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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF APPEAL OF:	)
	)
APPROVAL OF AMENDMENT TO	)
LIMITED MINING OPERATION, PEAK	)
GRAVEL, ET0961, TFN 7 6/211	

MOTION TO STRIKE AFFIDAVITS

Petitioners, David P. Schroeder and Bonnie L. Schroeder, ("Petitioners") by and through their undersigned counsel, hereby file this *Motion to Strike*, requesting that the EQC strike the affidavits of Todd Parfitt and Kyle Wendtland in this matter. In support thereof, Petitioners state the following:

I. INTRODUCTION

Following Petitioners' filing of their appeal, the Department of Environmental Quality ("DEQ") filed two motions: (1) *Motion to Dismiss for Want of Subject Matter Jurisdiction*, and (2) *Motion to Correct Characterization of Limited Mining Operation Notification ET0961, TFN 7 6/211*, both of which were accompanied by affidavits from Kyle Wendtland and Todd Parfitt.[1] Kyle Wendtland is the Land Quality Division Administrator for DEQ. Todd Parfitt is the Director of the DEQ. (*See* Affidavit of Kyle Wendtland, ¶ 2; Affidavit of Todd Parfitt, ¶ 2). This *Motion*

[1] This *Motion to Strike* is filed simultaneously with Petitioners' *Response to Motion to Dismiss for Want of Subject Matter Jurisdiction*.

requests that the EQC strike both affidavits and refrain from considering the legal argument set forth in the affidavits for the following reasons.

II. ARGUMENT AND LEGAL AUTHORITY

a. *History of* Chevron *Deference and Doctrine Overruled*

The *Chevron* Deference doctrine was first created by the United States Supreme Court (SCOTUS) in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). In *Chevron*, SCOTUS explained the doctrine as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43 (internal citations and page numbers omitted). Before *Chevron* was overruled, the courts could rely on the administrative agency's interpretation of the statute as long as such interpretation was "permissible." This legal doctrine was overruled this year by *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024) ("*Loper*"). As held in *Loper*, "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires…But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id*., at 2273.

The key to SCOTUS's decision overruling *Chevron* was that the concept of *Chevron* Deference went directly against the separation of powers in a section of the Administrative Procedures Act (APA) that mandated it was the court—not the agency—who decided questions of

law and statutory interpretation. *Loper*, 144 S.Ct. at 2265. SCOTUS said: "*Chevron* defies the command of the APA that 'the reviewing court'—not the agency whose action it reviews—is to 'decide *all* relevant questions of law' and 'interpret…statutory provisions." *Id*.; *see also* 5 U.S.C. § 706. Wyoming's statutory counterpart to the APA, the Wyoming Administrative Procedures Act (WAPA), contains a mandate nearly identical to the APA. It states:

> (c) to the extent necessary to make a decision and when presented, the reviewing court shall decide *all relevant questions of law*, *interpret* constitutional and *statutory provisions*, and *determine the meaning or applicability of the terms* of an agency action.

WYO. STAT. ANN. § 16-3-114(c) (emphasis added). WAPA clearly mandates that the court, a part of the judiciary, and not the agency, a part of the executive branch, decides questions of law.

b. *Affidavits Cannot Be Considered or Relied Upon by the EQC*

Since *Chevron* Deference no longer exists, the affidavits submitted by DEQ to support its legal argument and interpreting silence in the WEQA must be stricken and cannot be considered or relied upon by the EQC in making the determinations in this case. In its Motion to Dismiss, DEQ argues that because the statute is silent on whether administrative review is available for issues or cases relating to limited mining operations, no review is available. This argument is based in part on the affidavits submitted by Parfitt and Wendtland. As such, these affidavits must now be disregarded pursuant to the *Loper* Doctrine.

Specifically, of the Affidavit of Todd Parfitt, paragraphs 5 and 6 contain the agency's new interpretations of the Wyoming Statutes. (*See* Affidavit of Todd Parfitt, ¶¶ 5-6). The Affidavit of Kyle Wendtland contains the agency's new interpretations of the Wyoming Statutes at paragraphs 7-9, 14-16, and 18-20. (*See* Affidavit of Kyle Wendtland, ¶¶ 7-9, 14-16, 18-20). Pursuant to SCOTUS's mandate in *Loper*, these interpretations may no longer be considered by the reviewing body. Additionally, these two affidavits also contain the agency's interpretation of terms of the

agency's action. (*See* Affidavit of Todd Parfit, ¶¶ 5-6; Affidavit of Kyle Wendtland, ¶¶ 10-13, 17). This is clearly prohibited by the WAPA's clear language stated above: that it is the reviewing body—not the agency—who is to determine the meaning or applicability of terms relating to the agency's action. *See* WYO. STAT. ANN. §16-3-114(c).

c. *Affidavits Are Contrary to the Wyoming Rules of Civil Procedure and the Wyoming Rules of Evidence*

Additionally, the affidavits submitted by DEQ are contrary to the Wyoming Rules of Civil Procedure and the Wyoming Rules of Evidence and therefore should not be considered by the EQC.

The Wyoming Rules of Civil Procedure apply to the EQC by its own rule promulgated under Chapter 2, Section 2 which provides: "The Council shall conduct all contested case hearing with reference to the Wyoming Rules of Civil Procedure. Section 26 of this chapter specifically incorporates Rules 11, 12(b)(6), 24, 45, 52, 56, and 56.1 of the Wyoming Rules of Civil Procedure."

Pursuant to WYO. R. CIV. P. 12(d), "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." The Wyoming Supreme Court has held that "a Rule 12(b)(6) motion to dismiss is converted to a Rule 56 motion for summary judgment if materials outside the pleadings are considered. If affidavits are considered, conversion occurs automatically." *Stalkup v. State Dept. of Environmental Quality (DEQ)*, 838 P.2d 705, 709 (Wyo. 1992) (citing *Cranston v. Weston County Weed and Pest Bd.*, 826 P.2d 251, 254 (Wyo. 1992); *Mostert v. CBL & Assoc.*, 741 P.2d 1090, 1097 (Wyo. 1987); and *Torry v. Twiford*, 713 P.2d 1160, 1162-63, 1165 (Wyo. 1986)). *See also Vance v. Wyomed Lab, Inc.*, 375 P.3d 746, 748 n.1 (Wyo.

2016 ("the district court cannot consider matters outside the complaint when deciding a motion to dismiss, unless it treats the motion as one for summary judgment").

In this case, the DEQ submitted the two affidavits along with its Motion to Dismiss for consideration by the EQC. These affidavits are materials outside the pleadings (and are outside of the record), and thus are not to be considered by the EQC in making its determination as to whether it has subject matter jurisdiction over this appeal. Even if the motion was converted to one for summary judgment, and the affidavits could be considered, the affidavits submitted by DEQ do not meet the requirements of a competent affidavit under WYO. R. CIV. P. 56(e). This rule requires that "an affidavit (1) be made on personal knowledge, (2) set forth *facts* which are admissible in evidence, (3) demonstrate the affiant's competency to testify on the subject matter of the affidavit, and (4) have attached to the affidavit the papers and documents to which it refers." *Bangs v. Schroth*, 2009 WY 20, ¶ 15, 201 P.2d 442, 449 (Wyo. 2016) (emphasis added). The Wyoming Supreme Court in *Bangs* gave an example of the affidavit of a hospital administrator that fell short of the requirements in Rule 56(e) because, *inter alia*, "his affidavit set forth no facts and merely made categorical assertions and stated bald conclusions." *Id*. at 449 (discussing affidavit's sufficiency under Rule 56(e) in *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987)).

The affidavits submitted by DEQ in this matter fall short of Rule 56(e)'s requirements in the same way: the affidavits state no facts, but rather make conclusory statements about what the law is. Pursuant to both case law interpreting the requirements of a proper affidavit, and the fact that it is the reviewing body[2]—not the agency—who interprets questions of law, the affidavits of Todd Parfitt and Kyle Wendtland are insufficient and improper.

[2] *See* WYO. STAT. ANN. § 16-3-114(c).

In addition to the fact that the affidavits submitted by DEQ do not meet the requirements of WYO. R. CIV. P. 56(e) which requires the affidavits to contain factual information—and not legal conclusions—they also invade the province of the fact finder.

> *Legal conclusions by an expert witness*[3] *are inadmissible* as they invade the province of the fact finder, whose duty it is to apply the law as given to the facts in the case. Thus, for example, an expert cannot testify as to the law of forum, the meaning of a statute, or how a party should have interpreted the statute.

31A AM.JUR.2D EXPERT AND OPINION EVIDENCE S 29 Expert testimony cannot invade province of fact finder (emphasis added).[4] The affidavits submitted by DEQ do not contain factual information, but rather are largely legal conclusions and the agency's new interpretations of legal rules. Questions of law are for the reviewing body to decide, and expert testimony providing answers to questions of law are inadmissible. As such, the affidavits are inadmissible as evidence, failing to satisfy Rule 56(e) which requires that the information contained in the affidavits to be admissible under the rules of evidence, and therefore should be stricken.

III. CONCLUSION

WHEREFORE, Petitioners respectfully request that the EQC strike both affidavits submitted by DEQ, and that the EQC refrain from considering the affidavits and any argument supported thereby or contained therein.

[3] Petitioners treat both affidavits as expert testimony due to both affidavits claiming the affiant is an expert. (*See* Affidavit of Todd Parfitt, ¶ 3; *see also* Affidavit of Kyle Wendtland, ¶ 3).

[4] This particular secondary source has been cited with approval by the Wyoming Supreme Court in *Roberts v. Roberts*, 2023 WY 8, ¶ 10, 523 P.3d 894 (Wyo. 2023) (discussing the limits of expert and opinion testimony's admissibility) and should be considered persuasive authority.

DATED this 15th day of October 2024.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 15th day of October 2024, a true and correct copy of the foregoing was served by mail to the addresses below:

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