, Respondent began removing materials from the LMO Property and continued with the removal of materials from the LMO Property through 2019. *See* QLN-10.

6. In late 2011, the Town of Saratoga ("Town") constructed and/or installed a sheet pile retaining wall approximately three feet south of the south boundary line of the LMO Property. *See* QLN-20; *see also* QLN-6, pp. 4-5. The purpose of the sheet pile retaining wall was to stabilize property and structures lying south of the LMO Property. *Id.*

7. At various times from and after issuance of approval of LMO 1496ET, Petitioner performed inspections of the mining operation on the LMO Property. *See* DEQ-2 (2012 Annual Inspection Report); *see also* DEQ-3 (2013-2014-2015 Annual Inspection Report); QLN-8 (2016-2017-2018 Annual Inspection Report); QLN-9 (June and July 2018 Inspection Report); QLN-10 (2019 Annual Inspection Report); QLN-11 (2020 Annual Inspection Report); QLN-12 (2021 Annual Inspection Report); QLN-13 (August 9, 2022 Inspection Report); and QLN-14 (September 27, 2022 Inspection Report).

8. In addition to the above inspections, the State of Wyoming - Department of Workforce Services conducted an inspection of the LMO Property on April 4, 2018. *See* DEQ-10.

9. In the 2013-2014-2015 Annual Inspection Report, Petitioner determined that "[b]ased on the Carbon County Assessor's website it cannot be determined if off-site disturbance has occurred. It is unlikely Quality Landscape and Nursery disturbed land outside the LMO boundary based on the operator's relationship with and oversight by the Town of Saratoga.". *See* DEQ 3, p. 003.

10. For the first time, in the 2016-2017-2018 Annual Inspection Report, Petitioner concluded that Respondent had mined outside the boundary of the LMO Property. *See* DEQ-4. In such report, Petitioner noted as follows:

> The steel retaining wall was installed 2 feet inside the Town of Saratoga property. Mining has been conducted flush with the steel wall (Photo #7). Both Randy Stevens and a representative of the town council stated that the Town of Saratoga requested Mr. Stevens to mine up to the wall thus into the alley and the property owned by the Town of Saratoga.
>
> ***[Petitioner] will not require [Respondent] to amend the 2 foot wide strip along the south side, if the city requested this material to be mined. If the pending litigation directs the operator to conduct maintenance, repair, or construction along this corridor, [Petitioner] will follow the court's rulings and requirements.***

See QLN-8, p. 003 (emphasis added).

11. In the 2016-2017-2018 Annual Inspection Report, it was noted that there was water erosion behind the steel retaining wall installed by the Town, which erosion was first noted in 2015. *See* DEQ-4, p. 002.

12. The 2016-2017-2018 Annual Inspection Report also noted that the bulge in the steel sheet pile wall appeared to have increased between the 2016 and June 2017 inspections. *See* DEQ-4, p. 002.

13. Testimony and evidence was introduced at the hearing that although Respondent had mined outside the boundaries of the LMO Property, such mining activities in the alleyway adjacent to the LMO Property were approved by and consented to by the surface owner of the affected real property, i.e., the Town. *See* QLN-8, pp. 001, 003; *see also* QLN-9, p. 001, 003.

14. It is of significance that the District Court had ordered the Town to construct a dirt access ramp or roadway to the front end of Respondent's storage container which was situated on the southern edge of the LMO Property. *See* QLN-5, p. 003. The construction of a ramp to Respondent's storage container necessarily required movement of materials in, on and around the alleyway. *See* Hearing Transcript, Pg. 264, Line 1 through Pg. 265, Line 9.

15. Further, the Town was thereafter was required to relocate Respondent's storage container to a pad to be constructed by the Town on the LMO Property in the vicinity of the sheet pile wall. *See* QLN-5, pp. 004-005.

16. Most significantly, the District Court ordered the following:

> On or before one-hundred forty (140) days from the date of this Order Enforcing Settlement Agreement, the Town shall, at its own expense, complete reconstruction of the alleyway adjacent to Lots One (1) through Ten (10), inclusive, Block Eleven (11), Riverside Addition to the Town of Saratoga, Carbon County, Wyoming, in accordance with the finished contours and grades approved by this Court in the Order entered herein on March 1, 2011, as modified by the now-approved sheet piling retaining wall. The Town shall in good faith use its best efforts to complete reconstruction of the alleyway prior to the designated construction deadline. The Town shall notify the Defendants in writing of the date the Town proposes and/or intends to commence reconstruction of the alleyway.

See QLN-5, p. 004.

17. To date, the Town has failed and/or refused to reconstruct the alleyway immediately south of and adjacent to the LMO Property.

18. Starting with the 2019 Annual Inspection report, and in inspection reports for the LMO Property thereafter, Petitioner concluded that Respondent's permissive removal of materials from the alleyway owned by the Town and adjacent to the LMO Property had caused "material damage" (undefined) to the sheet pile retaining wall located on the Town's property without factual basis. *See,* e.g., QLN-10, pp. 001, 002; QLN-13. p. 001.

19. Notwithstanding the conclusion by Petitioner that Respondent had caused "material damage" (undefined) to the sheet pile retaining wall, Petitioner presented no credible evidence at the hearing to substantiate or support such conclusions nor has Petitioner undertaken any investigation or study to determine if any conduct and/or actions of Respondent did, in fact, cause "material damage" (undefined) to the sheet pile retaining wall. *See* Transcript of Hearing Proceedings ("Hearing Transcript"), 94:17 through 96:4; 166:23 through 167:13; and 170:7 through 170:24.

20. In its assessment of material damage being caused to the wall, Petitioner failed and/or refused to account for water retention behind the sheet pile wall as a possible mechanism for potential failure of the sheet pile wall. *See* Hearing Transcript, 167:16 through 169:19.

21. As a result of the 2019 Annual Inspection, on September 20, 2019, Petitioner issued Notice of Violation 5970-19 to Respondent based on a determination by Petitioner, *inter alia*, that Respondent had mined materials outside the boundaries of the LMO Property ("NOV 5970-19"). *See* DEQ-15. On this issue, Petitioner "...determined that mining has occurred outside of [the boundaries of the LMO Property] without surface owner consent and this mining has caused material damage to the adjacent property.". *See* DEQ-15, p. 002.

22. Petitioner had been aware that materials had been removed from outside the boundary of the LMO Property by Respondent since at least June 4, 2015 (the date of the 2013-2014-2015 Annual Inspection) based, *inter alia,* on annual inspections of the LMO Property and/or LMO1496ET but Petitioner did not and had not taken any action against LMO 1496ET until 2019. *Id. See also* DEQ-3, p. 002; DEQ-15, p. 002.

23. Petitioner did not take any action against Respondent for mining outside the boundaries of the LMO Property until such time as Petitioner had received a letter from Steve Wilcoxson on or about June 13, 2019 disputing the statements that had been attributed to him in the annual inspection reports prepared by and on behalf of Petitioner. *See* DEQ-21.

24. Despite receipt of the June 13, 2019 letter from Mr. Wilcoxson, Petitioner did not notify Respondent of such letter; give him an opportunity to respond to the same; nor did Petitioner correct the alleged misstatements in the annual inspection reports for the LMO Property and/or LMO 1496ET. *See* Hearing Transcript, 114:21 through 117:21.

25. On February 11, 2020, Petitioner increased the bond amount required for LMO 1496ET from the original amount of $1,000.00 to $65,000.00. *See* DEQ-13, p. 001. The bond amount was determined based on Petitioner's "in field and engineering analysis" in order "to achieve adequate and stable reclamation of LMO 1496ET following mineral extraction.". *Id.* Respondent posted a letter of credit in the amount of $65,000.00, which letter of credit was accepted by Petitioner. *See* DEQ-13, p. 002.

26. As a result of NOV 5790-19 and through negotiations between Petitioner and Respondent, the parties entered into a settlement agreement to, *inter alia*, resolve the issues identified in NOV 5790-19 ("Settlement Agreement"). *See* QLN-1.

27. In relevant part, the Settlement Agreement provides, at paragraph 7, as follows:

> c. Quality Landscape will provide an approved site plan to DEQ/LQD within twenty-four (24) months of signing this agreement reflecting the use and/or development of LMO 1496ET proposed by Quality Landscape. * * *
>
> * * *
>
> vii. The site plan must include measures to address slope stability between LMO 1496ET and the adjacent alleyway to the south in order to protect public safety during future commercial use of LMO 1496ET. ***These measures shall be implemented by Quality Landscape and/or the Town of Saratoga in accordance with the Second Judicial District Court's decisions in Town of Saratoga v. Randy Stevens et al, No. CV-09-284.***
>
> viii. The slopes and grades in an approved site plan under this subsection shall be exempt from Chapter 10, Section 5 of DEQ's Land Quality Non-coal Rules, which requires final reclaimed slopes to have a grade no steeper than a ratio of 3:1.
>
> * * *
>
> ***If Quality Landscape does not complete the approved site plan within twenty-four (24) months, Quality Landscape must proceed with site reclamation as described in subsection (d).***
>
> (d) ***If Quality Landscape is unable to complete Section 7(c) of this agreement, Quality Landscape agrees to develop an alternative plan to stabilize and reclaim LMO 1496ET,*** in accordance with the reclamation schedule and actions provided below:
>
> i. Quality Landscape must propose and submit an alternative plan to DEQ/LQD for the reclamation of LMO 1496ET. This plan must include the following:
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> 1. A map depicting the existing and proposed topography using two foot contour intervals tying into the adjacent properties;
>
> 2. Description of the proposed methods for stabilization and replacement materials along the southern boundary of the LMO;

> 3. The plan must be stamped by a Wyoming licensed Professional Engineer; and
>
> 4. Identify a source of suitable backfill material to import for completing the reclamation plan. Quality Landscape must provide a certified geotechnical analysis of the proposed imported backfill material, including standard proctor testing for determination of maximum soil density and optimum water content, recommendations for the appropriate lift thickness, recommendation for compaction testing of the intervals and depths, and completion of nuclear density compaction testing of the material as it is placed on site.
>
> Quality Landscape will provide the LMO l496ET reclamation plan and soil analysis for DEQ/LQD review within ninety (90) days of commencing the alternative plan. DEQ/LQD will conduct a technical review of the reclamation plan. This technical review may include a request for additional information as needed to ensure public safety, environmental compliance and long term site stability of the final reclamation. Based on the reclamation plan, DEQ/LQD will establish a phased approach to reclaim the site. This approach will include evaluation periods to conduct oversight of the site reclamation. Once the technical review is completed, DEQ/LQD will grant approval for Quality Landscape within ninety (90) days to proceed to the following settlement action for LMO 1496ET.
>
> ii. Quality Landscape must:
>
> 1. Fully implement the approved reclamation plan within ninety (90) days of DEQ/LQD's approval of the plan; and * * *

See QLN-1, pp. 002-004 (emphasis added).

28. Paragraph 7(d) provides, implicitly, that Respondent would be provided the opportunity and ability to reclaim the LMO Property without a resultant forfeiture of the performance bond. *See* QLN-1.

29. Conversely, neither Paragraph 7(d) of the Settlement Agreement, or the terms of the Settlement Agreement itself, provides a time limit or deadline by which Respondent was required to provide a proposed reclamation plan to Petitioner prior to Petitioner instituting

performance bond forfeiture proceedings. *See* QLN-1. *See also* Hearing Transcript, Pg. 101, Line 21 through Pg. 104, Line 1.

30. It is undisputed that Respondent has been unable to and/or prevented from commercially developing the LMO Property within the twenty-four (24) month period detailed in the Settlement Agreement due to, in part or in whole, the conduct of the Town.

31. Respondent presented competent evidence at hearing to show that its inability to develop the LMO Property is a result of, in significant part, the Town's refusal and/or failure to reconstruct the alleyway immediately south of and adjacent to the LMO Property. *See* QLN-2 through QLN-6, inclusive.

32. Evidence introduced at the hearing further suggests that Respondent submitted a site development plan to the Town within the twenty-four (24) month period prescribed in the Settlement Agreement but the Town failed and/or refused to consider and/or act upon such site development plan. *See* QLN-21; Hearing Transcript, 226:21 through 228:1.

33. Evidence adduced at the hearing established the Petitioner's attorney drafted the Settlement Agreement. *See* Hearing Transcript, 103:19 through 104:1.

34. It is undisputed that the Town is not a party to the Settlement Agreement. *See* QLN-1.

35. By its own terms, the Settlement Agreement is contingent upon, in multiple aspects, decisions made by the Second Judicial District Court, Carbon County, Wyoming ("District Court"), regarding actions to be taken, or which could be taken, by Respondent and/or the Town with regard to the LMO Property. *See* QLN-1.

36. By its own terms, the Settlement Agreement is completely devoid of, and entirely lacking, any time limitation, restriction or deadline on Respondent to take action(s) to reclaim the LMO Property and/or LMO 1496ET. *See* QLN-1, pp. 003-004.

37. Similarly, the Settlement Agreement is entirely devoid of, and entirely lacking, any time line and/or deadline for Respondent to either implement reclamation activities and/or to complete reclamation activities. *See* QLN-1, pp. 003-004.

38. Petitioner filed its Request for Bond Forfeiture with the Council on December 1, 2022 ("Petition"), asserting, *inter alia*, that Respondent is in violation of the terms of the Settlement Agreement as a result of its failure and/or refusal to comply with the terms of the Settlement Agreement. More specifically, Petitioner asserts that Respondent failed to provide a site development plan approved by the Town within 24 months from the effective date of the Settlement Agreement and, on the failure to do so, Respondent failed to reclaim the property within the ***same*** 24-month period.

39. As stated above, the Council finds the Petitioner's interpretation of the Settlement Agreement unreasonable and contrary to the terms of the same.

II. CONCLUSIONS OF LAW.

1. The Council has jurisdiction over the subject matter of this proceeding and the parties hereto. Venue is proper in Carbon County, Wyoming.

2. The claims asserted by Petitioner pertain to Respondent's failure and/or inability to develop the LMO Property within the deadlines proscribed in the Settlement Agreement and, based on such failure and/or inability, Respondent's failure to reclaim the property constitutes a breach of the Settlement Agreement.

3. To prevail on the Petition, Petitioner must prove the elements of the Petition by a preponderance of the evidence. A "preponderance of the evidence" is defined as "proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence." *Judd v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2010 WY 85, ¶31, 233 P.3d 956, 968 (Wyo. 2010) (citing *Anastos v. General Chemical Soda Ash*, 2005 WY 122, P 20, 120 P.3d 658, 665-66 (Wyo. 2005)).

4. Wyoming Statute § 35-11-421 provides as follows:

> a. If the director determines that a performance bond should be forfeited because of any violation of this act, he shall, with the approval of the council, make formal request of the attorney general to begin bond forfeiture proceedings.
>
> b. The attorney general shall institute proceedings to forfeit the bond of any operator by providing written notice to the surety and to the operator that the bond will be forfeited unless the operator makes written demand to the council within thirty (30) days after his receipt of notice, requesting a hearing before the council. If no demand is made by the operator within thirty (30) days of his receipt of notice, then the council shall order the bond forfeited.
>
> c. The council shall hold a hearing within thirty (30) days after the receipt of the demand by the operator. At the hearing, the operator may present for the consideration of the council statements, documents and other information with respect to the alleged violation. ***At the conclusion of the hearing, the council shall either withdraw the notice of violation or enter an order forfeiting the bond.***

See Wyoming Statute § 35-11-421 (LexisNexis 2023) (emphasis added).

5. At the hearing of this matter, both parties presented documentary and testimonial evidence.

A. SETTLEMENT AGREEMENT.

1. Petitioner asserts in the Petition that Respondent has failed to comply with the terms of the Settlement Agreement. More specifically, Petitioner contends that Respondent failed to provide a site development plan approved by the Town to Petitioner within 24 months from the effective date of the Settlement Agreement and, on the failure to do so, failed to reclaim the property within the ***same*** 24-month period. Petitioner argues that as a result of Respondent's failure to comply with these terms of the Settlement Agreement, the performance bond should be forfeited so that Petitioner can proceed with bidding the reclamation of the LMO Property. The Council rejects this interpretation of the Settlement Agreement.

2. Petitioner's interpretation of Section 7 of the Settlement Agreement is implausible in that it is unreasonable to believe that Respondent would, during the ***same*** twenty-four (24) month period, be attempting to develop the LMO Property while at the same time making preparations for the reclamation of the LMO Property.

3. Rather, Section 7 of the Settlement Agreement can only be interpreted to provide that Respondent had 24 months from the effective date of the Settlement Agreement to move forward with the development of the LMO Property, failing of which, Respondent would move to reclamation of the LMO Property. The Settlement Agreement cannot be interpreted in a manner that would obligate Respondent to reclaim the LMO Property within the ***same*** 24-month period from the effective date of the Settlement Agreement. The Council rejects the Petitioner's interpretation of this provision of the Settlement Agreement.

4. The evidence introduced at hearing establishes that Respondent was not able to move forward with development of the LMO Property to a point where Respondent could provide a site development plan to Petitioner that had been approved by the Town within the 24-month period contemplated by the Settlement Agreement. *See* QLN-2 through QLN-6, inclusive.

5. However, the failure to provide a Town-approved site development plan to Petitioner within 24 months from the effective date of the Settlement Agreement does not constitute a breach of the Settlement Agreement by Respondent, as argued by Petitioner.

6. Since Respondent was unable to provide Petitioner with a Town-approved site plan in the 24-month period, Section 7.d. of the Settlement Agreement pertaining to reclamation became operative. *See* QLN-1, p. 003.

7. While Section 7.d. lists numerous considerations to be addressed in the reclamation plan for the LMO Property, there is no defined and/or established deadline anywhere in the Settlement Agreement by which Respondent is required to submit a proposed reclamation plan to Petitioner. *See* QLN-1, p. 003. That is to say, unlike the 24-month period afforded Respondent to develop a Town-approved site development plan for the LMO Property and provide the same to Petitioner, there is no comparable deadline imposed on Respondent to submit a proposed reclamation plan for the LMO Property to Petitioner. *Id.*

8. The Council cannot insert words into the Settlement Agreement that are not there. *Essex Holding, LLC v. Basic Props.*, 2018 WY 111, ¶55; 427 P.3d 708, 724 (Wyo. 2018) (citing *Snyder v. Lovercheck*, 992 P.2d 1079, 1089 (Wyo. 1999) (citing Klutznick v. Thulin, 814 P.2d 1267, 1270 (Wyo. 1991) ("[c]ourts are not free to rewrite contracts under the guise of interpretation where the contractual provisions are clear and unambiguous.")). "[T]he 'language of the parties expressed in their contract must be given effect in accordance with the meaning which the language

would convey to reasonable persons at the time and place of its use.'" *Berthel Land & Livestock v. Rockies Express Pipeline LLC*, 2012 WY 52, ¶13, 275 P.3d 423, 430 (Wyo. 2012) (citations omitted).

9. If Petitioner and Respondent did not agree in the Settlement Agreement to a deadline by which Respondent was required to provide a proposed reclamation plan for the LMO Property to Petitioner, the Council cannot supply that term or read that term into the Settlement Agreement. The Settlement Agreement does not provide for this deadline and, as a result, the Council cannot provide that term.

10. Applicable Wyoming Statutes do not provide a reclamation deadline which could, presumably, be relied upon by Petitioner to supply the missing reclamation plan deadline argued by Petitioner.

11. Chapter 10, Section 5 of the Rules and Regulations, Department of Environmental Quality, pertaining to reclamation states in relevant part, as follows:

> (a) After the mining operations have ceased the operator shall notify the Administrator of such fact and commence reclamation and restoration. Provided however, that immediate reclamation will not be required if the landowner advises the Department in writing of his intent to further utilize the product of the mine, and if he assumes the obligation of reclamation and furnishes an appropriate bond to the Administrator.
>
> (b) The reclamation of the affected lands shall be in accordance with the following:
>
> (i) Reclamation shall be consistent with the proposed postmining land use. * * *

See Chapter 10, Section 5 of the Rules and Regulations, Department of Environmental Quality.

12. The Rules and Regulations applicable to Petitioner's operation do not provide a deadline to be imposed on Respondent to provide the proposed reclamation plan to Petitioner.

13. Neither applicable Wyoming Statute nor the Rules and Regulations applicable to Petitioner supply the missing deadline argued by Petitioner.

14. In the absence of a contractual term providing a deadline for Respondent to provide the proposed reclamation plan and without any direction from applicable Wyoming Statutes and/or agency rules, the Council concludes that there is no deadline for Respondent to provide a proposed reclamation plan for the LMO Property to Petitioner.

15. Petitioner's contention that Respondent is in breach of the terms of the Settlement Agreement as a result of its failure to submit a proposed reclamation plan for the LMO Property to Petitioner as of the date of the hearing of this matter is rejected. Respondent cannot factually or legally be in breach of a contractual term that is not included in the Settlement Agreement.

16. As with the absence of a deadline for Respondent to submit a proposed reclamation plan for the LMO Property to Petitioner, there is no provision, term and/or condition in the Settlement Agreement which provides when, and under what conditions and/or circumstances, Petitioner would be entitled to move forward with bond forfeiture proceedings as against Respondent for the LMO Property.

17. In the absence of a contractual provision addressing when, and under what conditions and/or circumstances, Petitioner would be entitled to move forward with bond forfeiture proceedings, the Council cannot read those terms into the Settlement Agreement.

18. Similarly and perhaps most fiscally significant to Respondent, Petitioner seeks to impose civil penalties against Respondent, as it argues, in accordance with the terms of the Settlement Agreement which states, in relevant part, as follows:

> f. Quality Landscape agrees that if Quality Landscape ***violates*** any term of this Settlement Agreement, DEQ/LQD shall provide notice of the violation to Quality Landscape and provide Quality Landscape a reasonable opportunity to cure. Should Quality Landscape fail and/or refuse to cure such violation within a reasonable period of time after notice, Quality Landscape will pay to DEQ/LQD stipulated civil penalties in the amount of one thousand dollars ($1,000.00) per day the violation exists.

See QLN-1, p. 005 (emphasis added).

19. The above provision does not set forth ascertainable deadlines under which Petitioner could presumably commence the assessment of the civil penalty set forth in the Settlement Agreement or what event(s) would trigger the assessment of the civil penalties. Nor does the above provision set forth the date on which Petitioner's assessment of the civil penalty would terminate. Rather, at the hearing of this matter, Petitioner contends that the civil penalties are ongoing to this date which the Council considers and concludes to be unreasonable in this case.

20. By its plain terms, the provision allowing the Petitioner to assess civil penalties against the Respondent is only triggered if the Respondent ***violates*** the terms of the Settlement Agreement. *See* QLN-1, p. 005.

21. As discussed above, the Council concludes that the Respondent has not violated and/or breached any of the written and express terms of the Settlement Agreement. As a result, assessment of civil penalties against the Respondent is not contractually supported or justified.

B. <u>MINING OUTSIDE OF LMO BOUNDARIES.</u>

1. As an additional basis for issuance of NOV 5970-19, which notice of violation forms the basis for the Petition, Petitioner asserts that Respondent mined outside the boundaries of the LMO Property.

2. Petitioner presently asserts this as a basis for bond forfeiture despite the long-standing knowledge by the Petitioner of Respondent's removal of materials beyond the boundaries

of the LMO Property. Since at least 2015, Petitioner knew or had knowledge that Respondent had removed materials from the alleyway owned by the Town adjacent to the LMO Property. *See* DEQ-4, p. 003. Approximately three years later in 2018, Petitioner determined that the removal of the materials from the alleyway adjacent to the LMO Property was with the consent of the Town. *See* DEQ-4, pp. 001, 003; DEQ-5. Petitioner similarly determined in 2018 that it would not require Respondent to amend the disturbed property ***unless ordered to do so by the District Court.*** *See* DEQ-4, p. 003. Then, in 2019, after a change in personnel, Petitioner determined that the removal of materials from the alleyway constituted a violation of LMO 1496ET notwithstanding that Petitioner had, for years, not acted upon this alleged violation of LMO 1496ET and certainly did not assert this as a basis for forfeiture of the performance bond posted by Respondent.

3. Petitioner is now estopped from asserting as a basis for forfeiture of the bond in the instant proceeding a property condition and/or conduct of Respondent which it had historically accepted and/or refused to take action upon.

4. Estoppel against a governmental entity has been addressed by the Wyoming Supreme Court, wherein it was stated:

> With respect to governmental agencies functioning in their governmental capacities, the standard for equitable estoppel is higher, requiring "even more egregious conduct." *Peterson*, 957 P.2d at 1312. Namely, for equitable estoppel to operate against the government, the movant must demonstrate that the inducement was made by "authorized affirmative misconduct." In addition to the "authorized affirmative misconduct" requirement, equitable estoppel is applied against the government only in rare and unusual circumstances, where its application would not serve to defeat public policy. *See Big Piney Oil Gas Company v. Wyoming Oil and Gas Conservation Commission*, 715 P.2d 557, 560 (Wyo. 1986). Accordingly, for Knori to succeed under his claim of equitable estoppel against the Office, he must demonstrate: (1) authorized affirmative misconduct; (2) reliance; (3) substantial prejudice; (4) rare and unusual circumstances; and (5) a situation that will not defeat public policy.

Knori v. State ex rel. Dep't of Health, Office of Medicaid, 2005 WY 48, ¶¶11-12, 109 P.3d 905, ¶¶11-12 (Wyo. 2005).

5. Continuing, the *Knori* Court opined:

> "... we have previously stated:
>
> > In order to invoke the doctrine against a government or public agency function]ing in its official capacity, there must be a showing of affirmative misconduct. (citation omitted in original). ***Affirmative misconduct exists where a person, by his acts, representations, or admissions, intentionally or through culpable negligence induces another to believe that certain facts exist and the other person rightfully relies and acts on such belief and will be prejudiced if the former is permitted to deny the existence of such facts***.

Id. at ¶12 (citations omitted) (emphasis added).

6. With reference to the *Knori* criteria set forth above, the Council finds and concludes as follows:

a. **Authorized affirmative conduct.** When a duly-authorized representative of Petitioner inspects the LMO Property and generates reports addressing the exact same issue upon which Petitioner now relies on as a basis for forfeiture, Petitioner is bound by the authorized actions of that representative. The conclusions and determinations by the authorized state representative have not been changed or modified as of the date of the hearing in this matter. Yet Petitioner now has decided that such determinations are apparently contrary to Petitioner's regulatory obligations. The Council concludes that the individual performing such inspections, and generating such reports (which are and remain official state records), was authorized and, by the inclusion of his conclusions in the reports generated, was authorized to make such determinations. This conduct was conclusively affirmative in nature.

b. **Reliance.** The evidence adduced at the hearing of this matter establishes that Respondent took no remedial action to correct, remediate and/or reclaim the area where materials were removed outside the boundaries of the LMO Property given the Petitioner's concession that remediation and/or reclamation were dependent on the decisions of the District Court. *See* QLN-4, p. 003. There is no evidence in this record that the District Court ordered and/or required Respondent to reclaim the Town's property. Respondent relied on Petitioner's inaction on this issue due to Petitioner's decision not to require Respondent's reclamation of this area of the adjoining real property.

c. **Substantial prejudice.** It is apparent to the Council that Respondent would be significantly and substantially prejudiced by the determination that mining outside the boundaries of the LMO Property can now serve as a basis for forfeiture of the performance bond. Petitioner reportedly was first aware of Respondent's mining outside the boundaries of the LMO Property in 2015. *See* DEQ-3, p. 003. Despite that knowledge, Petitioner took no administrative regulatory action against Respondent-. Petitioner only raised mining outside of the boundaries of the LMO Property in 2019 as a violation of LMO 1496ET. *See* DEQ-6, p. 003. Now, in this proceeding, Petitioner seeks to impose substantial and significant monetary civil penalties on Respondent for the consensual mining outside of the LMO boundaries. Respondent relied upon Petitioner's determination to not pursue regulatory action when first discovered by Petitioner in 2015. Petitioner cannot lull Respondent into inaction and defer to decisions of the District Court and then, after the passage of years, determine to pursue bond forfeiture for conduct which had previously been accepted by Petitioner. The Council concludes that this is substantially prejudicial to Respondent.

d. **Rare and unusual circumstances.** The evidence offered at the hearing certainly presents facts which can reasonably be considered rare and unusual. Respondent has been engaged for many years in litigation with the Town regarding the development of the LMO Property and the various obligations of Respondent and the Town to facilitate that process. Evidence presented at the hearing of this matter illustrates this continuing disagreement without resolution or action. *See* QLN-2 through QLN-6, inclusive. Petitioner, in the annual inspection reports in this record, has acknowledged that the decisions of the District Court are a factor in Respondent's development of the LMO Property. Understanding the dispute before the District Court, the evidence before the Council can only suggest that the circumstances affecting the development of the LMO Property, and consequent forfeiture of the performance bond attendant to LMO 1496ET, are unusual.

e. **A Situation that will not defeat public policy.** Petitioner has alleged that it has a public health and safety concern with the stability of the sheet pile wall situate, in its entirety, in the alleyway south of and adjacent to the LMO Property on real property owned by the Town. Petitioner's allegations do not rise to the level of a public policy issue. Petitioner selectively ignores the fact that starting in 2015, it has not taken any action against Respondent for removal of materials from the alleyway on Town property. Petitioner has only offered opinion testimony, which is completely lacking in foundation and offered by individuals legally incompetent and unqualified to offer such opinion, in support of Petitioner's conclusion that the conduct, actions and/or omissions of Respondent somehow or in some way caused "material damage" to and/or compromised the structural integrity of the sheet pile wall situate on the Town's property. Petitioner has not offered a

competent opinion or evidence to establish that any conduct, action or omission of Respondent caused "material damage" to the sheet pile wall or, in some manner, compromised the integrity of the sheet pile wall. Similarly, Petitioner has offered no evidence of the public policy concerns underlying the Petition.

6. The Council concludes that Petitioner is estopped, based on the *Knori* criteria set forth above and the Council's analysis of such factors and the evidence in this record, from asserting, as a basis for forfeiture of the performance bond, Respondent's removal of materials from areas outside the boundaries of the LMO Property.

7. Petitioner knew of the removal of materials from outside the boundary of the LMO Property by Respondent in 2015. Notwithstanding such knowledge, Petitioner voluntarily determined not to act on such alleged violation. Only in 2019, after a change in personnel, did Petitioner determine that this mining activity was in violation of LMO 1496ET. Petitioner is precluded from, at one time, accepting this conduct subject to resolution by the District Court and then, years later, utilizing this alleged violation of LMO 1496ET as a basis to substantiate forfeiture of the performance bond.

8. To summarize the foregoing conclusions by the Council, the evidence and testimony introduced at hearing do not support Petitioner's contention that Respondent has breached, or is in breach, of the Settlement Agreement.

9. Further, the Council concludes that the Settlement Agreement does not contain any provision by which Respondent could be considered in breach of the Settlement Agreement, Wyoming statute or Petitioner's rules and regulations, by its failure to submit a proposed reclamation plan to Petitioner.

10. Further, the Council concludes that Petitioner is estopped from asserting as a basis for forfeiture of the performance bond that Respondent removed materials outside the boundaries of the LMO Property given Petitioner's knowledge of such activity and its resultant failure and/or refusal to act on such information from the time that Petitioner had knowledge of the same.

III. ORDER.

IT IS THEREFORE ORDERED that the Petition filed herein by Petitioner is denied, in its entirety, and that Petitioner shall take nothing thereby.

IT IS FURTHER ORDERED that NOV 5970-19 filed herein by Petitioner shall be withdrawn, as determined by the Council.

IT IS FURTHER ORDERED that the performance bond posted by Respondent for the LMO Property shall not be forfeited.

SO ORDERED this _____ day of _____, 20____.

_____
Steve Lenz, Hearing Officer and Chairman
Environmental Quality Council