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

IN RE BROOK MINE APPLICATION)
) **Docket 17-4802 (Consolidated)**
TFN 6 2-025)

DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO STRIKE

The State of Wyoming, Department of Environmental Quality ("Department"), through its undersigned counsel, and pursuant to Wyoming Statute § 16-3-108(a), Wyoming Rule of Civil Procedure 12(f), and Chapter 2, Section 2 of the Department's and the Environmental Quality Council's ("Council") Rules of Practice and Procedure, hereby moves the Council to strike "Exhibit A" to the Powder River Basin Resource Council's ("PRBRC") proposed finding of fact and conclusions of law and the reference to Exhibit A found on page 22, paragraph 104, of the proposed findings. The Department also asks the Council not to consider the federal rules mentioned in Exhibit A in its deliberations or decision.

Exhibit A is composed of a letter from Mr. Mark Eslinger to PRBRC's legal counsel and a copy of Mr. Eslinger's resume. *Exhibit A* at 1-5. In the letter, Mr. Eslinger expresses his opinions about the regulations of the Mine Health and Safety Administration that govern ground control plans. *Id.* at 1. In essence, Exhibit A is a new expert report. *See* Wyo. R. Civ. P. 26(a)(2)(B).

However, PRBRC also appears to ask the Council to treat Exhibit A as an affidavit of Mr. Eslinger's opinion testimony. Along with attaching Exhibit A to its proposed findings, PRBRC referenced Mr. Eslinger's opinions as though they were somehow part of the evidentiary record and stated that it was submitting the exhibit to rebut testimony of Mr. Jeff Barron. *PRBRC's Proposed Findings* at 22 and n.7.

Brook Mining has also moved the Council to strike Exhibit A. *Brook Mine's Mot. to Strike PRBRC's Suppl. Expert Report*, filed July 26, 2017. The Department agrees with and supports Brook's arguments for striking Exhibit A. Rather than repeat all of Brook's arguments here, the Department hereby joins those arguments with this motion. In short, the Department agrees that the Council should strike or exclude Exhibit A and the reference in PRBRC's proposed findings under the five-factor test found in *Forbes v. Forbes*, 2015 WY 13, ¶ 83, 341 P.3d 1041, 1063 (Wyo. 2015). *See Brook's Mot. to Strike* at 3.

The Wyoming Administrative Procedure Act also requires striking Exhibit A. That act requires that each party be given the opportunity to respond to all evidence and arguments. Wyo. Stat. Ann. § 16-3-107(j). Further, the Department and the parties are also "entitled to confront all opposing witnesses." Wyo. Stat. Ann. § 16-3-108(c). By submitting Exhibit A as part of its proposed findings, PRBRC deprived the Department and the other parties of an opportunity to respond to the new evidence and argument in Exhibit A. *See* Wyo. Stat. Ann. § 16-3-107(j). Similarly, by submitting Exhibit A as written testimony of Mr. Eslinger's opinions, PRBRC obstructed the Department's and the parties' rights to confront and cross-examine Mr. Eslinger at hearing. *See* Wyo. Stat. Ann. § 16-3-108(c).

Therefore, because Exhibit A is untimely and prejudicial testimony intended to prevent the Department from responding, the Department respectfully asks the Council to strike the exhibit

and references to it from PRBRC's proposed findings and to exclude its contents from any consideration in this case.

Dated this 31st day of July, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2017, a copy of the foregoing document was filed electronically with the Wyoming Environmental Quality Council's online docket system and copies were served electronically via that system and by email on the following:

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