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ATTORNEYS FOR PETITIONER  
BROOK MINING COMPANY, LLC

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

IN RE BROOK MINE APPLICATION                    )  
  ) Civil Action No. 16-1601  
  )

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**MOTION TO STRIKE SURFACE OWNER BOND AFFIRMATIVE DEFENSE**

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**INTRODUCTION**

Simple facts. Simple law. Simple process. The order in lieu process evaluates: 1) whether the surface owners knew about a mine and reclamation plan; 2) whether the surface owners could evaluate the general effects of the mine and reclamation plan on the surface; and 3) whether those effects will substantially prohibit their operations. That is it. It does not require this Council to decide the technical elements of a mine permit or decide the types of bonds necessary for that permit. *See* Wyo. Stat. Ann. § 35-11-416. Those decisions belong exclusively to the Department of Environmental Quality. Wyo. Stat. Ann. § 35-11-403.

But Padlock Ranch Co. and Big Horn Coal (Respondents) have asked this Council to usurp the decision-making authority of the Department and add elements to the order in lieu process that do not exist in the Environmental Quality Act. The Respondents have requested that

the Council either deny the order in lieu because Brook has not yet posted a surface damages bond or condition the order in lieu on the posting of a bond. (Padlock Ranch Resp., 9; Big Horn Coal Resp., 6-7.) But this Council has no authority to do either because no statute empowers this Council to set surface damage bonds or require them as part of the order in lieu process.

The lack of supporting law for the Respondents' request reveals its true purpose—delay and leverage. The Respondents seek to add a financial obstacle to the order in lieu process in an effort to increase the difficulty of getting a mine permit. Should the Respondents succeed, then possible settlement offers that favor one or both could become more attractive. Padlock admits as much, noting that “in lieu of a bond, Ramaco could negotiate an agreement with Padlock by which Padlock agrees to waive such a bond. However, to date, Ramaco has neither provided a bond for Padlock's benefit, nor has it offered an agreement by which Padlock would waive the bond for payment of surface damages.” (Padlock Co. Resp., 9, Fn 2.)

Setting aside Padlock has no legal authority to waive the bond requirement, this Council does not have authority to decide or condition surface damages bonds. At best, the Respondents' tactic clouds the simple issues before the Council. At worst, the Respondents ask the Council to exceed its authority, making its decision void. Rather than exceed its authority, Brook requests the Council enter an order stating that it will not consider the status of surface damage bonds as part of deciding Brook's request for an order in lieu of consent.

### **ARGUMENT**

Under the Environmental Quality Act, the Department has the authority to determine whether an applicant has met the statutory requirements for a permit, including setting the necessary bonds. Wyo. Stat. Ann. § 35-11-403(a)(iv). The Department does not set the bond “until the permit application is finalized and a permit is issued.” (Ex. A, Email.) But here, the

Department has not set the bond because the permitting process is not complete. (*Id.*) Padlock Ranch knows this because the Department told one of its directors. (*Id.*)

Until the Department sets the bond, this Council has nothing to review, giving it no authority to consider the bonding issue. This Council exists to “hear and decide disputes arising from the implementation of the Environmental Quality Act.” *Platte Dev. Co. v. State, Env’tl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998). The Council has the authority to hear cases contesting the administration or enforcement of any “law, rule, regulation, standard or order” issued by the Department. *Id.* The Council does not have the authority to consider possible future action.

Should the Council consider the Respondents’ request, it will create an impossible catch-22 for Brook. Brook cannot get a permit to mine coal without an order in lieu of consent because the Respondents have withheld their consent. But, pursuant to its well-established permitting process, the Department will not determine a bond amount until it decides the permit application process is complete and the permit is ready for issuance. (Ex. A.) In this case, that requires an order in lieu of consent. (*See id.*) So the Respondents would create a scenario by which a bond could not practically be set because a permit did not issue but at the same time require a bond be set before a permit is issued.


But the Council has no authority to create the Respondents’ catch-22. The Council cannot “modify, dilute or change in any way the statutory provisions from which it derives its authority.” *Platte Dev. Co.*, 966 P.2d at 975. If the Council did so, then its decision would be “null and void.” *Id.* To consider the bonding issue, this Council would have to violate this rule because the elements necessary to issue an order in lieu have nothing to do with the bonding provisions of the Environmental Quality Act. In other words, the Council would have to change

the elements for an order in lieu to conflate this process with the surface damage bonding process. The Council should decline to do this.

**CONCLUSION**

This is a simple process because the Environmental Quality Act limited the elements the Council should consider for an order in lieu of consent. If Brook proves those elements, then the Council must issue the order. The Respondents cannot change this reality, no matter their desire to impede Brook's efforts. Therefore, the Council should decide that it will not consider the status of surface damage bonds as part of deciding Brook's request for an order in lieu of consent.

DATED: May 23, 2016.



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## CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, I served a true and correct copy of the foregoing by United States mail, postage prepaid and addressed to the following:

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