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

In re: Black Hills Bentonite
Permit to Mine No. 248C
Murphy Creek Update Area

) Docket No. 24-1601
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**NOTICE REGARDING LANDOWNERS' FAILURE TO
RESPOND TO BHB'S DISCOVERY REQUESTS**

COMES NOW, Petitioner, Black Hills Bentonite, LLC ("**BHB**"), a Wyoming limited liability company, through its undersigned counsel, Kayla A. Albertson, Patrick R. Tolley, and John A. Mastertson of Welborn Sullivan Meck & Tooley, P.C., and provides the following Notice to the Environmental Quality Council ("**Council**") regarding Bruce and Betty Jean Firnekas's ("**Landowners**") failure to comply with the Council's June 11, 2024 *Order Setting Prehearing Conference, Final Hearing, and Requiring Disclosure* (the "**Order**") by failing to answer BHB's requests.

The Council's Order states:

[a]ll discovery must be completed on or before July 25, 2024. The taking of depositions and discovery shall be conducted in accordance with Wyo. Stat. Ann. § 16-3-107(g). Parties shall not file discovery requests, answers, and deposition notices with the Council.

Order at p. 3 ¶ 7.

Wyo. Stat. Ann. § 16-3-107(g) provides, in part, “[i]n 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 ... of the Wyoming Rules of Civil Procedure....” Thus, the Council’s Order sets Rule 26 and Rules 28 through 37 of the Wyoming Rules of Civil Procedure (all future references to “**Rules**” in this Notice shall be to those “Rules” of the Wyoming Rules of Civil Procedure), with limited exceptions, as the parties’ guide for discovery in a contested case.

Discovery in civil litigation, and consequently in contested cases, is encouraged and has a wide reach, as shown in Rule 26(b)(1), which defines the general scope of discovery, stating in part:

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, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Discovery takes different forms, as well. Rule 33 provides for the use of interrogatories – questions to which a narrative response is sought and given under oath. Specifically, Rule 33(a)(2) states in part that “[a]n interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact....” Rule 36(a)(1) provides that “[a] party may serve on any other party a written “request for admission (“**RFA**”), for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to (A) facts, the

application of law to fact, or opinions about either; and (B) the genuineness of any described documents.”

Ultimately, the purpose of discovery is to let the parties understand the nature of their opponent’s case, including the theories and facts upon which they are relying. This enables the parties to make decisions about strategy, tactics, and, ideally, settlement. “Trial by ambush,” though wonderfully entertaining, is no longer expected.

On Wednesday, July 24, 2024, BHB, through its counsel, timely served discovery requests on counsel for the Landowners via email and regular mail. See **Exhibit A** attached hereto and incorporated herein by this reference. Since the Landowners have only provided one responsive pleading during the pendency of this matter, discovery is imperative to narrow the issues and learn about the landowners' positions. Included in BHB’s discovery requests were both RFAs and interrogatories. Responses to BHB’s discovery requests were due July 25, 2024.

Pursuant to Rule 36(a)(3), an RFA is admitted if not responded to within the time provided. It further states: “[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated under Rule 29 or be ordered by the court.” In this case, the Council’s Order specified that “discovery must be completed by July 25, 2024,” so the thirty-day period described in Rule 36(a)(3) for responding to RFAs does not apply – by order of the Council that period was constrained. However, Rule 36(a)(3) also provides the parties with the ability to stipulate to other reasonable periods in which to complete discovery pursuant to Rule 29.

The Landowners have failed to take any action. The Landowners failed to serve a written answer or objection to BHB's RFAs, and the Landowners did not seek an extension of time to answer or object. **Based upon their failure to respond to BHB's Requests for Admission, pursuant to Rule 36(a)(3), the Council must deem all of BHB's RFAs admitted.**

Furthermore, except for the remedies provided under Rules 37(b)(1) and 37(b)(2)(A)(vii), the Council has discretion under Rule 37 to issue further orders and sanctions as the Council deems appropriate for Landowners' outright and willful disregard of their discovery obligations.

WHEREFORE, BHB provides this *Notice Regarding Landowners' Failure to Answer BHB's Discovery Requests* to the Council for its consideration and prays that:

1. The Council deems admitted each and all of BHB's RFAs;
2. The Council grant BHB an Order in Lieu of Landowner Consent;
2. The Council regards BHB's RFAs as stipulated facts;
3. The Counsel resolves these issues prior to the contested case hearing scheduled in this matter.

DATED this 13th day of August 2024.



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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was served herein this 13th day of August 2024 via Email and on 14th day of August 2024 sent via US Postal Service follows:

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Welborn Sullivan Meck & Tooley, P.C.

EXHIBIT A

Docket No. 24-1601 Discovery Requests

Autum Parker <aparker@wsmtlaw.com>

Wed 24-Jul-24 11:41 AM

To:edwardsm@wyolegal.com <edwardsm@wyolegal.com>

Cc:Kayla Albertson <kalbertson@wsmtlaw.com>

 4 attachments (4 MB)

Petitioner Black Hills Bentonite, LLC First set of Requests for Admissions to Respondents Bruce and Betty Jean Firnekas.pdf; Petitioner Black Hills Bentonite, LLC First set of Interrogatories to Respondents Bruce and Betty Jean Firnekas.pdf; BHB ROGs - 3.0.docx; BHB Requests for Admissions - 3.0.docx;

Good afternoon attached you will find BHB's discovery request, I have also put a hard copy in the mail for you.

Please let me know if you have any questions or concerns

Thanks,

Autum

Autum Parker

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