

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

---

**RESPONSE TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY’S MOTION TO DISMISS**

---

The issues raised in the Department of Environmental Quality’s (“**DEQ**”) Motion to Dismiss can be distilled down to two following essential questions:

- 1) Does a third-party challenging a DEQ decision to issue an individual small wastewater permit have to appeal that decision to the Environmental Quality Council (“**EQC**”), or can the appellee proceed directly to a Wyoming District Court?
  
- 2) Does a non-profit organization that has directly spent money on the clean up and future conservation plans of a watershed have a right to challenge a permit that would allow pollution in that watershed under the Wyoming Supreme Court’s prior guidance that a

“description of the [entity’s] planned programs, where specifically they will be located, or how the programs would actually be harmed by” a proposed project is likely sufficient to confer standing?

On the first issue, Protect Our Water Jackson Hole (“**POWJH**”) believes the EQC has authority to hear these matters, but POWJH would not object to being allowed to proceed directly to District Court. Instead, POWJH’s primary argument is that, to the extent DEQ is arguing POWJH’s claims that the Delegation Agreement prevents DEQ from issuing a permit are not subject to adjudication in front of the EQC, but the rest of POWJH’s claims are, that position is internally inconsistent.

On the second issue, POWJH plainly and obviously has standing to challenge Permit No. 2023-025 (the “**Permit**”) under the most direct statements the Wyoming Supreme Court has made regarding non-profit organizational standing.

## **BACKGROUND**

As the parties have already provided the background to this case in their respective briefing POWJH’s Motion to Stay, the following is a limited recitation of facts limited to the instant motion. POWJH is non-profit 501(c)(3) corporation that, along with its predecessor in interest, Friends of Fish Creek, has, since its founding in 2014 and well before Basecamp ever came on the scene, expended significant resources to both remediate contamination in Fish Creek and invest in prospective solutions to poor water quality in Fish Creek. This work includes approximately \$300,000 in specifically identified expenditures for the benefit of Fish Creek water quality noted in the standing declaration attached as Exhibit A to POWJH’s Reply in Support of Motion to Stay.

Due to this longstanding interest in Fish Creek’s water quality, POWJH was concerned when the Office of State Lands and Investment proposed a high intensity hospitality use where

numerous paying guests would stay and use facilities on previously undeveloped property in the Fish Creek watershed. POWJH decided to dig deeper into these general concerns and, as detailed in the expert report by Brian Remlinger attached to POWJH's Petition for Review, it turns out there was cause for concern. Even well-designed septic systems are intentionally designed, through percolation, to discharge exactly the pollutants that already contaminated Fish Creek into the greater Fish Creek watershed.

As the science suggested the proposed septic system would pollute Fish Creek, POWJH naturally undertook a review of how that septic system was permitted. As the EQC is aware, POWJH found, in addition to numerous substantive issues that should have prevented DEQ from issuing the permit, that DEQ's attempt to initially permit this site was done under an expired general permit and, therefore, invalid. POWJH filed an initial appeal of that earlier permit which DEQ ultimately withdrew.

The DEQ then went back to try and permit the site for a second time. This time they elected to issue a site-specific permit to Basecamp but, as commentors noted at the time, it was not at all clear DEQ had the authority to do so. POWJH noted this deficiency in its initial petition for review, by highlighting the DEQ permit failed to comply with some of Teton County's standards.

Accordingly, POWJH specifically raised the issue of whether the DEQ could legally permit Basecamp's septic system, when DEQ had delegated its permitting authority to Teton County, in POWJH's first pleading after filing the petition for review, before the parties had conducted any discovery, before the EQC entered any scheduling order, and before Basecamp intervened in this matter.

While the EQC ultimately decided it did not have the authority to stay or enjoin a permit's effectiveness pending review, the DEQ's Response to POWJH's Motion for Stay laid bare that DEQ did not have a good legal justification for why it had authority to issue the Permit, that Teton County should have issued the Permit, and the septic permit for Basecamp's site is, once again, defective.

In an attempt to circumvent this ultimate conclusion, the DEQ is now arguing that the EQC should not even be permitted to hear the issue of whether the DEQ issued a permit in violation of the relevant authorizing statutes. The EQC should reject this argument, as it plainly has authority to hear appeals of DEQ permits and POWJH plainly has a concrete, pecuniary, and longstanding interest in the health of Fish Creek to raise these issues.

***1. The EQC either does or does not have authority to hear appeals of specifically permitted septic systems, but the EQC cannot have jurisdiction over only some violations of statutes and not others.***

The first argument DEQ has advanced in an effort to prevent the EQC from reaching the merits of POWJH's claims is that POWJH does not have legal authorization to bring a claim alleging that DEQ failed to comply with the relevant statutes when it issued the Permit.

As a preliminary matter, POWJH has an absolute right, provided it has standing, to appeal a decision to issue a permit made by the DEQ. Specifically, Wyoming law provides that "any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, or any person affected in fact by a rule adopted by an agency, is entitled to judicial review" of that agency action or inaction. Wyo. Stat. § 16-3-114. This rule plainly allows any "aggrieved party" to request and ultimately receive judicial review of any DEQ permit issuance.

This review, in turn, plainly includes the issue of whether an agency acted in a way that was “[a]rbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *See Dale v. S & S Builders, LLC*, 2008 WY 84, ¶ 9 (quoting W.S. § 16-3-114(c)). So, the question of whether the DEQ had the legal authority to issue the Permit is plainly within the scope of judicial review of the DEQ’s decision to issue the permit, generally.

The fact that the DEQ’s decision could also be challenged by a declaratory judgment action makes no difference. In fact, the Wyoming Supreme has explicitly stated that there are circumstances when a party may bring a claim though either a declaratory judgment claim or a petition for agency review. *Thomas Gilcrease Found. for Gilcrease Hoback One Charitable Tr. v. Cavallaro*, 2017 WY 67, ¶ 14. The Supreme Court’s guidance in these circumstances has been, generally, these actions may be pursued simultaneously but, in limited circumstances, agency review must be completed before a declaratory judgment claim can be brought. *Id.* In no case, however, has the Court even suggested a declaratory judgment action must be brought in place of a petition for review. *Id.* The Wyoming Rules of Appellate Procedure take the same approach. *See* W.R.A.P. 12.12.

Moreover, once the DEQ’s claim that POWJH’s claims should be brought as a declaratory judgment claim are properly set aside, it is obvious that all of POWJH’s claims are essentially the same. POWJH’s claims are that the DEQ failed to comply with its own statutes, rules, and regulations when it issued the Permit. These claims include:

1. Claims that, under W.S. § 35-11-304(a) and Chapter 3 of the DEQ Water Quality Rules, DEQ had not authority to issue the Permit because it had entered into a delegation agreement;

2. Claims that, under Chapter 25 of the DEQ Water Quality Rules, DEQ had no authority to issue the Permit because it failed to properly determine Basecamp complied with the relevant setbacks; and
3. Claims that, under Chapter 1 of the DEQ Water Quality Rules, DEQ had no authority to issue the Permit because the use by Basecamp would pollute Class 1 waters in violation of the applicable regulations.

All three of these claims are fundamentally the same. They allege DEQ could not legally issue the Permit, because doing so violated DEQ's own statutes, rules, and regulations.

As a result, the EQC is left with the following: First, POWJH has an absolute right to challenge DEQ's decision to issue a permit in violation of its delegation of authority; Second, all POWJH's claims are fundamentally the same in that all claims allege the DEQ violated the law by failing to follow its own statutes, rules and regulations.

The question for the EQC, then, is do these claims that an individual, as opposed to general, septic permit was issued in violation of applicable rules, laws, and regulation need to be heard by the EQC before proceeding to District Court or can these claims proceed directly to District Court after the DEQ makes a permit decision.

On this issue, the relevant statutes are unclear. On the one hand, the DEQ is right that W.S. § 35-11-801 does, in fact, only set forth a right for non-applicants to appeal permits issued under a general permit, and not individual permits.

On the other hand, the EQC's authorizing act specifically provides that the "council shall act as the hearing examiner for the department and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department" and that the "council shall... [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.” W. S. § 35-11-112.

Generally, it appears that the broad requirement the EQC act as a “hearing examiner” and conduct hearings in all cases related to permits generally confers jurisdiction to hear aggrieved third-party appeals, especially when that EQC role is read in combination with the underlying right of those third parties to appeal directly to District Court. This is consistent with the arguments advanced by the DEQ against POWJH’s attempt to file its first petition for review directly in district court. See Attached Exhibit A, *DEQ’s Motion to Dismiss Petition*, at 5-7.

There would, of course, be an advantage for POWJH in being allowed to proceed directly to the District Court, as a District Court is specifically authorized to issue an injunction suspending the permit while the matter is under review, unlike the EQC. POWJH recognizes, however, the relevant statutes likely require a hearing before the EQC. More importantly, though, POWJH notes that there is no legitimate basis to conclude POWJH’s claims the DEQ failed to comply with the delegation statutes are materially different than POWJH’s claims the DEQ failed to comply with its own regulations regarding setback and Class 1 waters. Instead, the issue the DEQ is truly presenting is whether the EQC has the authority to hear appeals of individual, as opposed to general, permit issuances made by parties other than the applicant.

***2. Privity of contract is not required to bring a claim an agency acted without legal authority.***

POWJH’s claim that the EQC illegally issued the Permit has nothing to do with privity contract. Wyoming law is clear that:

State agencies can exercise only those powers authorized by statute. *Natrona County School Dist. No. 1 v. Ryan*, 764 P.2d 1019, 1035 (Wyo. 1988). *See also K*

*N Energy, Inc. v. City of Casper*, 755 P.2d 207, 210–11 (Wyo. 1988). A corollary of the rule is that, when a statute provides a particular manner in which a power may be executed, the agency may not exercise its power in a different way. *Town of Worland v. Odell & Johnson*, 79 Wyo. 1, 16–17, 329 P.2d 797, 802–03 (1958). Any action taken by an agency without authority is ultra vires and void. *Id.* at 803.

*Horse Creek Conservation Dist. v. State ex rel. Wyoming Att'y Gen.*, 2009 WY 143, ¶ 30.

In this case, the relevant statute provides 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” all small wastewater permitting. W. S. § 35-11-304. As a result, the DEQ does not have authority to issue a permit, when it has delegated that authority to a local governmental entity. This analysis requires no enforcement of any provision of the Delegation Agreement. Instead, the only issue is whether a delegation agreement exists, in which case the DEQ’s decision to issue a permit is illegal. And agency actions can always be set aside by “any aggrieved party” raising an illegal action for judicial review. *See* W.S. § 16-3-114.

It is also important to understand the practical implications of the DEQ’s argument. The relevant statutes only require that local governmental regulations be “as stringent” as State regulations. Local governments are free to be more restrictive. So, imagine a scenario in which a local government, say after an extensive industrial spill, passes heightened septic requirements while a watershed recovers. Under the DEQ’s proffered approach, if a permittee was unhappy with local government limitations, they could simply elect to file for a permit with the DEQ and receive that permit. If a local government chose not to challenge this, say due to a strained budget related to the same spill, there would be no recourse for any citizen to raise the issue of an obvious end



run around local regulation. This purported ability of the DEQ to facilitate an end run around local regulation is neither practical nor consistent with Wyoming statutes and should be rejected.

***3. POWJH's standing to challenge the DEQ's issuance of the Permit is confirmed by the Wyoming Supreme Court's most direct guidance on the issue.***

The Wyoming Supreme Court has already provided clear guidance on when an incorporated 501(c)(3) non-profit organization has standing to challenge an administrative action and when it does not. In *N. Laramie Range Foundation*, the Wyoming Supreme Court addressed the standing of the Northern Laramie Range Foundation (the “*NLRF*”). In that case, the Wyoming Supreme Court recognized that the generalized recitation that a proposed wind farm would have impact on *NLRF*'s planned, but unspecified, activities was insufficient to provide standing. *N. Laramie Range Found. v. Converse Cnty. Bd. of Cnty. Comm'rs*, 2012 WY 158, ¶ 35. Instead, the Supreme Court stated that incorporated non-profits could presumptively show standing by providing a “description of the foundation's planned programs, where specifically they will be located, or how the programs would actually be harmed by the [ ] project.” *Id.*

In this case, POWJH has provided exactly what the Supreme Court asked for. Specifically, POWJH's standing affidavit, attached as Exhibit A to POWJH's Reply in Support of Motion to Stay and incorporated by reference, shows that POWJH has spent a minimum of approximately \$300,000 on projects focused on improving the water quality of Fish Creek, beginning as early as 2014, and the Permit will directly contribute to the pollution POWJH has sought to remediate. Put simply, POWJH has expended donor funds on projects to improve water quality in Fish Creek and the gains caused by those investments will be directly undermined by the discharge allowed by the Permit. Under these circumstances, POWJH plainly satisfies the *N. Laramie Range* standard and

a finding POWJH did not have standing would be the functional equivalent of finding incorporated non-profits could never have standing, a position the Wyoming Supreme Court has never endorsed.

### CONCLUSION

The DEQ obviously does not want to address the merits of POWJH's claim that the DEQ did not have authority to issue the Permit being challenged in this case. And who can blame them. The Permit is clearly illegal. As a result, the DEQ is grasping at straws and claiming that somehow, somehow, the EQC is powerless to address this flagrant violation law. As a matter of policy, the EQC should not allow the DEQ to evade responsibility for illegal issuing permits and, in this case, as a matter of law, it does not.

The Wyoming Administrative Procedures Act unequivocally allows "any aggrieved party" to appeal a DEQ permit to Wyoming District Courts. And the EQC, as the agency charged 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" has a right to hear these matters.

Additionally, POWJH unequivocally has the right to raise these issues. Once again, "any aggrieved party" can raise the issue of whether DEQ acted outside the scope of its authority by issuing an illegal permit. There is no privity of contract required to take this appeal. And POWJH is absolutely an aggrieved party, as a non-profit with over \$300,000 invested in improving Fish Creek's water quality which will be undermined by the discharge allowed under the Permit.

POWJH, therefore, respectfully requests that this Council deny DEQ's Motion to Dismiss.

Respectfully submitted this December 19, 2023.



---

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