BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of the Appeal	)	
Of the Revocation of	)	
Permit No. CT-1352B	)	Docket No. 07-2802
Two Elk Power Plant	)	

TWO ELK GENERATION PARTNERS, LIMITED PARTNERSHIP'S MOTION TO DISMISS APPEAL

Pursuant to WYO. R. CIV. P. 12(b)(1), Intervenor Two Elk Generation Partners, Limited Partnership ("TEGP") respectfully requests that the Environmental Quality Council ("Council" or "EQC") dismiss Sierra Club and Powder River Basin Resource Council's ("PRBRC") (collectively, "Petitioners") Appeal of DEQ Construction Continuance and Commencement Determinations, and Permit Deadline Extensions, Regarding Two Elk Power Plant ("Appeal") because the Council has no jurisdiction to consider any of the issues raised in the Appeal. In support of its Motion, TEGP states as follows:

INTRODUCTION

This Appeal is one of several redundant filings foisted upon this Council and other administrative and judicial bodies of this state as part of Sierra Club/PRBRC's campaign to block continued construction of the Two Elk Plant, notwithstanding the paucity of legal support for their position. By its own admission, the Sierra Club is engaged in a national effort to block coal-fired power plants using any means at their disposal. As stated by Bruce Nilles, Sierra Club's director of its national coal campaign, "Our goal is to oppose these projects at each and every stage, from zoning and air and water permits, to their mining permits and new coal railroads." *Ruling Allows Two Elk to Continue*, GILLETTE NEWS RECORD, Feb. 28, 2008, *available at:* http://www.gillettenewsrecord.com/articles/2008/02/28/news/ local%20news/ news01.txt. Sierra Club/PRBRC's blunderbuss approach has already resulted in the dismissal by

this Council of one proceeding for lack of subject matter jurisdiction; similar considerations require dismissal of this case. (EQC No. 07-2601, Order of Dismissal, March 7, 2008.)

The principal agency action appealed by Petitioners is the Department of Environmental Quality's ("DEQ") November 21, 2007 decision to withdraw its August 22, 2007 letter to TEGP. Because it is not final administrative action in the matter, the DEQ's decision is not the proper target of a challenge. Indeed, the issue addressed in the DEQ correspondence was resolved by the Council's decision in EQC No. 07-2601—the decision which does constitute the final administrative action. (EQC No. 07-2601, Order Approving Parties' Joint Stipulated Settlement, and Dismissing TEGP's Appeal, and Approving the Withdrawal of August 22 Letter, December 3, 2007.) The First Judicial District Court is currently considering Petitioners' judicial appeal from that decision. The Petitioners cannot resurrect Council jurisdiction for issues resolved in EQC No. 07-2601 through a new appeal.

Not satisfied with appealing the DEQ's November 21, 2007 decision, or even with appealing the Council's December 3, 2007 Order, Petitioners mount two additional challenges that serve to underscore the lengths to which they will go in their efforts to thwart continued construction of the Two Elk Plant. First, Petitioners appeal the "extension"—in 2003—of TEGP's deadline to commence construction.[1] Second, Petitioners appeal the Council and DEQ's determination—in 2005—that TEGP had commenced construction. These appeals are untimely by a matter of years. Petitioners offer no justification whatsoever for this Council to consider

[1] Petitioners incorrectly characterize the creation of a new deadline for commencement of construction, under TEGP's modified permit, No. CT-1352B, as an "extension" of the deadline by DEQ. First, the Council, not the DEQ, ordered that the permit be modified. (EQC No. 02-2601, Order Approving Joint Stipulation for Disposition of Contested Case, June 2, 2003, ¶ 2; *see also* EQC No. 02-2601, Joint Stipulation for Disposition of Contested Case, May 28, 2003, ¶ 3 (permit to be modified "upon the Council's entry of an Order approving [the] Joint Stipulation.")) Second, the new permit contained a new commencement deadline, wholly independent of any deadline that existed prior to the initiation of the contested case under the original permit, No. CT-1352A. (EQC No. 02-2601, Joint Stipulation for Disposition of Contested Case, June 2, 2003, Attachment ¶ 4 (requiring that construction commence "within 24 months of the date of the Council's Order approving the stipulated modification of this permit[.]"))

them so long after the relevant agency action became final.[2] Accordingly, the Council lacks jurisdiction to review those issues as well.

Petitioners' tardy appeals are the fruits of their own failure timely to intervene in the prior Two Elk proceedings. On the same day they instituted this action, December 20, 2007, Petitioners also filed a Motion to Intervene and Petition for Reconsideration and Vacation of EQC Order Regarding Discontinued Construction of Two Elk Plant in EQC No. 07-2601. In that proceeding, their request for leave to intervene came more than three weeks after the November 28, 2007 hearing, and nearly two months after the case was initially docketed with the Council. Petitioners knew, or reasonably should have known, of their interest in that proceeding long before they moved to intervene.[3] Nothing prevented Petitioners from appearing and requesting leave to intervene at the November 28, 2007 hearing in EQC No. 07-2601 to protect whatever interests they believed may have been implicated by action of the Council in that contested case. Petitioners' lack of diligence should not serve as a justification for Petitioners to be allowed to pursue a new petition before the Council on the same issue that was the subject of EQC No. 07-2601 and that is now the subject of a judicial appeal in the First Judicial District.

Finally, the Council also lacks jurisdiction to grant Petitioners' request for an order directing DEQ to immediately release to Petitioners all documents relating to the Two Elk Plant,

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[2] TEGP notes that despite Petitioners' tardiness, Petitioners also have challenged the DEQ's determination that TEGP commenced construction in May 2005 in a "Petition to Revoke Two Elk Permit," filed before the Wyoming Industrial Siting Council on February 15, 2008.

[3] On approximately November 5, 2007, the Council gave advance public notice of the November 28, 2007 hearing on its website and by email and U.S. Mail to individuals on its routine distribution list. PRBRC is included on the mail distribution list for Council notices; it accordingly received actual notice of the hearing approximately three weeks before the hearing was scheduled to occur. Exh. A, EQC 2007 Hearing Notice Distribution List. The notice specified that the hearing was to address TEGP's request for immediate stay. Exh. B, EQC November 28, 2007 Hearing Agenda (including amended agenda with revised hearing location, distributed on approximately November 9, 2007). TEGP's Petition for Review and Request for Immediate Stay, which was available to the public on the Council's website prior to the hearing, was sufficient to alert members of the public to the matters at issue in the proceeding.

because the Wyoming Public Records Act vests in the District Courts the exclusive authority to review public records requests and issue related orders.

Because the Council lacks subject matter jurisdiction to review any of the three challenged agency actions, or to entertain Petitioners' request for access to administrative record documents, TEGP respectfully moves the Council to dismiss Petitioners' Appeal.

A. THE COUNCIL LACKS JURISDICTION TO REVIEW DEQ'S WITHDRAWAL OF THE AUGUST 22, 2007 LETTER TO TEGP, WHILE THE DISTRICT COURT IS CONSIDERING AN APPEAL OF THE FINAL ADMINISTRATIVE DECISION CONCERNING THAT ACTION

The first issue raised in the Appeal is framed as a request that the Council "set aside the November 21, 2007 final determination of [DEQ] Director John Corra" that TEGP did not discontinue construction of the Two Elk Plant for a period of 24 months or more. Petitioners apparently contend that Director Corra's execution of the Joint Stipulated Settlement Agreement on November 21, 2007 is an appealable order of the DEQ. However, the final administrative action concerning this issue was not Director Corra's execution of the settlement agreement, pursuant to which the DEQ agreed to rescind DEQ Air Quality Division Administrator David Finley's August 22, 2007 letter, but rather the December 3, 2007 Order in which the Council approved the settlement agreement, affirmed the Director's withdrawal of the August 22, 2007 letter, and upheld the validity of TEGP's permit. Petitioners have filed an appeal challenging that Order in the First Judicial District Court.

On November 28, 2007, the Council conducted a hearing in EQC No. 07-2601, at which DEQ and TEGP presented their Joint Stipulated Settlement Agreement for approval by the Council, in accordance with the DEQ rules. See I R.P.P. § 11 (authorizing informal dispositions of hearings by settlement "upon approval of the Council"). At the hearing, the DEQ explained the basis for its conclusion that the August 22, 2007 letter to TEGP should be withdrawn because

TEGP had not discontinued construction at the Two Elk Plant for 24 months or more. TEGP submitted a demonstrative exhibit that illustrated the timing of construction activities at the project site, and showed that those activities had never been discontinued for a period of 24 months or more. See Exh. C, TEGP's Timeline Exhibit Presented at November 28, 2007 hearing. Additionally, the Joint Stipulated Settlement Agreement submitted by the parties for the Council's review and approval states in three different places that the August 22, 2007 letter is withdrawn because the DEQ agrees that TEGP did not discontinue construction in violation of its permit. (EQC No. 07-2601, Joint Stipulated Settlement Agreement, at 3, 4 & 6.) The Council could not have approved the withdrawal of DEQ's August 22, 2007 letter to TEGP if it had not agreed with the DEQ that, in the time since it commenced, construction of the Two Elk Plant had never been discontinued for a period of 24 months or more. When it affirmed the DEQ's action and dismissed the appeal, the Council's Order became the final administrative action on that issue.

An administrative agency "does not have discretion in determining whether or not it has subject matter jurisdiction; subject matter jurisdiction either exists or it does not." *Amoco Prod. Co. v. Wyoming State Bd. of Equalization*, 7 P.3d 900, 904 (Wyo. 2000). The Council's authority to hear and determine cases derives from the Environmental Quality Act, WYO. STAT. ANN. § 35-11-112(a). The Act further authorizes the Council to take specific actions relating to agency decisions. *Id.* § 35-11-112(b). The Council's Rules of Practice and Procedure implementing the Act provide that decisions of the Council may be subject to rehearing in specific circumstances, and may be appealed to the District Court. IV R.P.P. § 1; I R.P.P. § 8. Neither the Act nor the Council's rules authorize the Council to review, in a new proceeding, a decision that it already reviewed and acted upon in a previous proceeding. The Council has

jurisdiction to review only final agency actions. *See In re Triton Coal Co., Buckskin Mine*, 2001 WL 1776123 *1 (Wyo. Envtl. Qual. Council July 24, 2001).

In *Triton Coal*, the Council recognized the two-part test for final agency actions established by the United States Supreme Court: "First, the action must mark the consummation of the agency's decision-making process. Second, the action must be one by which the rights or obligations have been determined or from which legal consequences flow." *Id.* (citing *Bennet v. Spear*, 520 U.S. 154, 177-178 (1997), *Pub. Serv. Co. of Colo. v. U.S. Envtl. Prot. Agency*, 225 F.3d 1144 (2000)). Because the Council is the final administrative arbiter of DEQ decisions relating to air quality, its decisions mark the consummation of the administrative decision-making process, as contemplated by *Triton Coal* and *Bennet*. Further, it is the Council's decision in this case that determined the legal rights and obligations that are at issue, and it is the legal consequences flowing from the Council's decision that Petitioners dispute. *See Bennett*, 520 U.S. at 178 (in contrast to nonbinding actions, an action with "direct and appreciable legal consequences" is final agency action).

Viewed in isolation, the DEQ's November 21, 2007 decision might have been the final agency action for purposes of an appeal to the Council. However, once the Council issued its December 3, 2007 Order approving that decision, the Council's Order (rather than the Director's November 21, 2007 decision) became the final administrative action in the matter. *See Bennett*, 520 U.S. at 178. The Council's ability to review the November 21, 2007 decision ended—subject to the Council's power, under its rules, to entertain a petition for rehearing—when the Council entered its Order on December 3, 2007. It would defy common sense for the Council to entertain an appeal of a DEQ decision that it has already considered and affirmed.

Moreover, the Council's December 3, 2007 Order affirming the DEQ's November 21, 2007 decision is currently on appeal in the First Judicial District Court. The question whether the DEQ properly concluded that TEGP did not, after commencing construction, discontinue construction at the Two Elk Plant for 24 months or more is the basis of Petitioners' challenges in both venues. The Council cannot render a decision on the main issue framed by the Petition at the same time that the issue is concurrently pending before the District Court. *Cf. Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965) (overruled on other grounds) (court's jurisdiction over subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by administrative body).

If the Council were to consider Petitioners' challenge to the DEQ's November 21, 2007 decision, the proceedings would be fraught with the same risks of confusion, contradiction, and duplication of effort that were posed by Petitioners' effort to have the Council consider a Motion for Rehearing of the Council's December 3, 2007 Order in EQC No. 07-2601 at the same time that the District Court was considering an appeal of that Order. The Council has dismissed Petitioners' Motion to Intervene and Petition for Rehearing for lack of subject matter jurisdiction. (EQC No. 07-2601, Order of Dismissal, March 7, 2008.) Principles of judicial economy and avoidance of confusion likewise dictate that the Council should dismiss this proceeding. *Cf. Natural Res. Def. Council v. SW. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (citing the importance of judicial economy and avoiding "the confusion that would ensue from having the same issues before two courts simultaneously").

Petitioners' appeal of the DEQ's November 21, 2007 decision is a nugatory attempt to challenge a non-final agency action and to reopen an EQC docket that is resolved and already on

appeal to the District Court. This proceeding, therefore, should be dismissed as to the appeal of the November 21, 2007 decision.

B. THE COUNCIL LACKS JURISDICTION OVER PETITIONERS' UNTIMELY APPEALS OF TEGP'S NEW PERMIT DEADLINE TO COMMENCE CONSTRUCTION AND THE DETERMINATION THAT TEGP COMMENCED CONSTRUCTION

In their appeal, Petitioners also seek to overturn a decision entered in a final action of the Council, after notice and public hearing, on July 18, 2005 in which the Council affirmed DEQ's prior determination that TEGP had timely commenced construction at the Two Elk Plant. (EQC No. 02-2601, Order Granting Motion to Dismiss). Under the Rules of Practice and Procedure, the period in which to appeal a DEQ decision to the Council is 60 days. I R.P.P. § 16. In addition to the constructive notice to Petitioners by means of public postings and announcements, PRBRC received actual notice of the June 22, 2005 public hearing in the matter. See Exh. D, EQC June 22, 2005 Hearing Agenda and EQC 2005 agenda mail distribution list, including PRBRC among recipients. Nonetheless, Petitioners filed their Appeal on December 20, 2007. Under the rules, their attempt to appeal that decision comes more than two years too late.

Petitioners' attempt to appeal the 2003 "extension" of TEGP's deadline to commence construction is more than four years too late. The new deadline to commence construction was approved by the Council, after notice and public hearing, in EQC No. 02-2601, in an Order dated June 2, 2003. (EQC No. 02-2601, Order Approving Joint Stipulation for Disposition of Contested Case.) That Order incorporated the Parties' May 28, 2003 Joint Stipulation for Disposition of Contested Case, and directed that TEGP's construction permit be modified as Permit CT-1352B, allowing TEGP to commence construction within two years of the Council's Order. *See* WYO. STAT. ANN. § 35-11-112(c)(ii) (authorizing Council to modify permits).

Each of these orders was publicly available, and, in each instance, Petitioners had the opportunity to seek timely review of the challenged agency action. In each instance, Petitioners failed timely to appeal. *See* WYO. STAT. ANN. §§ 16-3-114, 35-11-1001; WYO. R. APP. P. 12; I R.P.P. § 8. Petitioners now attempt to resurrect issues that were resolved by the DEQ more than two, and more than four, years ago. However, "under the current Wyoming Rules of Appellate Procedure, timely filing of a petition for review of administrative action is mandatory and jurisdictional." *Chevron U.S.A., Inc. v. Dep't of Revenue*, 155 P.3d 1041, 1043 (Wyo. 2007).

On previous occasions, this Council has emphasized that it has jurisdiction only over appeals that are timely. For example, in *In re Objection to Permits*, Env. Qual. Council No. 00-3802 (May 4, 2001), the Council held that a request filed by the Wyoming Outdoor Council and PRBRC two months after the appeal deadline was untimely and that the Council had no jurisdiction to consider the motion. Similarly, in *In re State of Wyoming General Permit*, Env. Qual. Council No. 3124-99 (Oct. 18, 1999), the Council held that PRBRC's objection to a permit, filed one day after the 60-day deadline for appeal, was untimely, and that the Council was, therefore, stripped of jurisdiction to consider the merits of the petition.

As respects the DEQ's 2003 and 2005 decisions, Petitioners' appeal is not timely and should be dismissed.

C. THE COUNCIL DOES NOT HAVE JURISDICTION OVER THIS APPEAL BECAUSE PETITIONERS LACK STANDING

Under the Wyoming Administrative Procedure Act, the Environmental Quality Act, the DEQ Rules of Practice and Procedure, and the Wyoming Rules of Appellate Procedure, judicial review of a final agency decision is available only to a person "aggrieved or adversely affected in fact" by the decision. WYO. STAT. ANN. §§ 16-3-114, 35-11-1001; WYO. R. APP. P. 12; I R.P.P. § 8. Petitioners are not aggrieved or adversely affected in fact, and therefore do not have

standing to challenge the DEQ's or the Council's decisions. Accordingly, the Council does not have jurisdiction to entertain their Appeal.

"The doctrine of standing is a jurisprudential rule of jurisdictional magnitude." *State ex rel. Bayou Liquors, Inc. v. City of Casper*, 906 P.2d 1046, 1048 (Wyo. 1995).

> At its most elementary level, the standing doctrine holds that a decision-making body should refrain from considering issues in which the litigants have little or no interest in vigorously advocating. Accordingly, the doctrine of standing focuses upon whether a litigant is properly situated to assert an issue for judicial or quasi-judicial determination. A litigant is said to have standing when he has a "personal stake in the outcome of the controversy." This personal stake requirement has been described in Wyoming as a "tangible interest" at stake. The tangible interest requirement guarantees that a litigant is sufficiently interested in a case to present a justiciable controversy.

Id. (citations omitted) (quoting *Schulthess v. Carollo,* 832 P.2d 552, 556-57 (Wyo.1992)). Petitioners have not demonstrated they have the required "tangible interest" at stake in this administrative proceeding. Accordingly, they should not be permitted to seek review of the DEQ's actions.

A potential litigant must show injury or potential injury by 'alleg[ing] a perceptible, rather than a speculative, harm resulting from the agency action.'" *Roe v. Bd. of County Comm'rs, Campbell County*, 997 P.2d 1021, 1023 (Wyo. 2000) (quoting *Foster's, Inc. v. City of Laramie*, 718 P.2d 868, 872 (Wyo. 1986)). Moreover, "The interest which will sustain a right to appeal must generally be substantial, immediate, and pecuniary. A future, contingent, or merely speculative interest is ordinarily not sufficient.'" *Id.* (quoting *L Slash X Cattle Co. v. Texaco, Inc.*, 623 P.2d 764, 769 (Wyo. 1981)).

Petitioners allege that their interest in this proceeding is in enjoying the benefits of clean air and in ensuring that sources of air pollution comply with law. (Appeal ¶ 41.) Further, they allege that their interests are "injured" by DEQ's purported "failure to properly administer" state

law and TEGP's permit. (*Id.*) But these allegations do not suffice to show that Petitioners are "aggrieved or adversely affected in fact." WYO. STAT. ANN. § 16-3-114(a). They have not alleged a "substantial, immediate, and pecuniary" interest or even a "perceptible, rather than speculative, harm" to their asserted interests. Moreover, Petitioners have not demonstrated a nexus between their claimed interests and the subject of the litigation. Indeed, they have failed to present any specific facts to demonstrate how they or how any of their members have been injured by the DEQ's decisions. A generalized complaint about whether the administrative process was correctly followed is insufficient to satisfy the standard if it fails to assert specifically how Petitioners have been aggrieved by any alleged deviation from this process or by the final agency action. *See Roe*, 997 P.2d at 1023. On the contrary, there must be a showing of harm. *Sierra Club v. Envtl. Prot. Agency*, 292 F.3d 895, 898 (D.C. Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (requiring the pleading of "general factual allegations of injury" to make a threshold showing of standing). The Wyoming Supreme Court has emphasized that "[p]leadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *E.g., L Slash X Cattle Co.*, 623 P.2d at 769 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973)).

Moreover, Petitioners fail to point out that the settlement of the related proceeding in EQC No. 07-2601 resulted in an agreement by TEGP to lower significantly the emissions from the Two Elk Plant. The DEQ—the agency primarily responsible with advancing the public interest concerning air quality matters—is satisfied that the reductions in emissions of SO_2, NOx and filterable PM10 negotiated by the State as part of the settlement represent a laudable

achievement for the people of the State of Wyoming. Petitioners have made no showing about how they are adversely affected by a DEQ decision that results in a substantial reduction of the potential harmful impact on Wyoming's air quality.

Petitioners lack standing because they are not aggrieved or adversely affected in fact by DEQ's challenged decisions. The Council lacks jurisdiction and should dismiss their Appeal.

D. THE COUNCIL DOES NOT HAVE JURISDICTION TO ORDER THE RELEASE OF CONFIDENTIAL OR OTHER PUBLIC RECORD DOCUMENTS TO PETITIONERS

The Council does not have jurisdiction to order the DEQ to release public record documents to Petitioners. The Wyoming Public Records Act, WYO. STAT. ANN. §§ 16-4-201 *et seq.*, specifies the procedure by which members of the public may obtain access to the records of administrative agencies. Sierra Club initiated public records requests relating to TEGP's commencement and continuation of construction at the Two Elk Plant on November 29 and 30, 2007. TEGP understands that the DEQ is engaged in the process of compiling and reviewing the record for this matter in response to Sierra Club's request, and has granted Sierra Club access to portions of the public record for these matters. Petitioners' assertion that the DEQ has "refused" to allow them access to the requested records ignores the simple fact that compiling a complete response to broad requests such as those initiated by Sierra Club is a complex and time-consuming task that the DEQ staff members must undertake in addition to their routine responsibilities.

The record includes numerous documents provided to the DEQ by TEGP and designated by TEGP as containing "Confidential Business Information," including trade secrets, privileged information, and confidential commercial and financial information, within the meaning of WYO. STAT. ANN. § 16-4-203(d)(v) and § 35-11-1101. In letters dated July 19, 2005 and January 23,

2008, the Wyoming Attorney General's Office and the DEQ, respectively, acknowledged TEGP's claims of confidentiality over designated records. See Exh. E and F.

By letter to the Attorney General's Office dated December 14, 2007, counsel for TEGP requested that the DEQ deny public inspection of TEGP's confidential business information, in accordance with WYO. STAT. ANN. § 16-4-203(d)(v) and § 35-11-1101. If the DEQ denies Sierra Club access to portions of the requested record in these matters, Sierra Club may request a written statement of the grounds for the denial, and may apply to the District Court for an order directing the DEQ to show cause why inspection should not be permitted. WYO. STAT. ANN. § 16-4-203(e) & (f). Only the District Court has the authority to issue such an order under the Public Records Act.

Petitioners' request that the Council order DEQ to "release to [Petitioners] all Two Elk documents immediately," Appeal ¶ 71, is contrary to the mandates of the Public Records Act and the Environmental Quality Act. *See* WYO. STAT. ANN. §§ 16-4-203(d)(v), 16-4-203(e) & (f), and 35-11-1101. Because the Council lacks jurisdiction to entertain Petitioners' request, the request should be dismissed.

CONCLUSION

For all of the foregoing reasons, and pursuant to WYO. R. CIV. P. 12(b)(1), TEGP respectfully moves the Council to dismiss Petitioners' Appeal.

TEGP requests a hearing before the Council on this Motion.

Respectfully submitted this 17th day of March, 2008.

Mary A. Throne
John Coppede
Hickey & Evans, LLP
1800 Carey Ave., Suite 700
P.O. Box 467
Cheyenne, WY 82003-0467

Michael C. Theis
Hogan & Hartson LLP
1200 Seventeenth St., Suite 1500
Denver, CO 80202

ATTORNEYS FOR INTERVENOR
TWO ELK GENERATION PARTNERS,
LIMITED PARTNERSHIP

CERTIFICATE OF SERVICE

On this 7th day of March, 2008, in accordance with the requirements of Chapter I, Section 3(b) of the Department of Environmental Quality Rules of Practice and Procedure and Rule 5 of the Wyoming Rules of Civil Procedure, I caused the foregoing TWO ELK GENERATION PARTNERS, LIMITED PARTNERSHIP'S MOTION TO DISMISS APPEAL to be served by registered mail, return receipt requested, and electronic mail to:

John Corra, Director
DEQ
122 West 25th Street
Herschler Building, 2nd Floor East
Cheyenne, WY 82002
deqwyo@state.wy.us

Nancy Vehr
Assistant Attorney General
Attorney General's Office
123 Capitol
200 West 24th Street
Cheyenne, WY 82002
nvehr@state.wy.us

David Finley, Administrator
DEQ Air Quality Division
122 West 25th Street
Herschler Building, 2nd Floor East
Cheyenne, WY 82002
dfinle@stsate.wy.us

Reed Zars
Attorney at Law
910 Kearney Street
Laramie, WY 82070
rzars@lariat.org

Richard C. Moore, Chairman
Environmental Quality Council
122 West 25th Street
Herschler Building, Room 1714
Cheyenne, WY 82002
Email c/o Terri Lorenzon, EQC Director/Attorney, tloren@state.wy.us

Mary A. Throne