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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

) Docket No. 24-1601

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

OBJECTION AND MOTION FOR RECONSIDERATION REGARDING
ORDER FOLLOWING PREHEARING CONFERENCE

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. Masterson of Welborn Sullivan Meck & Tooley, P.C., and enters its objection to the Environmental Quality Council’s (“EQC’s”) August 9, 2024, *Order Following Prehearing Conference*, and concurrently moves the EQC to reconsider and strike certain findings in the Order.

AS GROUNDS FOR THIS OBJECTION AND MOTION, Petitioner Black Hills Bentonite (“BHB”) alleges as follows.

I. Factual Background

On August 8, 2024, the EQC conducted a hearing on BHB's *Motion for Summary Judgment*, which was denied. Immediately following the denial, a Final Prehearing Conference was held.

On August 9, 2024, the EQC issued its *Order Following Prehearing Conference* (“**Order**”). While the Order addressed the expected logistical and administrative issues for the hearing, it also made inappropriate rulings that exceeded common practice and the Hearing Examiner's authority; the rulings are not only premature but also unfairly prejudicial to BHB.¹ The rulings eviscerate BHB's arguments before the hearing on the merits, thus denying BHB its due process rights to a full and fair hearing. BHB, therefore, asks that the rulings be withdrawn, the EQC be informed why and instructed to disregard them, and efforts be made to ensure the rulings and this Objection have not prejudiced BHB.

II. Legal Argument

A motion for summary judgment hearing was and is not the appropriate time or place to exclude and limit BHB's claims. The denial of the motion simply puts the parties back to a status where all issues of fact and law are before the EQC.

A. **BHB, as with any litigant, has the right to a full and fair hearing.**

BHB's *Motion for Summary Judgment* was submitted to the EQC on written pleadings, supplemented by brief oral argument. As under any motion for summary judgment, the issues are narrow and the applicability of law to uncontested material of facts is the key inquiry. The EQC found it to be “without the necessary facts” and that “genuine issues of material facts exist,” *Order Denying Black Hills Bentonite's Motion for Summary Judgment* at ¶ 2, and that there are “disputed

¹ The rulings giving rise to this Objection are highlighted in a copy of the *Order Following Prehearing Conference*, attached as “Exhibit A” and incorporated herein by this reference.

material facts.” *Id.* at ¶3. ²

Given these conclusions, no further steps were required by the EQC. It had resolved the summary judgment issues.

Nonetheless, in the *Order Following Prehearing Conference*, the Hearing Examiner made substantive rulings adverse to BHB.³ The Hearing Examiner’s conclusions, which could only have been based upon the summary judgment arguments, preclude BHB’s factual and legal theories, therefore depriving it of an opportunity to be heard. If allowed to stand, the decisions eviscerate BHB’s ability to make and argue its case, as well as to create the necessary record.

B. It is inappropriate for a Hearing Examiner to make the decisions found in the Order

The role, duties, and obligations of the Hearing Examiner have been set by the Wyoming legislature and are found at Wyo. Stat. §16-3-112(b):

“Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its power to:

- (i) Administer oaths and affirmations;
- (ii) Issue subpoenas;
- (iii) Rule upon offers of proof and receive relevant evidence;
- (iv) Take or cause depositions to be taken in accordance with the provisions of this act and the rules of the agency;
- (v) Regulate the course of the hearing;
- (vi) Hold conferences for the settlement or simplification of the issues;
- (vii) Dispose of procedural requests or similar matters;
- (viii) Make recommended decisions when directed to do so by the agency; and
- (ix) Take any other action authorized by agency rules consistent with this act.”

These duties and obligations are ministerial and administrative. While a hearing examiner may “make recommended decisions when directed to do so by the agency,” Wyo. Stat. §16-3-

² For any “order adverse to a party in a contested case,” Wyo. Stat. §16-3-110 mandates “finding of facts and conclusions of law separately stated.” The EQC’s *Order Denying Black Hills Bentonite’s Motion for Summary Judgment* fails to meet these statutory requirements.

³ Just as with the EQC’s *Order Denying Black Hills Bentonite’s Motion for Summary Judgment*, the *Order Following Prehearing Conference* also does not include “finding of facts and conclusions of law separately stated.” Wyo. Stat. §16-3-110.

112(b)(viii), to BHB's knowledge there was never any direction by the EQC for the Hearing Examiner to make a recommended decision. In fact, had there been such a request, the parties were to be given the opportunity to review it and file exceptions. Wyo. Stat. § 16-3-109. BHB is not aware of any such opportunity.

In making the decisions reflected in his Order, the Hearing Examiner has dismissed BHB's arguments, limiting its legal and factual claims and essentially driving a decision when they have no duty, obligation, or ability to do so.

C. Contested case procedure requires the EQC to permit the parties to present their cases.

Wyoming's Administrative Procedure Act, at Wyo. Stat. § 16-3-107 (j) clearly reflects the goal of permitting all parties to present their cases:

Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved. Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel or, if permitted by the agency, by other qualified representative.

Foreclosing BHB's arguments - when they have not had the opportunity to present them in a full evidentiary hearing - is patently inappropriate.

WHEREFORE, Petitioner, Black Hills Bentonite, LLC, prays the Environmental Quality Council:

1. Sustain its objections, and permit BHB to present its full legal and factual arguments;
2. Strike the identified decisions and statements from the Order;
3. Address the basis for the relief granted herein;
4. Disregard the Hearing Examiner's identified decisions and statements; and
5. Conduct a voir dire of the EQC to determine whether their opinions have been influenced by the findings and statements in the Order, or by this Objection.

DATED this 13th day of August, 2024.

A handwritten signature in blue ink, appearing to be 'Kayla A. Albertson', written over a horizontal line.

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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 by email, sent via US Postal Service on August 14th, 2024, as follows:

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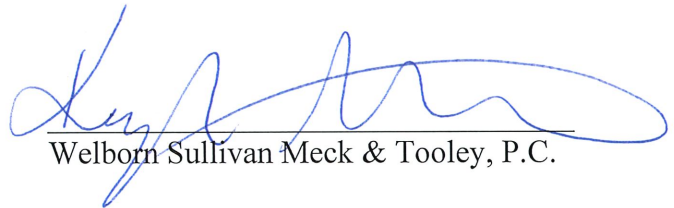

Welborn Sullivan Meck & Tooley, P.C.

EXHIBIT A

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

IN THE MATTER OF BLACK HILLS)
BENTONITE PERMIT TO MINE NO. 248C) Docket No. 24-1601
MURPHY CREEK UPDATE AREA)
)

ORDER FOLLOWING PREHEARING CONFERENCE

This matter came before the Hearing Examiner for a prehearing conference on August 8, 2024 via video conference. Appearing for Black Hills Bentonite was Kayla A. Albertson, Patrick R. Tolley, and John A. Masterson of Welborn Sullivan Meck & Tooley, P.C. Appearing for Bruce and Betty Jean Firnekas (Landowners) was Mitchell H. Edwards and Kenna J. Blaney of Nicholas & Tangeman, LLC.

The purpose of the prehearing conference was to discuss the relevant factual and legal issues and claims, witnesses, exhibits, burden of proof, and other matters related to the upcoming contested case scheduled for August 15 in Cheyenne, Wyoming.

Witnesses

Neither party has any objections to any of the listed witnesses in the parties' prehearing disclosure statements.

Stipulated Facts

The parties confirmed that they are in agreement with the stipulated facts in their prehearing disclosure statements. If the parties agree to additional stipulated facts, they must file them with the Council prior to the contested case.

Exhibits

Black Hills did not anticipate that it will object to any of the Landowners' exhibits (Exhibits 1 – 4); however, at the time of the prehearing conference, Black Hills was unwilling to stipulate to

the admission of the exhibits until it could confirm the accuracy of the exhibits. The Hearing Examiner requests that Black Hills notify the Council prior to the contested case if it will stipulate to the admission of those exhibits.

The Landowners agreed to stipulate to the admission of Black Hills' exhibits listed in its prehearing disclosure statement with the exception of Exhibits G and L. The Hearing Examiner requests that the Landowners notify the Council prior to the contested case if they will stipulate to the admission of Exhibits G and L.

Claims/Issues to be Decided by the Council

Black Hills contends that the main issue for the Council to decide is what rights are currently held by Black Hills to enter upon and mine bentonite on Landowners' land. Black Hills alleges that it is currently allowed to enter upon Landowners' land and mine bentonite without needing Landowners' consent or permission because of Black Hills' rights outlined in duly recorded land records.

Second, Black Hills contends that if a statutory process applies, the Council must decide whether Black Hills has satisfied the four elements outlined in Wyo. Stat. Ann. § 35-11-406(b)(xii)(A) – (D).

Landowners contend that the main issue for the Council to decide is whether Wyo. Stat. Ann. § 35-11-406(b)(xi) or (xii) applies, and if (xii) applies, whether the four elements in (b)(xii)(A) – (D) are satisfied. The Landowners further allege that if (xi) applies, the Council cannot issue an order in lieu of consent.

The Hearing Examiner concludes that the issues to be decided by the Council are whether Wyo. Stat. Ann. § 35-11-406(b)(xi) or (xii) applies, and if (xii) applies, whether the four elements in (b)(xii)(A) – (D) are satisfied.

The Council does not have the authority to decide whether Black Hills' and the Landowners' deeds allow Black Hills to enter upon Landowners' land and mine bentonite without needing Landowners' consent as outlined in § 35-11-406(b)(xi) or (xii). Black Hills contends that the "first and dispositive issue is that Respondents' consent is not necessary under the facts and circumstances presented." See *Black Hills' Prehearing Disclosure Statement*, p. 3. However, the Council is not statutorily authorized to decide that issue—the Council is required to follow the statutory process outlined in § 35-11-406(b)(xi) and (xii).

Burden of Proof

The parties agree that Black Hills has the burden of proof to show by a preponderance of the evidence that the four elements in Wyo. Stat. Ann. § 35-11-406(b)(xii)(A) – (D) are satisfied.

However, the Hearing Examiner also concludes that Black Hills has the burden to prove that § 406(b)(xii) is the appropriate statute in this case which requires Black Hills to prove that Wyo. Stat. Ann. § 35-11-406(b)(xi) does not apply.

Contested Case Hearing

The final contested case hearing is set for **August 15, 2024 beginning at 9:00 a.m., at the Hathaway Building, 2300 Capitol Ave, Cheyenne, WY**. The contested case hearing will be one day. A court reporter will report the hearing.

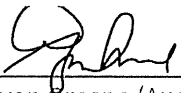
Other Matters

The parties shall make appropriate arrangements for the attendance of their witnesses at the contested case hearing. Parties or their witnesses shall be allowed to participate in the contested case by phone or videoconference if attendance in person is not feasible. In this case, Bruce Firnekas is allowed to testify via phone or videoconference. If any other party, attorney, or witness requires special accommodations, the Council shall be notified as soon as possible so the necessary arrangements may be made.

All parties are encouraged to continue to make reasonable efforts to resolve the case. The parties shall promptly notify the Hearing Examiner of all settlements, stipulations, agency orders, or other action eliminating the need for a contested case hearing.

The information provided in this order is binding on each party throughout the course of the contested case unless modified by the Hearing Examiner.

So **ORDERED** this 9th day of August 2024.



Ryan Greene (Aug 9, 2024 12:21 MDT)
Ryan Greene, Hearing Examiner
Environmental Quality Council