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

**IN THE MATTER OF THE APPEAL)
OF PROTECT OUR WATER)
JACKSON HOLE)
PERMIT NO. 2023-025) Docket No. 23-3801**

**DEPARTMENT’S REPLY TO PETITIONER’S RESPONSE TO THE
DEPARTMENT’S MOTION TO DISMISS**

The Department of Environmental Quality (Department), through the Attorney General’s Office, submits this reply to Petitioner’s Response to the Department’s Motion to Dismiss. To be clear, the Department is not attempting to hide from a discussion as to the merits of Petitioner’s claims with respect to the delegation argument. Rather, the Department wants to ensure that such arguments are heard before the proper judicial body. This Council does not have jurisdiction to hear and determine contractual issues arising under the Wyo. Stat. Ann. § 35-11-304.

ARGUMENT

In its Response, Petitioner posed two questions: 1) whether an appeal of the Department’s decision to issue a permit must go through the Council before an appeal to the District Court; and 2) whether a nonprofit with a demonstrated interest in the watershed has a right to appeal a permit granted by the Department. *See* Pet’r’s Resp. to the Dept. of Environmental Quality’s Motion to Dismiss, p. 1. In short, Petitioner oversimplifies its analysis with an all or none approach. Petitioner’s various claims must

be brought before different tribunals because there is no one size fits all approach for the claims Petitioner attempts to bring in its appeal. The Council simply lacks authority to interpret a statute or contract to determine the power of the Department, and ultimately, the power of the Council itself. Such issues of law must be brought before the judicial branch. Further, standing to challenge the Department's decision to grant a permit under laws administered by the Department is different than standing to enforce a contract. Petitioner must demonstrate standing for all of its claims and has not done so.

1. The Council lacks authority to hear issues related to the interpretation of the delegation statute, Wyo. Stat. Ann. § 35-11-304, and the Delegation Agreement entered into pursuant to that law.

In its response, Petitioner asked the question of whether its appeal of the Department's decision to issue a permit had to go through the Council, or if Petitioner could appeal directly to District Court. *See* Pet'r's Resp. to the Dept. of Environmental Quality's Motion to Dismiss, p. 1. Petitioner's main point in its Response seems to be that the Council's authority to hear its appeal is all or nothing. *Id.* at p. 4. It is on this point that the Department fundamentally disagrees – Wyoming law sets out different avenues of recourse for different types of claims. Petitioner has brought two very distinct claims in its appeal and there is no one size fits all approach. With respect to Petitioner's claim regarding the Delegation Agreement and underlying authority of the Department to issue the Permit, Petitioner has brought a claim to which the Council lacks statutory authority to grant any relief. As such, pursuant to recent Wyoming Supreme Court case law, Petitioner lacks standing. *See Matter of Adoption of L-MHB*, 431 P.3d 560, 568 (Wyo. 2018).

Petitioner's first issue on appeal is whether the permit granted by the Department complies with the Environmental Quality Act and Department's regulations. As a statutorily created administrative body, the Council is limited to the powers clearly expressed by law. *See Platte Dev. Co. v. EQC*, 966 P.2d 972, 975 (Wyo. 1998); *see also Mayland v. Flitner*, 28 P.3d 838, 854 (Wyo. 2001). The Council very clearly has

authority to hear issues “arising under [the laws] administered by the [D]epartment.” Wyo. Stat. Ann. § 35-11-112. Petitioner’s first issue, the question of whether the Department properly granted the Permit to Basecamp pursuant to laws and regulations “administered by the [D]epartment,” is properly before the Council and the Department looks forward to a hearing on the merits of this issue.

Petitioner’s second issue is whether under Wyo. Stat. Ann. § 35-11-304, and the Delegation Agreement entered into pursuant to that statute, the Department had authority to issue the permit in the first place. This second issue is not a question “arising under [the laws] administered by the [D]epartment.” Wyo. Stat. Ann. § 35-11-112. Rather, Petitioner asks this Council to interpret a Wyoming statute to determine which entity’s laws apply to this permit: the Department’s or Teton County’s. That question does not arise under the laws administered by the Department, but is a question of statutory interpretation regarding the extent of the Department’s authority. Further, the Council does not have statutory authority to hear cases interpreting State statute to further define the extent of its own authority. Such authority belongs to the judicial branch of government. Finally, the Council absolutely lacks authority to hear and decide cases applying the laws of contract construction and interpretation.

Petitioner cites to the Wyoming Administrative Procedure Act as general authority to appeal the Delegation Agreement and underlying authority. But again, in failing to include the entirety of the statute, Petitioner misinterprets the Act’s meaning. Wyoming Statute § 16-3-113(a), in its entirety, states that a party’s entitlement to judicial review is, “subject to the requirement that administrative remedies be exhausted.” It is on this precise point that the Department argues that Petitioner’s two issues have different procedural paths. The Council does not have authority to hear claims related to contractual disputes or to generally hear declaratory actions. *See* Wyo. Stat. Ann. § 35-11-112. The Council does, however, have authority to hear claims “arising under [the laws] administered by the [D]epartment,” and as such, Petitioner must exhaust its

administrative remedies for issues concerning whether the Department properly applied its laws in granting the permit.

In its Response, Petitioner attempts to portray the Department's ongoing arguments in this matter in a way that would lead the Council to believe that the Department is attempting to dodge an argument on the merits. *See* Pet'r's Resp. to Dept. Motion to Dismiss, p. 7 and 10. This is simply not the case. Petitioner has repeatedly failed to properly bring its claims in accordance with law and the Department has made the appropriate arguments to make sure that the appropriate body is hearing and deciding the issues.

In its previous arguments to the District Court, attached to Petitioner's Response as Exhibit A, the Department argued the need for Petitioner to exhaust its administrative remedies before the Council. In that case, Petitioner had requested an evidentiary hearing before the District Court while an appeal was still pending before the Council. In the previous case, the Department made the same arguments it makes today regarding the need for Petitioner to follow applicable procedural rules for the distinct claims Petitioner has chosen to bring. In that case, Petitioner was attempting to once again, through a one size fits all approach, appeal two distinct issues to District Court directly without going through the Council. The Department argued about the propriety of the District Court to hear evidence in the first instance on Petitioner's first issue, whether the Department properly issued the permit pursuant to laws "administered by the [D]epartment." The Department was clear then, and is clear today, that an appeal of the Department's decision to grant the permit, and whether the permit itself complies with the laws administered by the Department, must be heard by the Council before it may be appealed to District Court.

Petitioner's second issue, the question as to the interpretation of W.S. 35-11-304, however, is not a question "arising under [the laws] administered by the Department," but rather is an interpretation of the laws and powers of both the Department and the Council.

The Council lacks authority to hear this issue, and as such, there are no administrative remedies to be exhausted. Such a question, in accordance with both the Administrative Procedure Act and the Uniform Declaratory Judgement Act, should be heard in the first instance by the District Court. *See* Wyo. Stat. Ann. §§ 1-37-101 et seq; and 16-3-114. While it may appear as though the Department is unfairly batting down Petitioner’s attempts to bring its claims, it is not the Department’s job to outline the proper procedural mechanisms by which Petitioner must sue the Department. Once Petitioner properly brings its claims before the proper tribunal, the Department will gladly have a discussion on the merits of these claims.

2. Petitioner must have standing for all of its claims and Petitioner lacks standing for its claims related to enforcing the Delegation Agreement.

In its Response, Petitioner seems to equate standing to appeal the permit generally, with standing to challenge the Delegation Agreement. *See* Pet’r’s Resp. to the Dept. of Environmental Quality’s Motion to Dismiss, p. 9. While Petitioner may have standing to appeal the permitting decision by the Department to grant the permit under the laws it administers, Petitioner does not have standing under the Environmental Quality Act or the Supreme Court’s *Brimmer* test to appeal the Department’s performance under a contract. Wyoming law is clear that a person cannot sue over a contract to which that person was not a party. *See Southwestern Public Service Co. v. Thunder Basin Co.*, 978 P.2d 1138, 1144 (Wyo. 1999).

Petitioner now tries to argue that its claims have nothing to do with the Delegation Agreement itself, even though Petitioner attached the Delegation Agreement to its Motion to Suspend the Permit as Exhibit A. In its arguments, Petitioner repeatedly leaves off the entirety of Wyo. Stat. Ann. § 35-11-304, which states that, “[t]o the extent requested by” a county, the department shall delegate, through a “written agreement,” enforcement and administration of portions of the Environmental Quality Act. Teton County and the Department have entered into a written agreement—the Delegation Agreement—which expresses the extent to which Teton County wishes to have delegated

authority to enforce and administer portions of the Environmental Quality Act. Petitioner's claims have everything to do with whether the Department and Teton County have complied with the Delegation Agreement, to which Petitioner is not a party.

While Petitioner has repeatedly put forth, through affidavits, its general interest in the water quality of the Fish Creek watershed, such information and law is relevant only to Petitioner's standing as it relates to the Department's decision to grant the permit in accordance with the laws administered by the Department. The Department has not questioned Petitioner's standing to bring such claims. Petitioner has failed to allege any statutory standing, or apply the test outlined in *Brimmer*, that would give it standing to bring claims related to the Delegation Agreement.

CONCLUSION

The Department requests this Council to recognize the limitations of its statutorily-granted authority to hear and determine cases and dismiss Petitioner's claims related to the delegation agreement due to lack of standing for failure to plead a claim upon which the Council could provide relief. One issue brought by Petitioner is clearly within the realm of issues to be heard and determined by the Council. The second issue related to the Department's compliance with both the delegation statute, Wyo. Stat. Ann. § 35-11-304, and the Delegation Agreement itself, is not within the Council authority to hear and determine. That issue, by law, must be brought before the District Court.

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CERTIFICATE OF SERVICE

I, Abigail Boudewyns, hereby certify that on the 5th day of January, 2024, I electronically filed the forgoing *Department's Reply to Petitioner's Response to the Department's Motion to Dismiss* with the Environmental Quality Council and served the following parties using the Environmental Quality Council's electronic notification system:

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