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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

REPLY IN SUPPORT OF MOTION TO SUSPEND PERMIT

The central issue in Petitioner Protect Our Water Jackson Hole's ("***POWJH***") Motion to Suspend Permit was the glaring and obviously apparent issues present on the face of Permit No. 2023-025 (the "***Permit***"). Instead of squarely addressing these issues, the Department of Environmental Quality's ("***DEQ***") has devoted its Response to arguing that the Environmental Quality Council ("***EQC***") cannot issue preliminary injunctions and that Petitioner, a water quality non-profit which has paid for water protection and restoration initiatives in the Fish Creek

watershed, does not have standing to challenge a facially invalid permit that will lead to pollution in Fish Creek. While there is no merit to DEQ's procedural and standing arguments, it is important to start with the fact the DEQ has made these arguments in defense of a permit which is plainly indefensible.

1. The fact that DEQ issued a conditional permit does not change the fact that DEQ validly delegated authority to permit all small wastewater facilities to Teton County.

As outlined in POWJH's initial briefing on this matter, Wyoming has created a statutory framework where all septic systems require state permitting in the first instance. This permitting authority must, however, be delegated from the state to a qualified local governmental entity if the qualified local governmental entity requests that delegation. *See* W.S. § 35-11-304(a).

In conformance with these statutes, DEQ has delegated, to Teton County, "the authority and responsibility to enforce and administer the provisions of W.S. 35-11-301(a)(iii) for small wastewater facilities, as defined in W.S. 35-11-103(c)(ix)" for the geographic area covered by Teton County. *See* Delegation Agreement, Exhibit A to *Motion to Suspend*, at 2. As a result, the plain language of the Agreement provides that Teton County is responsible for issuing permits for septic systems, under W.S. 301(a)(iii), for all facilities that produce less than 2,000 gallons of domestic sewage a day, based on the definition of small wastewater facility in W.S. 103(c)(ix).

There is no ambiguity or equivocation in this agreement. If a septic system is geographically located in Teton County and produces less than 2,000 gallons of domestic sewage, the agency responsible for issuing permits is Teton County, and the DEQ has delegated its authority to do so.

To try and circumvent this plain reading of the delegation agreement, the DEQ has advanced the argument that DEQ somehow did not delegate authority to regulate ***all*** small wastewater

system to Teton County because Teton County does not have the same regulations as the state regarding discretionary monitoring programs.

This argument has no connection to the text of the Delegation Agreement. Nowhere in the Delegation Agreement is there any reference to any distinct types of small wastewater permits. Instead, the Delegation Agreement provides a wholesale delegation of authority to permit small wastewater facilities to Teton County, without regard to the nature or specifics of the proposed system.

In fact, to understand how indefensible the DEQ's position is, the EQC only needs to consider how the DEQ's alleged distinction between which permits Teton County can issue and which permits the DEQ can issue would work prospectively. The alleged unincorporated section of the DEQ's regulations provides that, "[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." The DEQ's position is, essentially, that, while the Delegation Agreement should govern the majority of Teton County permits, whenever this section is implicated, the permit is removed from Teton County's purview.

From this premise, it logically follows that every permitee would need an initial decision as to whether their proposed septic system "may alter the physical, chemical, radiological, biological or bacteriological properties of any Waters of the State" from the Administrator of the Water Quality Division to determine whether that permitee was required to go through the state or county

permitting process. As there is not even a remote expression of this procedure within the Delegation Agreement, it is clearly not how the parties intended their agreement to be read.

Moreover, the DEQ's ancillary argument, that it was the proper permitting authority because it created a more restrictive permit than Teton County could, is not supported by the record. In fact, the record shows that Teton County actually has more restrictive technical specifications for sand mound septic systems than the DEQ does. *See e.g.* Response to Comment Section 3-1 (comparing Teton County and DEQ sand mound regulations); S*ee generally* Teton County Small Wastewater Facility Regulations Section 9-3-11. As a result, there is no basis to conclude that the DEQ's regulations "better protect the State's water quality because Teton County does not have the same authority to impose the more stringent monitoring the State placed on the permit," as DEQ argues. Basecamp Teton WY SPV LLC ("***Basecamp***"), the permitee, could have, for example, submitted a permit that only complied with DEQ's more relaxed technical specifications, or the Administrator could have determined a monitoring program was not necessary. In either case, the fact the permit was issued under DEQ standards would not make the permit inherently more restrictive.

As a result, there is no basis to conclude the DEQ and Teton County intended their Delegation Agreement to require permitees to make an initial application to the DEQ to see if monitoring is potentially necessary and there is no reason to conclude the DEQ's standards will necessarily be stricter than Teton County's, even when the DEQ regulations allow for monitoring. With these specious arguments set aside, the plain language of Delegation Agreement between Teton County and the DEQ governs and this plain language requires all Small Wastewater Facilities in Teton County to be permitted by Teton County.

2. The DEQ has failed to provide any evidence it properly determined Basecamp's proposal complied with the relevant setbacks.

In addition to the DEQ lacking the authority to issue the Permit, writ large, the DEQ also lacked a factual basis to conclude that Basecamp's permit request met required setbacks. The DEQ is correct, and POWJH readily concedes, that no formal Army Corps of Engineers ("***ACOE***") delineation is required to issue a septic permit. What is required for DEQ to issue a permit, however, is a finding that the proposed septic system complies with all applicable setbacks for surface water and the agency must articulate a rational basis for that decision. Chapter 25, Section 7; *see Wilson Advisory Comm. v. Bd. of Cnty. Comm'rs*, 2012 WY 163, ¶ 53, (Wyo. 2012) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.")).

To meet this requirement, Basecamp submitted a map of the site, with a line marked as an ACOE delineation of wetlands. *See* Response to Comments at 2-5. The DEQ then, as cited in Petitioner's brief, repeatedly and consistently referred to the ACOE delineation as showing the relevant setbacks were met. *Id.* As the DEQ does not now claim the ACOE actually conducted a delineation, it appears all parties now concede such a delineation did not occur. Based on the fact no delineation occurred, the materials on Basecamp's application cannot be used to determine setback compliance, as there is no source material supporting that delineation.

To remedy this patent deficiency, the DEQ has pointed to the fact that Alder Environmental provided wetland mapping that is largely consistent with the mapping Basecamp submitted. These maps, however, are all plainly labeled as only containing "approximate" determinations and are

limited to "in time" snapshots that might not capture the full extent of seasonal or intermittent surface waters. *See* Exhibit H to *Petition for Review*. As a result, the DEQ has no documentation as to the full scope and extent of surface waters at high water levels on which to base a determination that Basecamp meets the relevant setbacks. While a formal ACOE delineation is not required, DEQ must have some rational basis for its decision and must have engaged in some level of independent analysis rather than taking Basecamp at its word. There is no indication that DEQ engaged in such analysis here. *Wilson Advisory Comm.*, 2012 WY 163, ¶ 53.

3. The Petitioner has provided expert reports unequivocally stating that there will be irreparable harm if the permitted system is allowed to operate.

To avoid discussing the clear impropriety of the Permit, the DEQ has argued there is no possibility of irreparable injury because Petitioner has provided no evidence the septic system will fail, no evidence that, without failure, contaminants will leach into the groundwater, and no evidence that such contamination would create an irreparable injury.

This is simply a mischaracterization of the record. Brian Remlinger's expert evaluation of the Basecamp site, which the DEQ is relying on to support its setback determinations, literally states that, even without system failure, "there will likely be some level of wastewater pollutant contribution to groundwater from the Resort as indicated by the 2022 study. The level of wastewater pollution leaching into the groundwater at Site 9 will likely be low concentration, however, water quality impacts will be chronic and long term and will ultimately be determined by occupancy rates and flow rates to the system." *See* Exhibit H to *Petition for Review*. There is no evidence in the record rebutting this opinion.

As a result, the Petitioner can plainly show that the Permit is invalid both because DEQ had no authority to issue it and no basis to confirm it complied with the relevant setbacks. The Petitioner can also show, based on Mr. Remlinger's expert opinion, that there will be irreparable environmental damage should the permitted system be allowed to operate. These two showings mandate that, to the extent a preliminary injunction preventing the permit from taking effect is available, the EQC must issue one.

4. A preliminary injunction is available in proceedings in front of the EQC.

At a fundamental level, Petitioner and DEQ agree that the EQC's authority to issue a preliminary injunction, and suspend the Permit, while a hearing is pending, is whether the EQC can rely on Federal Rule of Civil Procedure 65 for authority to issue a preliminary injunction. The relevant provision of Chapter 2, Section 2 provides that "[the EQC] shall conduct all contested case hearings with reference to the Wyoming Rules of Civil Procedure." This section then provides that another section "specifically incorporates" five discrete rules. As a result, the dispositive question whether the EQC can rely on a procedural rule that, although not specifically incorporated, is part of the suite of rules the DEQ is expressly directed to "reference" when the EQC's express rules are silent.

The Montana Supreme Court addressed this exact question, when it considered whether a petition for review in front of the Montana Board of Environmental Review could be amended, despite the fact that the Montana Administrative Procedures Act ("***MAPA***") did not provide any authority creating a right to amend a petition for review or providing a standard to operationalize that right.

In the absence of any specific statute, the Board of Environmental Review decided that amendment was appropriate, provided the proposed amendment complied with Montana Rule of Civil Procedure 15. The Montana Supreme Court explicitly approved of this approach stating, in relevant part:

> The procedures of MAPA govern a contested case hearing under § 75–2–211(10), MCA. MAPA, however, does not expressly address motions to amend pleadings. Here, the hearing examiner evaluated the Conservation Groups' motion for leave to amend under Rule 15(c), M.R. Civ. P. The Montana Rules of Civil Procedure do not apply to administrative hearings, M.R. Civ. P. 1 ("These rules govern the procedure in the district courts of the state of Montana ...."); although an agency may adopt them pursuant to statutory authority, and the legislature may mandate their application by statute. Nevertheless, where, as here, the Montana Rules of Civil Procedure do not govern an administrative proceeding, they may still serve as guidance for the agency and the parties. Accordingly, it was permissible here for the hearing examiner to consider Rule 15(c), M.R. Civ. P., in evaluating the Conservation Groups' motion to amend.
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> *Citizens Awareness Network v. Montana Bd. of Env't Rev*., 2010 MT 10, ¶ 20 (internal citations omitted).

As a result, the role of underlying state civil procedure rules, in the absence of any express limitation on the application or express adoption of those rules, is to act as a gap filler where there is no provision on point in the relevant agency hearing rules. *Id*. This is especially true where, as here, the relevant procedural rules explicitly require conducting administrative proceedings with reference to the rules of civil procedure.

In this case, the EQC is, generally, authorized to conduct all proceedings related to an initial contested case challenging a permit issuance and is directed to conduct those proceedings with reference to the Wyoming Rules of Civil Procedure. There is no specific authority, however, governing the EQC's authority to issue stays. As a result, Wyoming Rule of Civil Procedure 65 serves a gap filling function, establishes authority on an issue where the express rules are silent,

and sets the parameters through which the EQC can issue a preliminary injunction. And, as the DEQ concedes, if the EQC can rely on Rule 65 to issue an injunction, an injunction is appropriate in this case based on the showing that it is likely a petitioner will succeed on the merits and there is a possibility of irreparable harm without such an injunction.[1]

With this authority to issue a preliminary injunction in mind, the DEQ's extended discussion regarding how the DEQ retains authority to suspend permits in the first instance, and how the DEQ must meet certain procedural requirements to do so is immaterial and irrelevant. Once the DEQ has made a final decision, in this case issuing the Permit, the EQC is vested with the power to review that action. That review power, due to the incorporation of the rules of civil procedure to govern review proceedings, includes the authority to issue preliminary injunctions under WRCP 65. This authority is crucial and integral as a practical matter to the EQC's proper functioning as an administrative review body for two reasons.

First, the Wyoming Supreme Court has consistently recognized that 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." *In re Kite Ranch, LLC v. Powell Fam. Of Yakima, LLC*, 2008 WY 39, ¶ 22. A reviewing board that cannot functionally preserve the status quo that existed prior to the issuance of a facially invalid permit lacks a key power necessary to fairly review issued permits.

Second, the Wyoming Supreme Court has suggested that "a party may be pardoned from exhausting his administrative remedies when severe or irreparable harm will result from the

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[1] The due process concerns raised by the DEQ are, of course, addressed by Basecamps pending intervention, which POWJH does not anticipate opposing.

exhaustion requirement being enforced." *Koopman By & Through Koopman v. Fremont Cnty. Sch. Dist. No. 1*, 911 P.2d 1049, 1054 (Wyo. 1996). In this context, a finding that the EQC has no power to issue preliminary injunctions would essentially void the EQC's role in review of agency actions. If a party challenging a DEQ permit could show a likelihood of irreparable injury, but the EQC had no authority to issue a stay, that party could file directly in District Court based on the possibility of irreparable harm absent an injunction and the EQC's inability to issue an injunction. As a result of the need for injunctions to preserve the status quo in pending appeals and to maintain EQC's jurisdiction over DEQ appeals in the first instance, the EQC should read its own rules as allowing reliance on Rule 65 to issue injunctions.[2]

5. The Petitioner has standing to challenge whether the DEQ had lawful authority to issue the Permit.

Finally, the DEQ has asserted that POWJH lacks standing to raise the fact the DEQ issued a permit despite having no statutory or regulatory authority to do so. The Wyoming Supreme Court has been clear, however, that when challenging a land use permit, such as a zoning or septic permit, the relevant inquiry is whether the petitioner has "a legally recognizable interest that is or will be affected by the action of the [permitting] authority in question" and whether that interest "exceed[s] the general interest in community good shared in common with all citizens." *HB Fam. Ltd. P'ship v. Teton Cnty. Bd. of Cnty. Commissioner*s, 2020 WY 98, ¶ 22 (internal quotations and citations omitted). In operationalizing this standard for incorporated non-profits that do not have constituent members, the Wyoming Supreme Court has stated that a "description of the [entity's] planned programs, where specifically they will be located, or how the programs would actually be harmed

[2] POWJH also continues to maintain the DEQ should be judicially estopped from arguing the contrary position but concedes that Basecamp's anticipated intervention likely moots that issue.

by” a proposed project is likely sufficient to confer standing. *N. Laramie Range Found. v. Converse Cnty. Bd. of Cnty. Comm'rs*, 2012 WY 158, ¶ 35.

In this case, the attached affidavit, by a POWJH Board Member, establishes that Petitioner has explicitly expended donor funds for discrete projects related to both mitigating the damage done to Fish Creek by existing development and for improving the future water quality in Fish Creek prospectively. *See* Attached Exhibit A. This clear and continuing investment explicitly in Fish Creek water quality, which will be undercut by the permitted system, confers standing.

6. Conclusion

The issues in this case are simple. The DEQ delegated all authority to permit small wastewater systems in Teton County to the County. As a result, the Permit is facially invalid, and Basecamp had to apply to Teton County for a septic permit. On this issue alone, the Permit should be revoked and the DEQ’s refusal to do so is indefensible.

Additionally, even if DEQ could issue this Permit, its factual findings in support of the Permit relied heavily on a purported wetland delineation from the ACOE that all parties now appear to concede never occurred. Without this predicate factual analysis, there is no basis to conclude that Basecamp’s permit request complies with the relevant setback requirements. As a result, the Permit is invalid and will, eventually, be revoked.

While this inevitable revocation process is proceeding, the Petitioner has asked the EQC to issue a preliminary injunction staying the Permit and preventing irreparable environmental harm from occurring. Instead of providing a real and substantive defense to the alleged deficiencies

underlying the Permit, the DEQ is arguing that the EQC cannot issue a stay and POWJH cannot bring this claim. Neither of these contentions has merit.

The EQC's contested case rules plainly contemplate reliance on the Wyoming Rules of Civil Procedure when the agency rules themselves do not address an issue. In this case, the EQC has no rule on point regarding preliminary injunction, so Rule 65 serves as a gap filler and provides the authority and standard for issuing an injunction. And POWJH can raise this issue as it has a significant and well-established history of water quality projects in Fish Creek.

Accordingly, the EQC should issue a preliminary injunction staying the effectiveness of the Permit under Rule 65, until it reaches the ultimately inescapable conclusion that the permit must be revoked.

Respectfully submitted this November 8, 2023.

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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.