

BEFORE THE ENVIRONMENTAL QUALITY
COUNCIL OF THE STATE OF WYOMING

FILED

AUG 11 2023

ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF
PROTECT OUR WATER JACKSON HOLE
FROM PERMIT TO CONSTRUCT---
PERMIT NO. 2023-025

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Docket No. _____

APPEAL OF NOTIFICATION OF COVERAGE - Permit No. 2023-025

Protect Our Water Jackson Hole (Petitioner), by and through its undersigned attorneys, submits this Notice of Appeal and Petition challenging the PERMIT TO CONSTRUCT issued to Basecamp Teton WY SPV LLC, Permit No. 2023-025 (Reference Permit Numbers: 2022-090), Teton County, issued by the Department of Environmental Quality/Water Quality Division dated July 13, 2023, for failure to comply with the Wyoming Environmental Quality Act and the DEQ's water quality rules and regulations.

I. Name and Address of Petitioner and Petitioner's Attorneys.

Protect Our Water Jackson Hole
P.O. Box 1014
Wilson, WY 83014

Petitioner is represented in this matter by: (1) John Graham, a partner at Geittmann Larson Swift LLP, 155 East Pearl Street, Suite 200, PO Box 1226 Jackson, WY 83001, and (2) Kevin E. Regan, Protect Our Water Jackson Hole's staff Law and Policy Advisor (an attorney who is licensed to practice law in another state and who is associated with an attorney licensed to practice law in the State of Wyoming), 250 E. Broadway Avenue, PO Box 316, Jackson, WY 83001. Correspondence and information related to this Petition should be served on the undersigned counsel at the address shown above.

II. Action Upon Which Hearing is Requested. Petitioner hereby appeals the issuance of the PERMIT TO CONSTRUCT issued to Basecamp Teton WY SPV LLC, Permit No. 2023-025 (Reference Permit Numbers: 2022-090), Teton County, issued by the Department of Environmental Quality/Water Quality Division dated July 13, 2023. That permit was authorized

by Jennifer Zygmunt, Administrator, Wyoming Department of Environmental Quality/Water Quality Division. Notification of the draft permit was published by email notification and on the DEQ's website on May 3, 2023.

III. Statement of Facts and Specific Allegations.

Petitioner has standing to appeal this decision

1. W.S. § 35-11-801(d) provides that “[a]ny aggrieved party may appeal the authorization as provided in this act.”
2. W.S. § 35-11-112(a)(iv) authorizes the Environmental Quality Council (EQC) to “[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.”
3. W.S. § 35-11-112(c)(ii) authorizes the EQC to “[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.”
4. Protect Our Water Jackson Hole (POWJH) is a 501(c)(3) tax exempt, non-profit corporation registered in the State of Wyoming. Its mission is to serve as a powerful advocate for the protection of ground and surface waters in Teton County, Wyoming.
5. POWJH and its predecessor organization, Friends of Fish Creek, have invested heavily in efforts to restore and protect water quality in Fish Creek and its tributaries.
6. The operation of the onsite wastewater system contested herein will discharge pollutants — including *E. coli* and nutrients— to Fish Creek and its tributaries, diminishing the use and enjoyment that Petitioners and its members and supporters enjoy and appreciate.
7. The DEQ/WQD has determined that Fish Creek is impaired by concentrations of *E. coli* that exceed the quality standards for primary contact recreation contained in WQRR Chapter 1.
8. DEQ has indicated that several lines of evidence show that Fish Creek is impaired for nutrients and that DEQ is engaged in a process to list Fish Creek as impaired for nutrients, including

phosphorus, nitrogen, and related compounds. For example, see video footage of DEQ presentation at Fish Creek Watershed Management Planning Public Stakeholder Meeting on June 7, 2023 in Wilson, WY at: <https://jhcleanwater.org/initiatives/fish-creek-watershed-management/> (at 1:00:30; 1:01:26)

9. High concentrations of *E. coli* that exceed applicable water quality standards, and high nutrient levels that have impaired ecosystem health, have diminished and negatively affected Petitioners' use and enjoyment of Fish Creek.

10. POWJH submitted comments during the public opportunity for the above-referenced permit, including written comments and exhibits submitted on June 2, 2023, Attachment A (comments excluding attachments), supplemental comments and exhibits on June 9, 2023, Attachment B (supplemental comments excluding attachments), and oral comments from POWJH staff and Board of Directors members at a public meeting regarding Permit No. 2023-025 on June 9, 2023, Attachment C (DEQ transcript).

11. POWJH's members and supporters are adversely affected by the above-referenced permit and by the activities authorized thereunder; including but not limited to the construction and operation of a raised mound, pressure dosed commercial septic system in the headwaters of Fish Creek, a DEQ-designated Class 1 surface water that is heavily used year-round by Teton County residents and visitors alike for a variety of recreational, scenic, and aesthetic purposes.

The Temporary Use Permit

12. The Office of State Lands and Investments ("OSLI") issued a Temporary Use Permit (TUP-03345) to Utah-based Mountain Ventures/Basecamp Hospitality, LLC ("Basecamp" or "Applicant") on June 24, 2022, authorizing Basecamp to construct and operate "11 low-impact accommodations for single and multi-night vacation rental." Attachment D.

13. According to Basecamp's proposal to the OS LI, its development will include a "shower house trailers, a welcome center, retail/rental space, food offering, sauna, storage and maintenance shed, and small staff living quarters."

14. The TUP authorizes a number of other “improvements” on the site, including a septic system and leach field. Engineering drawings obtained by Petitioner show that a Public Water Supply well is planned on the property.

15. This complex of eleven geodesic domes and three prefabricated wood frame buildings is identified as Teton Village Resort on plans submitted by Basecamp to DEQ, apparently a reference to Teton Village which lies a few miles to the north on Highway 390, the Teton Village Road.

16. Paragraph 8 of the TUP’s General Conditions expressly requires Basecamp Hospitality, LLC, as the permittee, to “observe all state, federal and local laws and regulations.”

17. The TUP issued by the OS LI granted the permittee the right to temporary occupancy and use of a small portion of land (OS LI Site 9) on a state trust section but expressly did not grant the permittee unfettered rights to construct and operate its geodesic dome hotel complex without permits required by federal, state and local regulations.

18. Basecamp began construction on the site soon after receiving the TUP, which included clearing and grading several acres and the partial installation of a raised-mound commercial wastewater system without first obtaining necessary permits and authorizations from the State of Wyoming and Teton County.

19. DEQ later determined the already-constructed sand mound leach field failed to meet the necessary setback requirements from surface water, and that sand mound will be removed and rebuilt.

The Permit to Construct Permit No. 2023-025

20. DEQ issued a Permit to Construct to Basecamp Teton WY SPV LLC on July 13, 2023, Attachment E, authorizing Basecamp to construct and operate “to install a sand mound septic system with an approximately 156’ X 16’ sand mound, fed by two 1500-gallon septic tanks and two 1000-gallon pumping chambers, HDPE water and sewer lines, pump house for the well, miscellaneous fittings, and appurtenances, according to the procedures and conditions of the permit.

21. The conditions of the permit includes the following condition: “Prior to installing the

aeration devices, the permittee shall consult with the Northeast District Engineer on septic tank aeration devices for approval. Prior to operating the system, the permittee shall submit updated plans and specifications to address aeration, septic tank insulation, and replacement leach field labeling.”

22. The Statement of Basis for the permit notes that the application was reviewed for compliance with “Chapters 3, 11, 12, and 25 of the Wyoming Water Quality Rules.”

The Applicant failed to demonstrate it meets required setbacks

23. DEQ states that the proposed system constitutes a “small wastewater system” that distributes 2,000 gallons or less of domestic sewage. DEQ Response to Comments Permit #2023-025 dated July 13, 2023, Attachment F, at Responses 1-13, 2-1, and 2-4.

24. DEQ stated that Chapter 2, Section 7, Table 4 provides the minimum horizontal setbacks. In particular, such table requires a 50-foot setback from a surface water or spring, including “seasonal and intermittent,” to the absorption system. Attachment F at Responses 2-5.

25. DEQ further stated that “[t]he proposed system meets or exceeds the minimum horizontal setback distances provided in Chapter 25, Section 7, Table 4” because there is “65 ft between the nearest surface water* and the absorption system.” Attachment F at Responses 2-5. DEQ further stated “*The separation distance from the absorption system to surface water (including wetlands) is based on the US Army Corps of Engineers Wetland Delineation for the site **as shown on the design plans.**” *Id.* (emphasis added)

26. DEQ further stated “[t]he system meets required setback distances to be protective of seasonally high groundwater and wetlands as delineated by the US Army Corps of Engineers.” Attachment F at Response 2-7.

27. DEQ further stated: “In the permit application, Basecamp’s engineer supplied information and offset distances for review. **Basecamp provided information from a US Army Corp of Engineers wetland delineation** for the site. The US Army Corp of Engineers wetland delineation

for the site allowed DEQ to determine the small wastewater facility will meet the necessary setback requirements from surface water.” Attachment F at Response 3-2 (emphasis added). DEQ has not stated that it reviewed a wetland delineation or other documentation from the U.S. Army Corps of Engineers (“ACOE”).

28. Based on information and belief, DEQ’s own written Response to comments, and telephone communications with the ACOE, the ACOE did not in fact conduct a wetlands delineation or jurisdictional determination. The DEQ’s own response to comments make clear that DEQ relied on information provided by Applicant, Attachment G, rather than information provided by the ACOE or an official ACOE document. Thus, it appears that DEQ based its determination of the setback distance to surface water on incorrect or incomplete information.

29. POWJH and its environmental consultant conducted site visits on: (1) November 16, 2022, Attachment H (WY State Land Site 9 - Aquatic Resources and Water Quality Impact Assessment by Alder Environmental) and (2) June 5, 2023, see Attachment I (June 5, 2023 photo of proximity of geodesic dome to open water) and Attachment J (June 5, 2023 photo of potential groundwater in installed septic tank). POWJH’s environmental consultant created a diagram, Attachment K (Aquatic Resources Connectivity Map), that depicts wetland boundaries and shows encroachments into wetlands, as well as grading that impermissibly occurred outside the boundary of the Site 9 boundary.

30. Further, under Teton County’s Small Wastewater Facility Regulations, Attachment L, a proposed soil absorption system site must include room for an additional system. Under 9-3-4(e): “The site must include area for both the proposed soil absorption system and a future replacement soil absorption system. Both the proposed and replacement soil absorption systems shall be sized to receive one-hundred (100%) percent of the wastewater flow.” Attachment L at page 18.

31. Applicant has not shown that the future replacement site meets Teton County’s Small Wastewater Facility Regulations. In light of the uncertain status of the purported ACOE delineation on Applicant’s map, Attachment G, it is unclear whether or not Applicant is violating the setback requirements from surface water for the future replacement site.

Violations of surface and groundwater quality standards

32. Basecamp's wastewater facility is under construction in the headwaters of Fish Creek, a DEQ-designated Class 1 surface water. Pursuant to Chapter 1, Appendix A, the entire Fish Creek drainage is designated Class 1, along with all adjacent wetlands.
33. A number of studies and reports show a hydrologic connection between ground and surface water in the Fish Creek drainage.
34. The regulatory objective for Class 1 surface waters is to protect and maintain water quality that existed at the time of designation. Chapter 1, Section 4 and Section 7
35. Studies of septic system function in Teton County demonstrate the limitations of septic systems due to the cold weather, which inhibits biological activity, and high groundwater levels. Attachment M (Teton Conservation District, Teton County Septic System Effluent Monitoring Study Report, August 2022).
36. The DEQ's July 13, 2023, authorization to permit the construction of the wastewater facility without proper safeguards and best management practices violates DEQ Water Quality Rules Chapter 1 by failing to protect Class 1 surface waters and adjacent wetlands in the Fish Creek drainage. DEQ has failed to demonstrate that the proposed system will not discharge pollutants into groundwater, as well as connected surface waters.
37. The commercial septic system authorized by DEQ in Permit No. 2023-025 will introduce a variety of pollutants into ground and surface water and adjacent wetlands in the headwaters of Fish Creek, including *E. coli*, further exacerbating an existing *E. coli* impairment documented in the DEQ's combined 305(b)/303(d) water quality assessment (2020). The system will also introduce nutrient pollution, including nitrogen, phosphorus, and related compounds, exacerbating an anticipated nutrient impairment, as indicated by DEQ on June 7, 2023 at a public meeting.
38. The DEQ's decision allowing a discharge of *E. coli* and other dangerous pathogens into a tributary of Fish Creek is a violation of the Wyoming Environmental Quality Act and is unlawful agency action within the meaning of W.S. § 16-3-114(c) allowing a discharge of *E. coli*, other dangerous pathogens, and nutrient pollutions into a tributary of Fish Creek is a violation of the

Wyoming Environmental Quality Act and is unlawful agency action within the meaning of W.S. § 16-3-114(c). Neither DEQ nor the Applicant has demonstrated that the proposed septic system will not violate groundwater quality standards, including Chapter 8 of DEQ's water quality rules.

***DEQ failed to appropriately consider alternatives and thus failed to require
Best Management Practices***

39. Section 7(c) of Chapter One of DEQ water quality rules states that for Class 1 waters, "best management practices will maintain existing quality and water uses." The term "Best Management Practices" is specifically defined in Chapter 1 as: "a practice or combination of practices that after problem assessment, examination of alternative practices, and in some cases public participation, are determined to be the most technologically and economically feasible means of managing, preventing or reducing nonpoint source pollution." Chapter 1, Section 2(b)(v)(emphasis added).

40. Here, DEQ only considered two alternatives: (1) the option of a storage tank and removal and (2) the option to connect to an existing sewer line.

41. DEQ failed to consider an appropriate range of alternatives, including requiring alternative septic treatment technologies, including advanced treatment. See Exhibit A at page 6; Exhibit B at page 3 (POWJH Supplemental Comments describing advanced technology including recirculating vertical flow wetland). Indeed, the Environmental Protection Agency ("EPA") notes that "many [septic] configurations include additional treatment components following or in place of the septic tank, which provide advanced treatment solutions." See <https://www.epa.gov/septic/advanced-technology-onsite-treatment-wastewater-products-approved-state> (EPA describing advanced treatment and providing links to various states' advanced treatment methods).

***The monitoring program is inadequate to ensure detection and knowledge of migration and
behavior of the pollution or wastes***

42. Under Chapter 3 of DEQ's rules, "[a]s determined by the Administrator, whenever a facility may cause, threaten, or allow the discharge of any pollution or wastes into Waters of the State or may alter the physical, chemical, radiological, biological or bacteriological properties of any Waters of the State, the permittee shall develop and implement an environmental monitoring program.

Chapter 3, Section 14(a).

43. DEQ water quality rules further explain, in relevant part: “[a]n environmental monitoring program **shall** be adequate to ensure detection and knowledge of migration and behavior of the pollution or wastes.” *Id.* at Section 14(b) (emphasis added). Thus, while the requirement of monitoring is discretionary, once a decision to require monitoring is made, it is mandatory that such monitoring be adequate to ensure detection and knowledge of migration and behavior of the pollution or wastes.

44. Here, the monitoring wells proposed by the Applicant and accepted by DEQ are inadequate to ensure detection and knowledge of migration and behavior of the pollution or wastes because the wells: (1) not located properly up-gradient (i.e. a baseline) and down-gradient and (2) located too far from the leach field. Exhibit A at 7-8, Exhibit B at 3.

A stay pending appeal is appropriate

45. The Council has broad authority to issue temporary relief, including to stay Permit No. 2023-025. The Council’s authority includes the ability to “approve, disapprove, repeal, modify or suspend any . . . order of the Director or any division Administrator” and “order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” Wyo. Stat. Ann. § 35-11-112(c).

46. A stay pending resolution of this appeal would allow Petitioner to protect the status quo until the deficiencies in Permit No. 2023-025 can be addressed by DEQ.

47. Here, the ultimate relief of proper analysis can be accomplished relatively quickly. Accordingly, preserving the status quo pending resolution of the appeal will not prejudice WDEQ or any other interested party, and will help prevent any harm or risk of harm to public health, welfare or the environment.

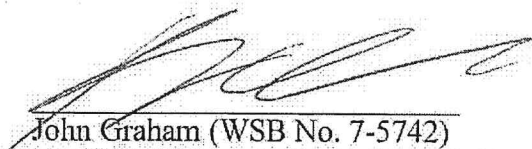
Request for Hearing

48. Petitioner hereby requests a hearing before the Environmental Quality Council and requests that the Council reverse and vacate the DEQ’s decision to issue Permit No. 2023-025.

Request for Additional Relief

49. Petitioner further requests such relief as they are entitled to by law or regulation. Petitioner specifically requests relief including: (1) a stay of construction and operation of the septic facility; and (2) in the event that the permit is not reversed and vacated, the requirement of monitoring adequate to ensure detection and knowledge of migration and behavior of the pollution or wastes.

Respectfully submitted this 11th day of August, 2023.



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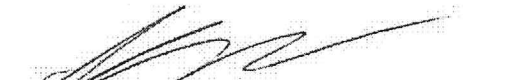
**Attorneys for Petitioner
Protect Our Water Jackson Hole**

CERTIFICATE OF SERVICE

I certify that on the 11th day of August, 2023, I served a true and correct copy of the foregoing by depositing the same in the U.S. Mail, Certified, Return Receipt Requested, postage prepaid and addressed to:

Todd Parfitt, Director
Department of Environmental Quality
200 West 17th St.
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