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FILED

OCT 25 2011

Jim Ruby, Executive Secretary
Environmental Quality Council

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

**IN THE MATTER OF THE OBJECTION)
TO THE PROPOSED RENEWAL PERMIT,)
SAND DRAW LANDFILL, SHWD FILE #10.195)** **Docket No. 11-5602**

DEQ'S FIRST MOTION IN LIMINE

In accordance with DEQ Rules of Practice and Procedure Chapter II, Section 14(a), Wyoming Rule of Civil Procedure 26(a)(2)(B), and the Environmental Quality Council's (Council) order dated September 9, 2011, the Wyoming Department of Environmental Quality, Solid and Hazardous Waste Division (DEQ) moves that the Council exclude the expert testimony of Ken Schreuder, Donald Siegel, James Fink, and Howard Johnson on the potential for vertical expansion of the Sand Draw landfill to affect groundwater quality.

BACKGROUND

On September 8, 2011, the Council held a scheduling conference at which attorneys for both DEQ and the Fremont County Solid Waste Disposal District (District) were present. Order of Schedule, docket no. 11-5602 (Sept. 9, 2011). The following day,

the Council issued a scheduling order, which expressly required that “[e]xpert designations *and reports* shall be filed by 12:00 noon September 23rd.” *Id.* at 1, ¶ (a) (emphasis added).

On September 23, 2011, the District filed its designation of expert witnesses. *See* Pet’rs Designation of Expert Witnesses. In the designation, the District asserted that Ken Schreuder, Donald Siegel, James Fink, and Howard Johnson would render undisclosed expert opinions on what effect vertical expansion of the Sand Draw landfill would have on groundwater quality. *See id.* at 2-5. The District’s designation did not set forth the expert opinions the designated witnesses would offer, the bases for the opinions, or the data or other information the witnesses considered in forming their opinions. *See id.*¹

ARGUMENT

The DEQ Rules of Practice and Procedure provide that the Wyoming Rules of Civil Procedure “apply to matters before the Council.” *Id.* at ch. II, § 14(a). Moreover, the Wyoming Administrative Procedure Act requires that in all contested cases discovery be conducted in accordance with Wyoming Rule of Civil Procedure 26. *See* Wyo. Stat. Ann. § 16-3-107(g).

¹ The District stated that Ken Schreuder will “render his opinion as to what, if any, effect a vertical expansion of the current landfill area of the Sand Draw Landfill will have on the groundwater quality”; that Donald Siegel “will also render his opinion as to what, if any, effect a vertical expansion ... will have on groundwater quality”; that James Fink “will also render his opinion as to what, if any, effect a vertical expansion of the current landfill area ... will have on the groundwater quality”; and Howard Johnson “will also testify as to underground water condition of the site ... and the effect thereon by the Landfill and the effect that vertical expansion would have on the site.” Pet’rs Designation of Expert Witnesses, at 2-5 (Sept. 23, 2011).

I. EXPERT OPINIONS MUST BE FULLY DISCLOSED.

Wyoming Rule of Civil Procedure 26 requires that designations of expert witnesses include “a complete statement of all opinions to be expressed and the basis and reasons therefor[.]” *Id.* at (a)(2)(B). Expert witness designations must provide “the data or other information considered by the witness in forming the opinions[.]” *Id.* The disclosures required by Rule 26(a)(2) are mandatory, and must be “made in the detail required by the rule.” *Wilson v. Tyrell*, 2011 WY 7, ¶¶ 52, 54, 246 P.3d 265, 279-80 (Wyo. 2011) (internal citation omitted).

The purposes behind the rule requiring disclosure of expert opinions, including the underlying bases for the opinions and supporting data, are clear. The corollary federal rule requiring disclosure of expert opinions is designed “to convey the substance of the expert’s opinion ... so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary.” *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 762 (7th Cir. 2010) (internal citation omitted). The following passage succinctly illustrates why the rules require complete, pretrial disclosure of expert opinions:

Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon. If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony. He may need advice of his own experts to do so and indeed, in certain cases, his experts might require time to make further inspections and analyses of their own.

Smith v. Ford Motor Co., 626 F.2d 784, 794 (10th Cir. 1980) (quoting Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 Stan. L. Rev. 455, 485 (1962)). Stated simply, the purpose of the expert witness disclosure rule is to ensure a fair and full evaluation of expert testimony.

Accordingly, the Council's scheduling order required the parties to this case to submit expert witness designations and reports no later than September 23rd. Order of Schedule, docket no. 11-5602, at 1, ¶ (a) (Sept. 9, 2011).

II. THE DISTRICT'S EXPERT WITNESS DISCLOSURE IS INADEQUATE.

The District designated Ken Schreuder, Donald Siegel, James Fink, and Howard Johnson as witnesses who will render expert opinions on the effect vertical expansion of the Sand Draw landfill will have on groundwater quality. Pet'rs Designation of Expert Witnesses, at 2-5 (Sept. 23, 2011). The District did not state what opinions the designated expert witnesses will offer, or provide the bases and reasons for the expert opinions the witnesses will provide. *Id.*; see also Wyo. R. Civ. P. 26(a)(2)(B). The District also did not provide the data or other information the expert witnesses considered in forming their opinions. *Id.*

The only support the District provided for these witnesses' proposed expert testimony is two reports that accompanied the designation. The first is a report prepared by James Fink's employer that summarizes electrical conductivity observations at Sand Draw. Pet'rs Designation of Expert Witnesses, Ex. E. The second—a manuscript prepared by Donald Siegel—argues that solid waste regulators in arid western states should treat solid waste disposal differently than regulators in humid,

eastern states. Pet'rs Designation of Expert Witnesses, Ex. C, at 2. Neither report offers an opinion on the potential for vertical expansion of Sand Draw to contaminate groundwater.

The District has thus failed even to provide the opinions its expert witnesses will offer, let alone the bases, data, and information used by its proposed expert witnesses in formulating opinions about vertical expansion and groundwater contamination. The District's failure to provide any explanation of the opinions that the District's expert witnesses will offer on the potential for vertical expansion to contaminate groundwater, or the bases therefor, violates the Council's scheduling order, Wyo. R. Civ. P. 26(a)(2)(B), and Wyo. Stat. Ann. 16-3-107(g). The District's inadequate disclosure places DEQ in the untenable position of having to rebut, cross-examine, and offer competing expert testimony without advance notice of what expert evidence will be presented.

III. EXCLUSION IS THE APPROPRIATE REMEDY.

The Wyoming Rules of Civil Procedure make clear that the appropriate remedy for the District's failure to comply with Rule 26(a) is exclusion of the proffered testimony. *See* Wyo. R. Civ. P. 37(c)(1). As the rules provide, "[a] party that without substantial justification fails to disclose information required by Rule 26(a) ... is not, unless such a failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed." *Id.*

The District failed to disclose the following information required by Rule 26(a): (i) the opinions its expert witnesses will offer, (ii) the bases and reasons for the experts' opinions, and (iii) the data or other information the witnesses considered in forming

their opinions. Wyo. R. Civ. P. 26(a)(2)(B). Without knowing what opinions the District's proposed witnesses will offer, or the bases for those opinions, DEQ cannot formulate a response to the proposed expert testimony. Moreover, because this case is proceeding on an expedited hearing schedule in accordance with Wyo. Stat. Ann. § 35-11-502(k), the District's insufficient disclosure prevents DEQ from having a fair opportunity to depose expert witnesses and to seek out its own expert opinions. Therefore, the District's failure to comply with Rule 26(a) is not harmless, and the District should not be allowed to present the insufficiently disclosed expert testimony. *Id.*

In the alternative, the District should be required to provide a complete disclosure of expert witness testimony no later than November 7, 2011. Such a late disclosure would unfairly prejudice DEQ's preparation for the November 16th hearing, but would be a preferred alternative to entering the hearing without any notion of what testimony the District's expert witnesses will offer.

CONCLUSION

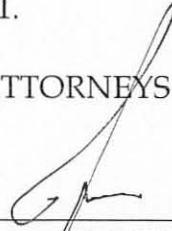
WHEREFORE DEQ requests that the Council grant this motion, and exclude the expert opinion testimony of Ken Schreuder, Donald Siegel, James Fink, and Howard Johnson on the subject of the potential for vertical expansion of the Sand Draw landfill to impact groundwater, or in the alternative require the District to completely disclose expert testimony by November 7, 2011.

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Dated this 25th day of October, 2011.

ATTORNEYS FOR DEQ



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of October, 2011, a true and correct copy of *DEQ's First Motion In Limine* was served by placing the same in the United States mail, postage pre-paid, and via electronic mail to the following:

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