

accordance with the Wyoming Rules of Civil Procedure (“WRCP”). Wyoming DEQ, Rules of Practice and Procedure, Ch. 2, §2. The WRCP delineate a clear and concise process parties must follow in expert witness designation. The PRBRC expert witness designation failed to comply with the WRCP.

The PRBRC expert designation, identified Gennaro G. Marino as its sole expert. The expert designation failed to comply with the disclosure of expert testimony requirements set forth in the WRCP. *See generally*, WRCP, Rule 26 (a)(2). According to the WRCP, the designation “must disclose to the other parties any witness it may use at trial to present evidence... [and] this disclosure must be accompanied by a written report prepared and signed by the witness or a disclosure signed by counsel for the party. **The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them...**” *Id.*, Rule 26 (a)(2)(A-B). [emphasis added]. The Designation of Expert Witness filed by the PRBRC references only two Marino reports to be relied upon by the PRBRC in this matter. It referenced the reports by Marino that were “attached to the Resource Council’s Petition for Hearing” that was previously offered as part of the PRBRC’s objections and comments on the mine permit application. *See* PRBRC Designation of Expert Witness, attached as Exhibit A. These pre-informal conference and pre-permit reports were the only reports mentioned by the PRBRC as formal notice to Brook and DEQ in the PRBRC expert designation.

The Designation of Expert Witness filed by the PRBRC failed to include notice of the opinions expressed by Dr. Marino in his October 23, 2020 Affidavit. *See*, Marino Affidavit, October 23, 2020, attached as Exhibit C. The Affidavit of Marino now provided to Brook Mining Co., LLC (“Brook”) is filled with new opinions that were not included in the prior notice and reports referenced in the PRBRC Expert Designation.

The Marino Affidavit includes twelve paragraphs, the first three of which are merely introductory and biographical in nature. Paragraphs four through twelve include opinions which were not provided in the previous Marino reports and were not disclosed, as required, in the Expert Designation.¹ One glaring example of this blatant violation of the WRCP is the reference and attachment of an entirely new report that has never been previously provided to Brook and was not included in the Expert Designation. *See* Marino Report, *Review of EAI Memo Dated June 9, 2020, dated July 30, 2020* attached as Exhibit B; *See also*, Marino Affidavit, October 23, 2020, attached as Exhibit C, ¶ 4(c). This new Marino report was provided to Counsel for the PRBRC, attorney Shannon Anderson, on July 30, 2020, according to the date on the email. *See*, *Review of EAI Memo*, attached as Exhibit B. This delivery date is two months prior to the PRBRC deadline to comply with the EQC Scheduling Order requirement to provide “a complete statement of all opinions the witness will express” to Brook. Yet PRBRC chose not to disclose it.

Marino Affidavit Paragraph 4:

4. MEA was hired by the Powder River Basin Resource Council (PRBRC) to provide an independent review and analysis of the geotechnical aspects of application for mining by Ramaco of the Brook Mine located just north of Sheridan, Wyoming. This application process involved a number of rounds of questions and answers between Ramaco and Wyoming Department of Environmental Quality (DEQ). During this process, I have provided testimony on the Brook Mine application and DEQ’s evaluation and requirements of these applications. In addition to providing verbal testimony on May 4, 2017, and May 13, 2020, **I have written the following reports based on the mine permit documents.**

- a. Report entitled: *Brook mine Permit Application* dated January 23, 2017
- b. Report entitled: *Review of Brook Mine Application–Rounds 8 to 13* dated April 15, 2020.
- c. **Email entitled: *Review of EAI Memo Dated June 9, 2020 dated July 30, 2020.***

These documents are attached. Below is a summary of my comments.

¹ The Designation of Expert Witness filed by the PRBRC did not include the new, unnoticed, opinions or new, unnoticed, report that now appears in the Affidavit.

See, Marino Affidavit, October 23, 2020, attached as Exhibit C, ¶ 4. [emphasis added].

Marino's Affidavit included a report and opinions that were not disclosed in accordance with the Rules outlined herein. Further, the new report expresses opinions on the mine permit as granted and Conditions 9 and 10 of the mine permit. This is outside the scope of the PRBRC expert designation and contrary to the assurances of Shannon Anderson after the filing of the PRBRC expert witness designation. *See*, email chain, attached as Exhibit D. Ms. Anderson assured WDEQ and Brook that Dr. Marino would not testify beyond the scope of his prior reports. *Id.* The PRBRC violated the scheduling order and the WRCP by failing to provide this new report to Brook and DEQ in the PRBRC Designation of Expert Witness it filed with the EQC on September 30, 2020.

Striking this Affidavit may appear to some as a harsh result but the EQC is required to follow the Wyoming Rules of Civil Procedure and those Rules clearly require all opinions and reports to be disclosed with the Expert Witness Designation. *See generally*, WRCP, Rule 26. When a party fails to provide information as required, the party is not allowed to take advantage of that information or witness later. WRCP, Rule 37 (c) provides, "If a party fails to provide information... as required by Rule 26(a)..., **the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial... .**" *Id.* [emphasis added]. The Wyoming Supreme Court has affirmed use of this harsh result, in the striking of an affidavit under similar, but different circumstances. *Kibbee v. First Interstate Bank, supra*, ¶ 39, 988.

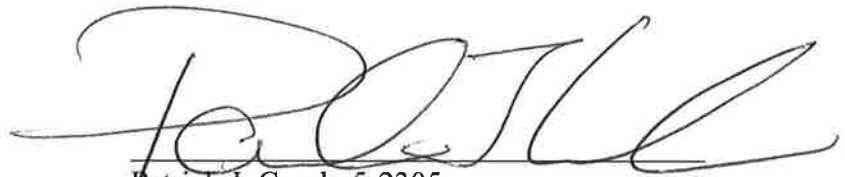
In *Kibbee*, the Court struck the affidavit because it did not have supporting documentation attached as was required by Rule 56(e) at that time. Most importantly, however, the Court stated soundly that "[t]he Wyoming Rules of Civil Procedure were adopted to promote an orderly and efficient means for 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.² *See*, WRCP Rule 56 (c)(4). This affidavit is not admissible. WRCP, Rule 37 (c).

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 and the aforementioned Marino Affidavit must be stricken from the record in this appeal.

Respectfully submitted this 3rd day of November, 2020.



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² "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].

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of November, 2020, a true and correct copy of the foregoing *BROOK MINING CO., LLC'S BRIEF IN SUPPORT OF MOTION TO STRIKE AFFIDAVIT OF GENNARO G. MARINO, 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* was served upon the following:

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

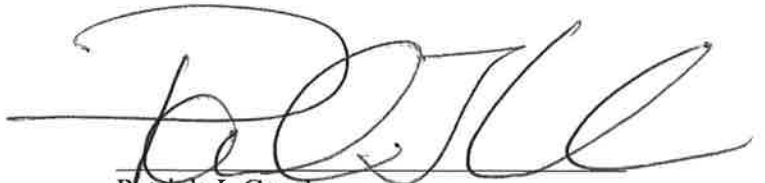
- U.S. Mail
- Fed Ex
- EQC's electronic docket system
- Hand Delivered

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- EQC's electronic docket system
- Hand Delivered


Patrick J. Crank