John W. Graham (WSB # 7-5742)
Geittmann Larson Swift LLP
155 E Pearl
Jackson, WY. 83001
(307) 733-3923
jwg@glsllp.com

Kevin E. Regan
Protect Our Water Jackson Hole
250 E. Broadway Avenue
PO Box 316
Jackson, WY 83001
Phone: (206) 601-5180
kevin@protectourwaterjh.org
Attorneys for Petitioner Protect Our Water Jackson Hole

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

In the Matter of the Appeal of	)	
Protect Our Water Jackson Hole	)	
From Permit to Construct –	)	
Permit No. 2023-025	)	Docket No. 23-3801

MOTION TO SUSPEND PERMIT

Protect Our Water Jackson Hole ("***Petitioner***" or "***POWJH***") respectfully move the Environmental Quality Council to stay the effectiveness of or suspend Permit No. 2023-025 (the "***Permit***") because of both the Department of Environmental Quality's ("***DEQ***") clear error in determining it had the requisite authority or evidentiary basis to issue the permit and because failing to stay or suspend the permit will potentially lead to irreparable environmental harm. On a fundamental level, Petitioner's two arguments are in support of this request are simple.

First, the DEQ had no authority to grant the issued permit to Basecamp Teton WY SPV LLC ("***Basecamp***"), under the DEQ's own rules, after determining that Basecamp's septic system was a "small wastewater facility." As a preliminary matter, W.S. § 35-11-301 prohibits all construction and operation of septic systems without a permit. The DEQ's authority to issue individual permits, like the type granted to Basecamp, is governed by Chapter 3 of the Water Quality Rules, and the issued permit explicitly states that it was issued Pursuant to Chapter 3, Section 4. Chapter 3 of the Water Quality Rules explicitly provide, however, in Section 2(b)(xi) that Chapter 3 does not apply to permit applications when that permit application is governed by a municipal delegation agreement. In this case, there is a valid delegation agreement conferring all authority to permit "small wastewater facilities" to Teton County. As a result, the DEQ has no authority to issue any permit for a "small wastewater facility" in Teton County, and all such applications ***must*** go to the county under the applicable rules and regulations.

Second, the DEQ never received a reliable delineation of wetlands or surface waters in the vicinity of the permit area and, as a result, could not validly conclude Basecamp met the required setbacks. Specifically, while Basecamp purported to submit a wetlands delineation by the Army Corps of Engineers ("***ACOE***") the ACOE has, by the DEQ's own admission, not conducted any formal delineation of the site. As a result, there is no formal delineation of wetlands or surface waters that the DEQ can rely on when determining if Basecamps septic system meets appropriate setbacks. Rather, DEQ relied on Basecamp's unsubstantiated representation that a line on a map represented the extent of surface water, without any support. *See* Petition, Attachment G (map submitted to DEQ by Basecamp depicting an "USACE" line that provided the basis for calculating distance to determine setbacks from surface waters).

Due to these two flaws, the DEQ permit issued to Basecamp, on its face, both exceeds the DEQ's permit issuance authority and lacks necessary supporting evidence. While Petitioner believes there are many more substantive flaws with this permit, these two facial deficiencies with the permit show the Petitioner is likely to succeed in its challenge to the permit. And, when a petitioner can show a likelihood of success on the merits, "[i]njunctive relief is typically appropriate in environmental cases [] because environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (internal citations and formatting omitted).

LEGAL STANDARD

Under the Environmental Quality Act, the Council may "[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified." W.S. § 35-11-112(c)(ii). The EQC has previously granted a stay of permit under this authority and the DEQ has previously conceded the EQC had the authority to issue a stay. See *In the Matter of: Petitioner Big Horn LLC*, Permit No. WYW0027731 (January 11, 2022, Proposed Order Granting Stay) (Proposed order submitted by the DEQ, stating that "a stay of the permit [is] consistent with the Department of Environmental Quality, Rules of Practice and Procedure," and entered, unaltered, by the hearing officer). Moreover, to the extent DEQ now opposes EQC's authority to enter a stay, despite its prior position, such opposition is meritless for two reasons.

First, the Council's rules specifically state that "[t]he Council shall conduct all contested case hearings with reference to the Wyoming Rules of Civil Procedure." DEQ Rules of Practice and Procedure, Chapter 2, Section 2. Rule 65 of Wyoming Rules of Civil Procedure, in turn,

specifically authorizes an adjudicatory body to issue injunctions, once certain procedural requirements are met. *See* WRCP 65(a); 65(d).

Second, the DEQ should not be allowed to oppose the request for an injunction under the doctrine of judicial estoppel. Judicial estoppel is a well-established concept in Wyoming law that "is sometimes referred to as a doctrine which estops a party to play fast and loose with the courts or to trifle with judicial proceedings. It is an expression of the maxim that one cannot blow hot and cold in the same breath. A party will just not be allowed to maintain inconsistent positions in judicial proceedings." *Wilson v. Lucerne Canal & Power Co*., 2007 WY 10, ¶ 26 (citation omitted). As a result of this doctrine, "where a man is successful in a position taken in a previous court proceeding, that position rises to the position of conclusiveness." *Id.*

In this case, the DEQ has previously taken the position that the EQC has authority to issue a stay and was successful in maintaining that position as a stay was issued. *See In the Matter of: Petitioner Big Horn LLC*, Permit No. WYW0027731. Due to this previous position, and success in advocating for that position, the DEQ is now estopped from asserting the EQC does not have the authority to issue a stay. The only question is what the appropriate standard for issuing a stay should be.

To determine whether a stay, as a form of preliminary injunctive relief, is appropriate, the Wyoming Supreme Court has stated that lower courts should first look to whether the party requesting the injunctive relief has "substantial likelihood of prevailing on the merits." *CBM Geosolutions, Inc. v. Gas Sensing Tech. Corp*., 2009 WY 113, ¶ 8.

If the party applying for the injunction can make this showing, the next question for the district court is whether there is a "***potential*** harm" that "is irreparable and there is no adequate remedy at law to compensate for the harm." *In re Kite Ranch, LLC v. Powell Fam. Of Yakima,*

LLC, 2008 WY 39, ¶ 22 (emphasis added). In making this determination a court or agency can properly enter injunctions directing a stay of the effectiveness of a permit if the "purpose of the preliminary injunction is to preserve the status quo until the rights of the parties can be fairly inquired into and determined under equitable conditions and principles." *Id.*

ARGUMENT

While POWJH has a myriad of valid substantive objections to the conclusions DEQ made when issuing the Permit, which it intends to raise in this matter, POWJH's request for an injunction staying the effectiveness of the Permit is limited to the two obvious and facial deficiencies in the Permit at issue here. First, the Permit was issued under the DEQ's individual permitting authority under Chapter 3, but Chapter 3 itself forbids such individual permitting when there as a valid delegation agreement in place. In this case, permitting for "small wastewater facilities," which the DEQ determined this system was, is governed by a delegation agreement with Teton County.

Second, even if the DEQ had permitting authority, which it does not, the DEQ's conclusions that Basecamp's application complied with the relevant setbacks does not appear to be based on any valid or verifiable delineation of wetlands and surface waters. Specifically, Basecamp has represented that the wetland delineation was conducted by the ACOE, but DEQ concedes it has no wetlands delineation pursuant to Section 404 of the Clean Water Act, which authorizes the ACOE to conduct delineations, on file. As a result, the Permit is both beyond the scope of DEQ's authority and not backed by the substantive evidence necessary to issue the Permit. These two failings justify an injunction as "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *N. Cheyenne Tribe*, 503 F.3d at 843 (internal citations and formatting omitted).

A. The DEQ does not have authority to issue an individual permit for a "small wastewater facility" in Teton County and the Permit is, therefore, invalid.

The DEQ's position regarding its authority to issue an individual permit is clear on the face of the Permit issued to basecamp. The Permit provides that the "DEQ issued this permit based upon a review of the application package submitted in accordance with the requirements of Chapter 3, Section 4, Wyoming Water Quality Rules." And this is a correct interpretation of where the DEQ's authority to issue individual "small wastewater facility" permits comes from.

To start with, W.S. § 35-11-301(a) provides that "[n]o person, except when authorized by a permit issued pursuant to the provisions of this act, shall… [c]onstruct, install, modify or operate any sewerage system [or] disposal system." Sewerage system is then defined as "pipelines, conduits, storm sewers, pumping stations, force mains, and all other constructions, devices, appurtenances and facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal" W.S. § 35-11-103(c)(iii). Disposal system is defined as "a system for disposing of wastes, either by surface or underground methods, including sewerage systems, treatment works, disposal wells, and absorption fields." Accordingly, construction of a septic system, such as the one at issue here, which includes pipelines and an absorption field used to dispose of waste are only allowed with a permit issued under the Environmental Quality Act.

Having established that a permit is necessary to install a septic system, the Environmental Quality Act then designates the administrator of the Water Quality Division the authority to establish standards for the issuance of "permits for construction, installation, modification or operation of any… sewerage system [or] disposal system." W.S. § 35-11-102. This authority is limited, however, by W.S. § 35-11-304 which commands that "the administrator of the water quality division, with the approval of the director, shall delegate to municipalities, water and sewer

districts or counties which apply the authority to enforce and administer within their boundaries the provisions of W.S. 35-11-301(a)(iii) and (v)."

The requirement that DEQ must delegate to counties that meet the criteria is mandatory. *See* W.S. § 35-11-304. Specifically, the plain language of the statutory provision provides:

> To the extent requested by a . . . county, the administrator of the water quality division, with the approval of the director, ***shall*** delegate to … counties which apply the authority to enforce and administer within their boundaries the provisions of W.S. 35-11-301(a)(iii) and (v), including the authority to develop necessary rules, regulations, standards and permit systems and to review and approve construction plans, conduct inspections and issue permits.
>
> W.S. § 35-11-304(a) (emphasis added).

As a result of these related statutory sections, Wyoming has created a framework where all septic systems require permitting, and the Water Quality Division must administer those permits, except in a case where a municipality or other government agency properly requests that authority be delegated. If a delegation request is make, and there is a valid delegation agreement, permitting is the right and responsibility of that government agency and not the Water Quality Division.

The Wyoming Water Quality Rules acknowledge this statutory framework in Chapter 3. This Chapter provides the basis for DEQ to issue individual septic permits and explicitly acknowledges Chapter 3 cannot be the basis for a permit for "[f]acilities permitted by a municipality, water and sewer district, or county delegated authority under W.S. § 35-11-304." Chapter 3, Section 2(b)(xi). Accordingly, both the Wyoming statutes and Water Quality Rules, Chapter 3 are clear. Individual permits for septic systems can be issued by DEQ, except when there is a valid delegation agreement in place, in which case the permits must be issued by the relevant delegated authority. And, in this case, there is a valid delegation agreement (the "***Delegation Agreement"***) in place.

In the DEQ's Delegation Agreement with Teton County, the DEQ "delegates and [Teton County] accepts the authority and responsibility to enforce and administer the provisions of W.S. 35-l l-301(a)(iii) for small wastewater facilities, as defined in W.S. 35-l l-103(c)(ix)" within Teton County's territorial boundaries. Exhibit A at 2. As a result of this agreement, the DEQ does not have any authority to issue permits for "small wastewater facilities," as defined in W.S. § 35-l l-103(c)(ix), located within Teton County, and only Teton County can issue such permits.

In the DEQ's response to comments for this permit, however, the DEQ explicitly found that Basecamp's proposed septic system was a "small wastewater facility" as defined in W.S. 35-11-103(c)(ix). DEQ RESPONSE TO COMMENTS PERMIT #2023-025, Attachment F to Petition, at 2-1; 2-4. As a result, both the relevant Wyoming statutes, regulations, and delegation agreement are clear that authority to grant or deny Basecamp's application, in the first instance, is vested in Teton County. In fact, Chapter 3 explicitly prohibits DEQ from issuing a permit for a small wastewater facility in Teton County, because that chapter does not apply "[f]acilities permitted by a municipality, water and sewer district, or county delegated authority under W.S. § 35-11-304."

Additionally, there is no evidence the Delegation Agreement was somehow invalid or revoked. Teton County has met the conditions of delegation set out in W.S. § 35-11-304(a)(i)-(v), as evidenced by the delegation agreement here. *See* Exhibit A. There is no evidence that the Delegation Agreement has ever been terminated mutually by the parties. For DEQ to unilaterally revoke this authority, there are conditions and procedures that the DEQ must satisfy. W.S. § 35-11-304(a)(v) (noting that the DEQ administrator "may with the consent of the director revoke or temporarily suspend the delegation agreement entered into with any entity ***which has failed to perform its delegated duties or has otherwise violated the terms of its agreement of***

delegation.").[1] There is no suggestion anywhere in the record that Teton County failed to perform its delegated duties, much less that a formal revocation occurred.

Moreover, under Article IX of the Delegation Agreement, DEQ may only revoke or temporarily suspend the Delegation Agreement if "the Entity fails to perform its delegated duties or has otherwise violated the terms of this Agreement." DEQ is required to notify Teton County of any revocation or suspension of the permitting authority "in writing." This type of "administrative action is subject to review by the Environmental Quality Council if the Entity so requests within twenty (20) day or notice of the State's action." *Id.* The revocation or suspension is only effective twenty days after receipt of such written notice. *Id.* Again, there is no record evidence this process has ever occurred.

As this analysis shows, The DEQ has no authority to grant permits for "small wastewater facilities" in Teton County. Based upon DEQ's own determination that this was a "small wastewater facility" the challenged permit should have never been issued, and should be revoked by the EQC if the DEQ does not withdraw it first.[2] In permitting Basecamp's septic system, the DEQ unlawfully and without explanation or jurisdiction usurped Teton County's duly delegated authority to administer its small wastewater program, and the EQC should ultimately find the Permit was issued in error.

[1] The delegation of authority and process for revocation is analogous to that contemplated in the federal system. For example, the delegation of authority over mineral land royalties. See 30 U.S.C. § 1735; 30 C.F.R. § 1229 ("Delegation to States"). As an example, there is a specific process for revocation of authority from a state to the federal government, including "written notice" "reasonable opportunity to take corrective action."

[2] It is important to note that Petitioner does not concede that Basecamp and DEQ's flow calculations or categorization of the system are ultimately correct and reserves the right to challenge those calculation at a contested case hearing. Instead, Petitioner's argument is that once DEQ made this determination, it was divested of legal authority to issue a permit.

B. The DEQ did not have sufficient information to determine that the proposed septic system will meet required setbacks.

In addition to not having the legal authority to issue the Permit, DEQ did not even have a sufficient evidentiary basis to conclude Basecamp's proposal complied with the DEQ's rules for small wastewater systems. Specifically, DEQ rules require that small wastewater systems meet setback requirements from both surface water and infrastructure that could potentially be contaminated, such as wells. *See* Water Quality Rules, Chapter 25. In this case, the DEQ determined that, under DEQ's own analysis of basecamps septic system, Basecamp was required to meet a 50-foot setback from any surface water or spring, including "seasonal and intermittent," to the absorption system.[3] Attachment F at Responses 2-5

The DEQ determined that this standard was met and "[t]he proposed system meets or exceeds the minimum horizontal setback distances provided in Chapter 25" because there is "65 ft between the nearest surface water and the absorption system." Attachment F at Responses 2-5.

In reaching this conclusion, however, the DEQ relied exclusively on Basecamp's bare representation that a line on a map it submitted was a formal surface water delineation by the ACOE. For example, the DEQ stated "[t]he 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). Similarly, the DEQ further explained "[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. Finally, the DEQ stated: "[i]n the permit application, Basecamp's engineer

[3] As noted above, Petitioner disagrees with DEQ's determination regarding Basecamp's system designation and water usage, and ultimately reserves the right to make such a challenge, but at this initial stage, DEQ must still show Basecamp's system complies with the less restrictive requirements DEQ initially determined applied.

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).[4]

It does not appear, however, that the ACOE ever did a wetland or surface water delineation. A wetlands jurisdictional delineation is performed on a property to delineate which waters are Waters of the U.S. and are therefore subject to Clean Water Act Section 404. *See* EPA SECTION 404 EXPLANATION, Exhibit B. Jurisdictional delineations are performed on a property in order to delineate which waters are Waters of the United States and are therefore subject to Clean Water Act Section 404. *Id*. Jurisdictional delineations are performed on a property in order to delineate which waters are Waters of the U.S. and are therefore subject to CWA 404. *Id*. DEQ has not stated that it reviewed a wetland delineation or other documentation from the ACOE, or a delineation prepared by Basecamp and verified by ACOE. Thus, DEQ has not provided any basis for determining appropriate setback distances other than its reliance on Basecamp's unsubstantiated representation. In fact, the DEQ's own admissions make clear that DEQ relied on information provided by Applicant rather than information provided by the ACOE or an official ACOE document.

Further, public records requests to DEQ indicate that DEQ never received a wetlands delineation or surface water assessment conducted by the ACOE. In response to a public records

[4] Although DEQ did note that POWJH's June 9, 2023 letter included a map prepared by Alder Environmental that identified wetland areas, Attachment F at Response 3-1, such map clearly states on its face that aquatic resources are "approximate." Petition, Attachment K.

request to DEQ for "Any jurisdictional determination or wetlands delineation conducted by the U.S. Army Corps of Engineers in connection with DEQ Permit No. 2023-025," DEQ stated that "[a]t this time, DEQ has not discovered any records pertaining to the request." DEQ RECORDS REQUEST RESPONSE, Exhibit C.

Thus, it appears that DEQ based its determination of the setback distance to surface water on incorrect or incomplete information. Accordingly, DEQ committed clear legal error by relying on Basecamp's representations regarding the setback distances based on a "US Army Corps of Engineers Wetland Delineation for the site **as shown on the design plans**," when such wetland delineation never existed or was never received by DEQ. Petition, Attachment F at Responses 2-5.

C. Pollution in Fish Creek and its watershed is an irreparable harm that will occur if the EQC does not enter an injunction.

As both the fact the DEQ issued a permit beyond the scope of its authority and without a sufficient evidentiary basis show that the Petitioner will succeed on the merits, an injunction is appropriate if there is a potential for irreparable harm that cannot be remedied by monetary damages should the injunction not issue. *In re Kite Ranch, LLC* 2008 WY 39, ¶ 22. The crux of this analysis, however, is ***not*** focused on how likely the potential harm is to occur. *Id*. Instead, it is sufficient to find there is a ***potential*** it may occur, in which case a preliminary injunction, in the form of suspending the permit, is appropriate "to preserve the status quo until the rights of the parties can be fairly inquired into and determined under equitable conditions and principles." *Id.*

In this case, there is strong evidence that failing to suspend the Permit will lead to pollution in Fish Creek. As detailed in the report of Brian Remlinger, a professional wetland scientist, submitted as part of the public comment process by POWJH, a number of studies and reports show

a hydrologic connection between ground and surface water in the Fish Creek drainage. Petition, Attachment H at 1-2. Mr. Remlinger's report explains: "Interactions between surface and groundwater are well documented in studies conducted by the US Geological Survey and others (Eddy-Miller 2009)." Attachment H at 1. The assessment further notes that "[a] recent 2-year study of raised mound wastewater treatment leachfields and septic systems in the Fish Creek watershed indicates that nitrate contamination of groundwater due to these systems is highest during winter months when the effectiveness of these systems is limited by cold conditions (Nelson and Alder 2022)." Attachment H at 2; *see also* Attachment M to Petition (referenced Nelson and Alder 2022 study). Based on these prior studies, Mr. Remlinger's report concludes that there will be groundwater and surface water impacts: "The groundwater within the vicinity of Site 9 has significant hydrologic connectivity with surface water and stormwater . . . there will likely be some level of wastewater pollutant contribution to groundwater from the [glamping facility septic system] as indicated by the 2022 study." Attachment H at 2-3.

Record evidence, both in this EQC Petition and in comments submitted by POWJH during the public process leading to issuance of the Permit, also demonstrates irreparable harm. 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. Petition, Attachments A, B, and C. The DEQ/WQD has already determined that Fish Creek is impaired by concentrations of *E. coli* that exceed the quality standards for primary contact recreation contained in Chapter 1 of DEQ's Water Quality Rules. DEQ WYOMING'S 2020 INTEGRATED 305(B) AND 303(D) REPORT, Exhibit D, at 29 Table 8 (listing Fish Creek as impaired) and at page D-12 (listing entirety of Fish Creek as impaired for *E. coli*).

DEQ has also 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. *See e.g.* 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)

As a result, what the EQC is left with, at a fundamental level, is a permit that DEQ issued, despite no statutory or regulatory authority to do so, that reached crucial factual conclusions based on studies that do not appear to have actually occurred. And, if this Permit, which will clearly be revoked based on these deficiencies in the near future, is allowed to go forward, there is unrefuted and well supported scientific evidence that the facility allowed by the Permit will lead to pollution in the Fish Creek watershed. Courts have repeatedly and consistently found that this type of direct pollution because "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *N. Cheyenne Tribe* 503 F.3d at 843 (internal citations and formatting omitted). This factual situation, with a facially invalid permit and well documented evidence showing the illegally permitted facility will cause environmental contamination plainly calls for a preliminary injunction, and the EQC should issue one.

CONCLUSION

For the foregoing reasons, the Council should suspend the Permit to preserve the status quo and prevent irreparable harm to water resources and to Petitioner.

Respectfully submitted this October 10, 2023.

John Graham (WSB # 7-5742)
Geittmann Larson Swift LLP
155 E Pearl
Jackson, WY. 83001
(307) 733-3923
jwg@glsllp.com

Kevin E. Regan (OR No. 044825; CA No. 262335; WA No. 44565)
Protect Our Water Jackson Hole
250 E. Broadway Avenue
PO Box 316
Jackson, WY 83001
Phone: (206) 601-5180
kevin@protectourwaterjh.org

Attorneys for Petitioner Protect Our Water Jackson Hole

Certificate of Service

Based on the foregoing signature, counsel certifies that a true and correct copy of motion was electronically filed with the Environmental Quality Council and was served on all parties via the Environmental Quality Council's electronic notification.