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

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

**BASECAMP’S RESPONSE IN OPPOSITION TO POWJH’S MOTION
FOR LEAVE TO FILE AMENDED PETITION FOR REVIEW**

Intervenor Basecamp Teton WY SPV LLC (“Basecamp”), by and through its undersigned counsel, respectfully submits this response in opposition to POWJH’s Motion for Leave to File Amended Petition for Review (“Motion for Leave”). With its Motion for Leave, POWJH attempts to raise a new claim that is not within the scope of the Council’s jurisdiction. Accordingly, the Council should deny POWJH’s Motion for Leave.

LEGAL BACKGROUND

POWJH correctly notes that leave to amend should be freely given when justice so requires. *See* Wyo R. Civ. P. 15(a). However, justice does not require granting leave when a proposed amendment would be futile. *McDill v. McDill*, 2022 WY 40, ¶ 40. “A proposed amendment is futile if the complaint, as amended, would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment.” *Id.* (quoting *Halling v. Yovanovich*, 2017 WY 28, ¶ 26, and *Watson v. Beckel*, 242 F.3d 1237, 1239—40 (10th Cir. 2001)). It is not an abuse of discretion to deny leave to make a futile amendment. *See Gaston v. Life Care Ctrs. Of Am., Inc.*, 2021 WY 74, ¶¶ 30, 48.

The Council has adopted and incorporated Wyoming Rule of Civil Procedure 12(b)(6). Rules, Wyo. Dep’t of Env’tal Quality, Practice and Procedure, Ch. 2, § 2. Under that rule, the Council can dismiss a claim that “fail[s] to state a claim upon which relief can be granted[.]” Wyo. R. Civ. P. 12(b)(6). A claim fails to state a claim upon which relief can be granted when a petitioner cannot assert any set of facts that would entitle the petitioner to its requested relief. *E.g., Moses Inc. v. Moses*, 2022 WY 57, ¶ 8 (citations omitted). When a judicial body lacks legal authority to grant the requested relief, dismissal is warranted. *See Guy v. Lampert*, 2015 WY 148, ¶ 20.

The Council’s Rules of Practice and Procedure allow amended pleadings. Nonetheless, the Council need not grant leave to amend where the proposed amendment would assert futile claims. Claims that would be subject to dismissal are futile.

ARGUMENT

The Council should deny POWJH’s Motion for Leave because it attempts to add claims for which the Council cannot grant POWJH’s requested relief. The new claims are futile, and the Council should limit its review to the as-filed appeal.

In its proposed amendment, POWJH attempts to raise a new claim that the Department “allow[ed] a discharge [... in] violation of the requirement that all point-source discharge of effluent be permitted under WDEQ Water Quality Rules, Chapter 2[.]” (1st Am. Appeal of Notification of Coverage, ¶ 40). POWJH states that this new claim was “fairly encompassed” in its original appeal. (Mot. for Leave, ¶ 9). However, POWJH’s original appeal does not mention that Basecamp should have applied for, or that the Department should have required, a WYPDES surface discharge permit under Chapter 2. (*See* Appeal of Notification of Coverage). Originally, POWJH identified (and continues to identify) the “action upon which hearing is requested” as “the issuance of the PERMIT TO CONSTRUCT issued to Basecamp Teton WY SPV LLC, Permit No. 2023-025[.]” (Appeal of Notification of Coverage, ¶ II).

Reviewing the Department’s decision to issue a small wastewater permit is a markedly different exercise from determining whether the Department should have required a WYPDES permit. Whether fairly encompassed in its original appeal or not, the Department’s decision *not to require* a WYPDES permit is a separate decision from the Department’s decision *to grant* Basecamp’s small wastewater permit. Crucially, Basecamp has not applied for or been granted a WYPDES permit, nor has the Department required Basecamp to obtain a WYPDES permit. Basecamp has always complied with the permitting requirements applicable to it. If a WYPDES permit were required for Basecamp’s operation, Basecamp would obtain such a permit—but it has not done so at this time.

The Council does not have authority to grant prospective relief for a permit that has not even been applied for. With respect to permits, the Council has authority 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[.]” Wyo. Stat. § 35-11-112(a)(iv).

POWJH's claim that the Department should have required Basecamp to obtain a WYPDES permit is not a grant, denial, suspension, revocation, or renewal the Council can review. The Council also has authority to "[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified[.]" Wyo. Stat. § 35-11-112(c)(ii). Again, because there is no WYPDES permit that can be granted, denied, suspended, revoked, or modified here, the Council has no authority to grant relief on POWJH's claims related to surface water discharge.

The Council cannot order the Department to grant or deny a WYPDES permit for which Basecamp has not applied. Nor can the Council order that a WYPDES permit be suspended, revoked, or modified when no such permit currently exists. Similarly, the Council cannot conduct a hearing on the Department's decision to grant, deny, suspend, revoke, or renew a WYPDES permit that does not currently exist.

In a case brought under the Wyoming Public Records Act, the Wyoming Supreme Court upheld dismissal of a claim that sought a prospective ruling on records requests that might be made in the future but were not yet actually made. *Guy v. Lampert*, 2015 WY 148, ¶ 20. Dismissing the claims under Rule 12(b)(6) was warranted where petitioner asked court to "prospectively declare that a class of records that may be requested sometime in the future will be subject to the [Wyoming Public Records Act] and must be produced upon demand[.]" but the court lacked legal "authority to rule on records requests that have not yet been made." *Id.* Similarly, POWJH's new claim requests the Council make a decision on a permit that might be applied for in the future. The Council lacks legal authority to issue such prospective rulings on potential permits. Therefore, this new claim is futile and would be subject to dismissal, as outlined by the Department in its *Notice of Related District Court Filing and Response to Petitioner's Motion for Leave to File Amended Petition for Review*, filed with the Council on March 22, 2024.

CONCLUSION

To the extent POWJH's Motion for Leave requests leave to add a new claim regarding surface water discharges and a potential, not-yet-granted, and not-yet-applied-for permit, that is not a claim for which the Council can grant relief. Because the Council cannot grant relief regarding a nonexistent permit, POWJH's claim would be subject to dismissal pursuant to Wyoming Rule of Civil Procedure 12(b)(6) and adding the claim to this appeal would be futile. The Council should reject POWJH's attempt to add a futile claim to this appeal and deny POWJH's Motion for Leave.

Respectfully submitted this 25th day of March, 2024.

/s/ Kelly Shaw

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2024, a true and correct copy of the foregoing **BASECAMP'S RESPONSE IN OPPOSITION TO POWJH'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR REVIEW** was filed and served in accordance with by uploading to Docket Entry No. 23-3801 at wyomingeqc.wyo.gov, in accordance with Rules of Practice and Procedure, Chapter 2, Section 5(b).

/s/ Kelly Shaw
KOCH LAW, P.C.