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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
UPON REFERRAL FROM THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In re Applications for Coal Mine Permit)	OAH Docket No. 19-004-220
Transfers – PT0214 & PT0428)	
Blackjewel, LLC)	EQC Dockets No. 18-4805 &
)	18-4803
In re Permit Renewal Application)	
Contura Coal West – PT0214)	
)	

POWDER RIVER BASIN RESOURCE COUNCIL’S RESPONSE TO CONTURA COAL WEST’S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY ABOUT ALLEGED WILLFUL VIOLATIONS OF ENVIRONMENTAL LAWS

The Powder River Basin Resource Council (“Resource Council”) hereby responds to Contura Coal West’s (Contura) motion *in limine* to exclude testimony – and exhibits – about alleged willful violations of environmental laws.

INTRODUCTION

While carefully styled as a motion *in limine*, what Contura is actually seeking is a partial dismissal of the Resource Council’s claims. Contura is seeking complete exclusion of *all* evidence related to the claim of willful violations – regardless of what that evidence may be – and, if successful, that would effectively prevent the Resource Council from prosecuting that claim. As such, Contura should have filed a motion to partially dismiss the petition, under W.R.C.P. 12(b)(6), as opposed to the motion it did file. The motion is in the wrong form, and it

is impossible for Contura to cure this deficiency because the deadline for pre-hearing motions has now passed.

Contura also, somewhat remarkably, does not discuss a standard of review for its motion, nor does it cite to any relevant case law or precedent from the Environmental Quality Council in support of its position. Contura's motion is without legal grounds, is not timely, and should be denied.

Finally, even if the improperly styled motion should stand, it must be denied as it fails to provide a sufficient basis for exclusion of evidence related to the Resource Council's claim.

STANDARD OF REVIEW

Under the Wyoming Rules of Civil Procedure, a motion *in limine* is a "motion relating to the exclusion of evidence." W.R.C.P. 6(c)(6). These motions can be filed "at any time" as they are responsive to proffered evidence and exhibits. *Id.* That principle is especially relevant here, where hearing exhibits have not yet been filed by any party, including the Resource Council.

Although the Environmental Quality Council's rules of practice and procedure generally provide application of the Wyoming Rules of Civil Procedure, its rules for contested case hearings do not incorporate W.R.C.P. 6. *See* Rules of Practice and Procedure Ch. 2 §§ 2, 26. As such, the Council's rules of practice do not contemplate a motion *in limine*. Nevertheless, should the Council entertain a motion *in limine*, the motion must be reviewed under its rules of practice and procedure, which establish that "[e]vidence of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible" and "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded." *Id.* at § 20(a)(i).

This more lenient standard for admitting evidence at a contested case hearing is particularly appropriate here, where the hearing is the first and only opportunity for a public hearing on the permit renewal and transfer applications. *See* W.S. § 35-11-406(k).

ARGUMENT

Contura's motion is untimely and without legal basis, and it should be denied.

1. Contura's Motion is Untimely

As discussed above, a motion *in limine* is a motion to exclude evidence or testimony. As the name suggests, a motion *in limine* is filed prior to or at the beginning of a hearing, but it is an extraordinary remedy, and it is untimely if the evidence and testimony to which it objects has not yet been proffered. *See Young v. State*, 2016 WY 70 ¶ 6, 375 P.3d 792 (2016) (upholding the denial of a motion *in limine* but allowing an objection at the time the evidence was presented at trial).

Here, the Resource Council will file, along with other parties, exhibits as required by the scheduling order for this hearing on or before May 8, 2019. No exhibits have been filed yet. Contura's motion to exclude exhibits that have not yet been filed is untimely. Contura can, if it so chooses, bring forward its objections at the appropriate time prior to the hearing, but such objections are premature now.¹

Ruling on Contura's motion now would be prejudicial to the Resource Council because it would prevent the Environmental Quality Council's consideration of the admissibility of any exhibits it wishes to submit on the subject at issue. At this time in the proceedings, the Environmental Quality Council cannot possibly evaluate the relevance of the yet-to-be filed exhibits.

¹ The Resource Council does not waive any responses to any objections yet to be made by Contura or any other party.

2. Contura Cannot Object to Evidence Using the Hearsay Objection

As discussed above, the Environmental Quality Council has a specific rule of practice and procedure that governs the admissibility of evidence. That rule – Chapter 2, section 20 – mirrors the well-established standards for admitting evidence in Wyoming contested case hearings.

The Wyoming Supreme Court has ruled on numerous occasions that hearsay evidence is admissible in administrative proceedings as long as the evidence meets the requirements of Wyo. Stat. Ann. § 16-3-108(a). *See e.g. Matter of Goddard*, 914 P.2d 1233, 1238 (Wyo. 1996); *Story v. Wyoming State Board of Medical Examiners*, 721 P.2d 1013, 1018 (Wyo.1986); *Lunde v. State ex rel. Wyo. Workers' Comp. Div.*, 6 P.3d 1256, 1260 (Wyo.2000). Wyo. Stat. Ann. § 16-3-108(a) requires that evidence offered and considered in a contested administrative proceeding not be “irrelevant, immaterial or unduly repetitious,” and instead be “the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs.”

In short, even if the evidence or testimony presented is hearsay, it may still be admitted provided it is relevant and material to the proceeding. *See Griffin v. State ex rel. Dept. of Transp.*, 2002 WY 82, ¶11 (Wyo. 2002) (holding “Administrative agencies acting in a judicial or quasi judicial capacity are not bound by the rules of evidence that govern trials by courts or juries.”).

3. Contura’s Relevance Objections Are Misplaced

Contura also claims that *any* evidence related to the Resource Council’s claims under Wyo. Stat. § 35-11-406(o) should be excluded on relevance grounds. Contura’s objections should be dismissed.

First, as discussed above, the Resource Council has yet to file any exhibits for the hearing. It is impossible for Contura – let alone the Environmental Quality Council – to be able to effectively weigh the relevance of evidence that has not yet been proffered.

Second, exclusion of evidence related to the past and current violations will have an adverse prejudicial effect of excluding evidence related to the Resource Council’s other claims under W.S. § 35-11-406(n)(vii). While Contura uses its motion to offer its views on what is necessary to meet the standards of section 406(o), determining what the standard is and whether it has been met is a substantive issue for the hearing, not a preliminary issue that is able to bar the admission of evidence. The hearing presents the opportunity for the Environmental Quality Council to consider and weigh the factual and legal issues brought by the parties, including exhibits and testimony on cross-examination. The Resource Council has full faith in the Environmental Quality Council to properly evaluate all of the evidence presented by all parties at that time in order to consider whether the legal standards of section 406(o) have been met. It is for this reason that section 406(o) contemplates an “opportunity for hearing” as the appropriate venue to consider these claims. This hearing, and the appropriate weighing of evidence at that time, is especially important as it will be the first of its kind and presents a matter of first impression for the Environmental Quality Council.

Respectfully submitted this 23rd day of April, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of April, 2019, the foregoing **RESPONSE TO CONTURA COAL WEST'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY ABOUT ALLEGED WILLFUL VIOLATIONS OF ENVIRONMENTAL LAWS** was mailed to:

Bernard Haggerty, Hearing Examiner
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And was served on the following parties via electronic mail and the EQC online docket system:

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