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

**IN RE THE MATTER OF THE APPEAL)
TO PROTECT OUR WATER)
JACKSON HOLE)
PERMIT NO. 2022-274) Docket No. 22-3801**

**MOTION TO DISMISS PETITION AS MOOT AND MEMORANDUM IN
SUPPORT**

Pursuant to the Hearing Examiner’s January 5, 2023, Order, the Wyoming Department of Environmental Quality (Department), through the Attorney General’s Office, asks the Environmental Quality Council to dismiss Petitioner’s appeal of the Department’s decision to issue a Notice of Coverage under the Small Wastewater Facility General Permit, Permit Number 2022-274. Following the filing of the appeal, the Department revoked Permit Number 2022-274. Accordingly, the matter is now moot. Petitioner’s counsel has been consulted on this motion and indicated that Petitioner opposes the Motion.

BACKGROUND

In May of 2022, Mountain Ventures began working with the Department to seek a permit for their new onsite wastewater system improvement project at their Teton Village Resort

to serve thirteen “glamping” sites. (R. at 0009; Zygmunt Aff. ¶4). On October 6th, 2022, the Department issued a Notice of Coverage under the Small Wastewater Facility General Permit, Permit Number 2022-274. (R. at 0001; Zygmunt Aff. ¶4). On November 22, 2022, Petitioners filed an *Appeal of Notification of Coverage – Permit No. 2022-274*, appealing the Department’s decision to issue the Notice of Coverage, Permit Number 2022-274. (*See generally* Pet’r’s Appeal of Notification). Specifically, Petitioner alleged that the general permit under which the Department granted Permit 2022-274 was expired at the time the Department issued the Notice of Coverage. (*Id.* at ¶¶ 19-28). If the general permit is determined to be found not expired, Petitioner alleges the Department failed to comply with the terms of the general permit and violated the Wyoming Environmental Quality Act and rules and regulation promulgated under the Act by issuing the Notice of Coverage, Permit Number 2022-274. (*Id.* at ¶¶ 29).

Following the filing of this appeal, the Department Water Quality Administrator reviewed the work of field staff and determined that the October 6, 2022, Notice of Coverage had in fact been incorrectly issued under an expired general permit. (Zygmunt Aff. ¶ 6). The general permit under which Permit Number 2022-274 was granted coverage was issued on June 19, 2017. (R. at 0033). Per the terms of the general permit, the general permit expired on June 19, 2023, almost four months before the issuance of coverage for Permit Number 2022-274 was granted by the Department on October 6, 2022. (R. at 0033). As a result of the Administrator’s review, on December 7, 2022, the Department revoked its October 6, 2022, Notice of Coverage, permit number 2022-274. (Zygmunt Aff. ¶ 7; Exhibit A). The Department stated in its Notice of Coverage

Revocation letter that construction of the small wastewater facility needed to stop until appropriate permit coverage is in place. (Ex. A). At this time, there is no Department permit issued for the small wastewater system being constructed by Mountain Ventures. (Zygmunt Aff. ¶8).

ARGUMENT

The Petitioner asks the Council to reverse and vacate the Department's decision to issue Permit Number 2022-274 and for any remedies available by law. (Pet'r's Appeal of Notification § IV). However, this case is moot because the Department has revoked Permit Number 2022-274 and any other relief sought by Petitioner related to the revoked permit is not available by law through the Environmental Quality Council through an appeal of a permitting decision. Further, no exception to the mootness doctrine applies. Accordingly, the Council should dismiss the appeal.

A. The Council has limited jurisdiction with respect to Petitioner's claims.

Petitioner claims the Department's decision to grant Permit Number 2022-274 was in violation of the general permit under which it was granted. (*See generally* Pet'r's Appeal of Notification). Petitioner asks that Permit Number 2022-274 be vacated and asks for any other remedies available under law. (Pet'r's Appeal of Notification § IV). However, the permit has already been revoked, and no other remedy at law is available to Petitioner in these proceedings.

The Environmental Quality Council is the administrative body that acts as hearing examiner for cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the Department of Environmental Quality. Wyo. Stat. Ann. §35-

11-112. Specifically, the Council must conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit. *Id.* at 112(a)(iv). All proceedings of the Council must be conducted in accordance with the Wyoming Administrative Procedure Act. *Id.*

State statute describes the limited remedies the Council may grant Petitioner. The Council may:

- (i) Approve, disapprove, repeal, modify or suspend any rule, regulation, standard or order [. . .];
- (ii) Order that any permit [. . .] be granted, denied, suspended, revoked or modified;
- (iii) Affirm, modify or deny the issuance of orders to cease and desist any act or practice in violation of the laws, rules, regulations, standards or orders issued or administered by the department [. . .].

Wyo. Stat. Ann. § 35-11-112(c).

Petitioner's claims all arise from the Department's permitting decision to grant the Notice of Coverage, Permit Number 2022-274, to Mountain Ventures under the Small Wastewater Facility General Permit. Petitioner does not ask the Council to approve, disapprove, or modify a rule, regulation standard, or order promulgated by the Department, nor does Petitioner ask the Council to affirm, modify or deny the issuance of orders to cease and desist any act or practice in violation of the laws. Therefore, the only remedy available, by law, to Petitioner is to request that the Council grant, or in this case, deny,

suspend, or revoke Permit Number 2022-274. Wyo. Stat. Ann. § 35-11-112(c)(ii). Because the permit has already be revoked, this matter is moot.

B. The Petitioner’s appeal of the general permit coverage to the Council no longer presents a live controversy.

The pending appeal before the Council is moot because Petitioner seeks revocation of a permit that has already been revoked. An action should be dismissed, “when, pending appeal, an event occurs which renders a cause moot and makes a determination of the issues unnecessary.” *Gulf Oil Corp. v. Wyo. Oil and Gas Conservation Comm’n*, 693 P.2d 227, 233 (Wyo. 1985). An issue becomes moot when there is no longer a “live controversy with respect to which the court can give meaningful relief.” *CL v. ML*, 2015 WY 80, ¶ 22, 351 P.3d 272, 279 (Wyo. 2015) (quoting *White v. Shane Edeburn Constr., LLC*, 2012 WY 118, ¶ 13, 285 P.3d 949, 953 (Wyo. 2012)). The dismissal of moot cases promotes judicial economy and prevents a court from rendering advisory opinions. *Shisler v. Town of Jackson*, 890 P.2d 555, 558 (Wyo. 1995); *Reiman Corp. v. City of Cheyenne*, 838 P.2d 1182, 1187 (Wyo. 1992); *N. Arapaho Tribe v. State (In re SNK)*, 2003 WY 141, ¶ 23, 78 P.3d 1032, 1038 (Wyo. 2003).

Pursuant to Wyoming Statute 35-11-112(c)(ii), the only remedy available to the Petitioner is revocation of the permit. Following the filing of Petitioner’s Appeal of Notification of Coverage, the Department revoked Permit Number 2022-274—an event which renders any determination by the Council on the Department’s decision to grant Permit Number 2022-274 unnecessary. Therefore, there is no longer any controversy for the Council to decide.

C. No mootness exceptions apply to this administrative appeal before the Council.

While generally, moot cases must be dismissed, the Wyoming Supreme Court recognizes three exceptions where the Court will hear moot issues in limited circumstances: (1) where the issue is “one of great public importance;” (2) where deciding the issue is “necessary to provide guidance to state agencies and lower courts;” or (3) where the “controversy is capable of repetition yet evading review.” *Cir. Ct. of the Eighth Jud. Dist. v. Lee Newspapers*, 2014 WY 101, ¶ 12, 332 P.3d 523, 528 (Wyo. 2014) (quoting *Operation Save Am. v. City of Jackson*, 2012 WY 51, ¶¶ 22-23, 275 P.3d 438, 448-49 (Wyo. 2012)). None of these exception apply to the appeal in this matter.

The Court applies the “great public importance” exception with “strict standards,” assessing the importance of an issue objectively and not in reference to the “judge’s own beliefs and philosophies.” *Operation Save. Am.*, ¶ 25, 275 P.3d at 449 (quoting *Jolley v. State Loan and Inv. Bd.*, 2002 WY 7, ¶ 10, 38 P.3d 1073, 1078 (Wyo. 2002)). Generally, the Court recognizes great public importance in cases involving questions of fundamental constitutional rights. *See, e.g., Lee Newspapers*, ¶ 13, 332 P.3d at 528 (First Amendment free speech and “the constitutionally protected right to discuss governmental affairs”); *DB v. State (In re CRA)*, 2016 WY 24, ¶ 30, 368 P.3d 294, 301 (Wyo. 2016) (parental rights); *RM v. Washakie Cty. Sch. Dist. No. 1 (In re RM)*, 2004 WY 162, ¶ 8, 102 P.3d 868, 871 (Wyo. 2004) (fundamental right to education).

With regard to the second mootness exception, the Court has “ruled on matters, otherwise moot, where [it] deemed it necessary to provide guidance to state agencies and

to produce uniformity in the decisions of the district courts.” *Operation Save. Am.*, ¶ 22, 275 P.3d at 448. The Court has utilized the second exception to ensure uniform application of a statute, to establish evidentiary standards and notice requirements for licensing boards, and to guide juvenile courts on the effect of consent decrees. *Lee Newspapers*, ¶ 14, 332 P.3d at 528; *Penny v. State ex rel. Wyo. Mental Health Professions Licensing Bd.*, 2005 WY 117, ¶ 4, 120 P.3d 152, 157 (Wyo. 2005); *CY v. State (In re DJS-Y)*, 2017 WY 54, ¶ 11, 394 P.3d 467, 470 (Wyo. 2017). This exception applies where a decision will have “broad application beyond the specific facts of [the] case.” *Penny*, ¶ 4, 120 P.3d at 157; *see also Wyo. Dep’t of Revenue & Taxation v. Andrews*, 671 P.2d 1239, 1245 (Wyo. 1983).

Finally, under the “capable of repetition yet evading review” exception to mootness, two requirements must be met. “First, the duration of the challenged action must be too short for completion of litigation prior to its cessation or expiration. Second, there must be a reasonable expectation that the same complaining party will be subjected to the same action again.” *Operation Save Am.*, ¶ 30, 275 P.3d at 450 (citation omitted).

None of the mootness exceptions apply to this limited administrative permitting appeal before the Council. First, the granting of a permit for a local small wastewater system does not objectively affect an issue of great public importance. Second, any decision in this matter will be limited to the permit in question, and will not have broad application beyond the facts of this case. Finally, the review of this particular permitting decision does not meet the requisite two-factor test to be considered capable of repetition yet evading review. Permit Number 2022-274 will not be re-granted. Any future permit

application for the project will have to satisfy the standard permitting process. Any future permitting decision by the Department on this particular project will necessarily be reviewed on its own individual terms, conditions, and facts. Further, any future permitting decision, by law, would be eligible for appeal, therefore expressly not satisfying the first condition of the two-factor test which requires that the duration of the challenged action will be too short for completion of litigation.

CONCLUSION

For the foregoing reasons, the Department asks the Council to dismiss this matter as moot.

Submitted this 24th day of February 2023.



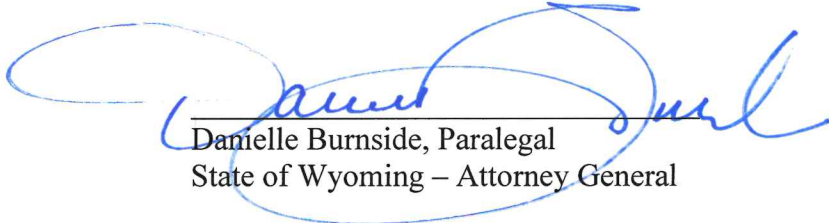
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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February 2023, I electronically filed the forgoing with the Environmental Quality Council and served all parties using the Environmental Quality Council's electronic notification. The following individual was served via U.S. Mail:

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