



STATE OF
COLORADO

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Aggregate Industries - Motion to Strike - M-2004-044

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Tue, Jan 11, 2022 at 2:30 PM

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Good Afternoon,

Attached, please find Aggregate Industries' Motion to Strike in the Matter of Aggregate Industries, File No. M-2004-044 to be heard before the MLRB on January 19-20, 2022.

Thank you,
Brenden Desmond



Tucson South Pit AM-02 Application - AI's Motion to Strike (Final).pdf

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**BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO**

**AGGREGATE INDUSTRIES-WCR, INC.'S MOTION TO STRIKE WITNESSES AND
EXHIBITS**

**IN THE MATTER OF THE 112c PERMIT APPLICATION AMENDMENT WITH
OBJECTIONS, TUCSON SOUTH PIT, FILE M-2004-044 AMENDMENT NO. 2 (AM-02)**

Aggregate Industries-WCR, Inc. ("AI") hereby submits its Motion to Strike Witnesses and Exhibits from consideration during the Mined Land Reclamation Board's ("Board") formal hearing scheduled for January 19, 2022, as follows:

INTRODUCTION

As the Board is aware, this formal hearing is for AI's application for a second amendment to Permit File M-2004-044 to revise the affected lands under Permit File M-2004-044 to remove 3.3 acres of unaffected land related to a former conveyor route and add 7.7 acres for a new conveyor route. This hearing is not to relitigate or rehear objections to the underlying permit, which was approved by a previous Board on May 11, 2005, or any other revisions thereto (the "Existing Permit"). Testimony regarding the Existing Permit, and the Conditional Use Permit issued to AI by the Adams County Board of Commissioners (the "CUP") for the Tucson South Resource, however, are the primary focus of Ms. Gould's, Mr. Muhler's, and Mr. Lloyd's (collectively, the "Objectors") witness and exhibit lists. Such matters are outside of the Permit Amendment application (the "Application") and outside the jurisdiction of the Board for this hearing. Allowing the introduction of such irrelevant testimony or evidence would waste the Board's time, cause confusion, and prejudice the proceedings. AI, therefore, respectfully submits this Motion to Strike Witnesses and Exhibits.

LEGAL STANDARDS

MLRB Hearing Rule 2.8.1(2) states that "[t]he rules of evidence and requirements of proof shall conform to the extent practicable, with those in civil non-injury cases in district courts." When holding a hearing, the Board may exclude testimony and evidence "as duplicative and unnecessary." *Glustrom v. Colorado Pub. Utilities Comm'n*, 2012 CO 53, ¶¶ 21-22, 280 P.3d 662, 667. For example, C.R.S. § 24-4-105(7) states that agencies are authorized to exclude "incompetent and unduly repetitious evidence." *Id.* Similarly, pursuant to CRE 403, the Board may exclude even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the [Board] or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence". *Id.* Furthermore, "[e]vidence which is not relevant is not admissible." CRE 402.

The Colorado Rules of Evidence also require exclusion of certain witnesses and testimony. For example, "a person may testify as a lay witness only if his opinions or inferences do not require

any specialized knowledge and could be reached by any ordinary person.” *Glustrom*, 2012 CO 53, ¶ 22 (quoting *People v. Rincon*, 140 P.3d 976, 982 (Colo.App.2005)). In fact, a person may only testify as an expert when the Board qualifies them “as an expert by knowledge, skill, experience, training, or education” CRE 702. On the other hand, “if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” CRE 701. Finally, witnesses may only testify regarding matters for which they have personal knowledge. CRE 602.

MOTION

1. The Following Witnesses Should Not be Allowed to Testify at the Hearing

In their listing of witnesses, the Objectors primarily name witnesses whose stated areas of testimony are either entirely irrelevant to the Board’s consideration of whether the Application meets the applicable statutes, rules and regulations, or such areas of testimony regard matters that are outside the jurisdiction of the Board.

One category of witnesses is listed as providing “historical knowledge.” The Application, however, is for the very narrow purpose of removing 3.3 acres of unaffected land related to a former approved conveyor route and adding 7.7 acres for a new conveyor route that was approved as part of the CUP. The conveyor itself and any road crossings for the conveyor are in the process of being reviewed and approved by Adams and Weld Counties, thus there is no “history” that is relevant to the Application. The Objectors, however, wish to re-litigate the “history” of the Existing Permit and AI’s performance under other Department of Reclamation, Mining and Safety permits. Rather than providing probative evidence of whether AI met the criteria for approval of the Application, the Objectors’ requests are, instead, an attempt to prejudice the hearing. Allowing such testimony is irrelevant to whether AI met the criteria for approval of the Application, and would serve merely to waste the Board’s time. As such, the following witnesses should be prevented from testifying:

- **Cristofer Muhler**
- **James Hood**

Next, the Objectors list witnesses who will purportedly testify as to matters that are addressed in the CUP. This testimony is also irrelevant to whether AI met the criteria for approval of the Application. Further, this proffered testimony is as to the CUP, the conditions of the CUP and AI’s performance under the CUP, which is outside the Board’s jurisdiction. As such, the following witnesses should be prevented from testifying:

- **Tania De La Cruz**
- **Chris Muhler**
- **James Hood**

Lastly, a number of witnesses are listed as testifying to AI’s “outreach”. “Outreach” is not notice of the Application, as required by the applicable statutes, rules and regulations. Further, as

noted by Mr. Muhler at the pre-hearing conference, and by the Board staff, AI has met all notice requirements. Instead, testimony regarding “outreach” is the Objectors’ attempt to argue about the relative merits and efficacy of the Board’s underlying rules regarding notice, not how these rules were complied with by AI for the Application. Such testimony is irrelevant and serves merely as a distraction and an attempt to waste the Board’s time. As such, the following witnesses should be prevented from testifying as to these issues:

- **Chris Muhler**
- **James Hood**

2. *The Following Witness Testimony Should be Limited at the Hearing*

Similarly, each Objector lists the other Objectors on their respective witness lists, but the scope of the testimony listed is either irrelevant, regarding matters that are outside of the Board’s jurisdiction, or is a waste of the Board’s time, as such, allowing the proposed testimony would merely lengthen the hearing and prejudice the proceedings.

Dr. Wayne Muhler: Dr. Muhler is listed by other Objectors as providing historical knowledge, engineering, and data. As addressed above, historical knowledge of the Existing Permit is not relevant to the Board’s consideration of whether AI met the applicable statutes, rules and regulations for the Application, and is merely an attempt to prejudice the hearing. Also, while approval of the conveyor system itself is outside the Board’s jurisdiction, even if the conveyor were within the Board’s jurisdiction, to AI’s knowledge, Dr. Muhler has no experience or expertise in conveyor systems or their operation. Further, Dr. Muhler has not provided any information necessary to qualify as an expert on these topics. Rather, Dr. Muhler’s stated experience appears to be related to groundwater mounding and slurry wall design, which are not part of the Application, and for which he similarly has not disclosed any information necessary to qualify as an expert on these matters. Furthermore, any data related to these issues is likewise irrelevant to the Board’s consideration of the Application. As such, any of Dr. Muhler’s testimony should be limited to the scope of the Application: the revision to the affected lands for the new conveyor route.

Sherie Gould and Mike Lloyd: The other objectors list Ms. Gould and Mr. Lloyd as also providing historical evidence. But, like the other proposed witnesses, historical knowledge is irrelevant to the revision to the affected lands for the new conveyor route and beyond the scope of this Application. Allowing such testimony would merely prejudice the proceedings and waste the time of the Board and the Parties. As such, Ms. Gould’s and Mr. Lloyd’s testimony should be limited to the revision to the affected lands for the new conveyor route and the Application.

AI also notes that Ms. Gould is attempting to present as evidence testimony about the allowed duration of AI’s mining and reclamation operations under the CUP. In effect, Ms. Gould is attempting to testify that AI could not possibly accomplish its mining and reclamation goals even if the Application is approved, therefore the Board should not approve the Application. However, AI’s obligations under the CUP and are outside the jurisdiction of the Board, and are not relevant to the Application which is limited to the removal of 3.3 acres of unaffected land related to a former approved conveyor route and addition of 7.7 acres. Further, even if such testimony would be considered relevant to the Application, which AI disputes, to AI’s knowledge, Ms. Gould has no

expertise in mining so is not qualified to testify as to whether AI's mining and reclamation goals can be accomplished. Finally, the prehearing conference officer specifically determined this issue is outside the jurisdiction of the Board, and did not include this issue in the draft prehearing order

3. *The Following Evidence Should Not be Allowed to be Introduced at the Hearing*

Portions of Adams County Board of County Commissioners CUP Resolution: This evidence was provided by Ms. Gould. As discussed above, testimony regarding the CUP is irrelevant to the Application and outside of the Board's jurisdiction. This evidence coincides with Ms. Gould's proposed testimony regarding the mining time frame in the CUP, which, as discussed above, is irrelevant, and outside Ms. Gould's knowledge. Thus, the Board should strike this evidence.

Westminster Email Chain, Westminster Agreements and Discussion of the Wattenberg Permit: A substantial number of the Objectors' proposed exhibits address the terms of a private agreement between AI and the City of Westminster for delivery of water storage, and a permit for mining and reclamation of a mine site for such water storage called the Wattenberg Mine (the "Wattenberg Documents"). While the conveyor for the Tucson South mine is designed to connect to an existing conveyor on the Wattenberg Mine site, there is no legal right of entry to the Wattenberg Mine required for approval of the very narrow Application to remove 3.3 acres of unaffected land related to a former approved conveyor route and add 7.7 acres for a new conveyor route. Further any legal right of entry required for AI to conduct any necessary conveyor operations on the Wattenberg Mine Site is as provided for in the Wattenberg Documents. The Wattenberg Mine DRMS permit is not before the Board today and therefore any information regarding AI's agreement with the City of Westminster and the Wattenberg DRMS Permit are matters that are outside the Board's jurisdiction, are irrelevant, a waste of time, and would merely serve to prejudice the hearing. Thus, the Board should strike this evidence.

Discussion of the City of Aurora Water Rights, Water Depletion Lease Agreement, Hydrology Issues, and Substitute Water Plan: Another substantial portion of the Objectors' proposed exhibits regards issues associated with the City of Aurora's alleged storage of out-of-priority water. Specifically, a Water Depletion Lease Agreement, Valley Water and Challenger Reservoir issues, hydrology issues, a City of Aurora Water Rights Decree, and a Substitute Water Plan. However, none of these documents are relevant to the Application. The Application is to remove 3.3 acres of unaffected land related to a former approved conveyor route and add 7.7 acres for a new conveyor route, which would not affect Aurora's water rights or hydrology issues. Moreover, discussion of the Challenger Reservoir, which was not mined or created by AI, is merely meant to distract the Board from the subject of the Application and provide the Objectors a vehicle for airing their general grievances with mining and water storage operations in the area. This proposed evidence is not probative of whether the Applications meets the applicable statutes, rules and regulations. At best, the introduction of this evidence is meant to relitigate the Existing Permit, which is irrelevant, and outside of the Board's jurisdiction for this Application, and which would merely prejudice the proceedings. As such, this evidence and any related testimony should be excluded from the hearing.

Pre-Application Documentation for the Conditional Use Permit: This evidence is

irrelevant to the Application and outside the scope of the Board's jurisdiction. In fact, the documentation does not even reflect the CUP as finally approved by Adams County. As such, discussion of this evidence is irrelevant, outside of the Board's jurisdiction, would prejudice the proceedings, and should be struck.

Photos of Deer: Included with Ms. Gould's proposed exhibits are, what appear to be, photos of deer. It is unclear why Ms. Gould intends to introduce such evidence, but the photos are not of the proposed new affected lands. As such, Ms. Gould cannot show authenticity or relevance of the photos. In addition, if the photos are an attempt to show that wildlife may be trapped by a conveyor, AI notes that the Colorado Department of Wildlife provided comments to which AI responded, which formed the basis for the recommended approval with conditions, showing AI had adequately addressed this concern. Therefore, the Board should strike the photos.

Photos of the Site: It is unclear why the Objectors wish to introduce this evidence, but it is presumed that it is for the purpose of discussing AI outreach, which is in essence an attempt to challenge the Board's rules regarding posting, or AI's compliance with the CUP. As the Objectors acknowledged, and the Board staff stated, AI complied with all notice requirements, and the Objectors are instead attempting to argue the Board's rules are somehow inadequate. Further, compliance with the CUP conditions is outside the Board's jurisdiction. Such testimony is beyond the scope of this hearing, irrelevant, a waste of time, and prejudicial. As such, the submitted photos should be struck.

Evidence Related to Existing Permit: Finally, while not specifically disclosed by the Objectors, it is AI's understanding that a portion of the objections raised by Dr. Muhler and Mr. Lloyd were heard and dismissed by the previous Board that approved the Existing Permit. In an attempt to relitigate these issues, the Objectors may attempt to present such arguments as reasons that the Board should deny the Application. However, considering such evidence would be outside of the Board's jurisdiction, prejudicial, and a waste of time.

4. *Evidence Submitted after the Board's Deadline Should Not Be Allowed at the Hearing*

In addition to the above reasons that certain evidence should be excluded, Dr. Muhler's proposed evidence should also be excluded as it was served on AI at 5:21 pm (MST) on January 7, 2022, after the Board's extended 5:00 p.m. (MST) deadline. The Board's rules set out deadlines in which to exchange proposed exhibits. This deadline was communicated to the Parties through the rules and at the pre-conference hearing. Dr. Muhler was also reminded of this rule by email by the Division staff at 3:24 pm on January 7, 2022. However, Dr. Muhler did not submit exhibits to AI until after the deadline passed. Allowing such evidence to be introduced is prejudicial to AI and the Board should order it excluded.

CONCLUSION

A majority of the Objectors' arguments relate to the Existing Permit, the Board's own rules or the Conditional Use Permit and are irrelevant to the Application or address issues that are outside the Board's jurisdiction. Allowing the introduction of such testimony or evidence would be prejudicial to AI, would serve to waste the Board's time or would be beyond the scope of the hearing. As such, the Board should exclude this testimony and evidence.

Respectfully submitted on January 11, 2022.

/s/ *Michelle L. Berger*

Michelle L. Berger, #21099

Attorney for Aggregate Industries-WCR, Inc.