

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

**IN THE MATTER OF THE APPEAL FROM            )**  
**THE PERMIT TO CONSTRUCT # P0036295        )**        **Docket No. 24-2801**  
**JACKSON HOLE CONSERVATION                 )**  
**ALLIANCE, ET AL.                                 )**

**MOTION FOR STAY**

Jackson Hole Conservation Alliance and the Teton Village Association (collectively, the “Petitioners”), by and through their undersigned attorneys, respectfully move the Environmental Quality Council (“Council”) for a stay of Permit to Construct #P0036295 dated February 29, 2024 (the “Permit”) until this appeal is resolved.

**Conferral:** Pursuant to WY Rules and Regulations 020.0008.2 § 11, counsel for the Petitioners conferred with counsel for the Wyoming Department of Environmental Quality Air Quality Division (“DEQ”) on April 25, 2024. On April 29, 2024, counsel for DEQ responded stating his client did not consent to the requested relief.

**I.     Background and Procedural History**

On March 29, 2024, the Petitioners filed a timely appeal of the Permit (“Appeal”). The Permit authorizes Arbor Works Tree Service (“Arbor”) to “install and operate a portable air curtain burner at various locations throughout Wyoming.” Permit at p. 1. The Permit states the portable air curtain burner (“Burner”) will be located on state-owned property in the SE¼SE¼ of Section 36, Township 42 North, Range 117 West, 6<sup>th</sup> P.M. in Teton County, Wyoming (“Section 36”). *Id.* Upon information and belief, the Burner is currently located and operating on Section 36. As explained in the Appeal and the affidavits attached to the Appeal, the Petitioners’ members are currently being harmed by the Burner as authorized by the Permit because operating the Burner degrades the air quality of the area, impedes the visibility of the natural surroundings, and poses

significant fire and other health risks to nearby residents and businesses. The Appeal asserts the DEQ, Air Quality Division (“AQD”) issued the Permit in violation of the Wyoming Administrative Procedure Act, and contrary to the Wyoming Environmental Quality Act, the applicable implementing rules and regulations set forth in the Wyoming Air Quality Standards and Regulations, applicable AQD and other guidance, and applicable federal Clean Air Act rules.

The Appeal requests the Council hold a contested case hearing and stay the Permit pending resolution. Appeal at p. 24. On April 16, 2024, the Council entered an order requiring the Petitioners to file a separate motion in support of their request for stay (the “April 16<sup>th</sup> Order”). The Petitioners respectfully submit this Motion for Stay in response to the April 16<sup>th</sup> Order.

## **II. Legal Standard and EOC Authority to Issue Temporary Relief**

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). Chapter 1, Section 8 of the DEQ Rules of Practice and Procedure, specifically provides the Council with the authority to grant temporary relief while an appeal is pending:

(c) Where a hearing is requested under subsection (b) of this section, the Council may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceedings if:

- (i) All parties to the proceedings have been notified and given an opportunity to be heard on a request for temporary relief;
- (ii) The persons requesting that relief show that there is a substantial likelihood that they will prevail on the merits of the final determination of the proceeding;
- (iii) Such relief will not adversely affect the public health or safety or cause significant imminent environmental harm to land, air, or water resources; and
- (iv) The relief sought is not the issuance of a permit where a permit has been denied by the Director, except that continuation under an existing permit may be allowed where the operation has a valid permit issued under W.S. § 35-11-406.

WY Rules and Regulations 020.0008.1 § 8(c). The Appeal meets these requirements.

### **III. Argument**

The Council has the authority to grant the Petitioners' request for a stay of the Permit while the Appeal is pending because the request meets all applicable criteria for temporary relief outlined in Chapter 1, Section 8 of the DEQ Rules of Practice and Procedure. Further, the Petitioners' request for a stay is distinguishable from the Council's August 21, 2008 order in EQC Docket No. 07-2801 and January 12, 2024 order in EQC Docket No. 23-3801<sup>1</sup> for two reasons: (1) the Petitioners seek a stay of the Permit, not a suspension of the Permit, and (2) Chapter 1, Section 8 of the DEQ Rules of Practice and Procedure, which specifically authorize the Council to grant temporary relief, did not exist when the Council entered its August 21, 2008 order and was not addressed in the Council's January 12, 2024 order.

#### **A. The DEQ Rules of Practice and Procedure Explicitly Provide for Temporary Relief While an Appeal is Pending.**

Subsection c of Chapter 1, Section 8 of the DEQ Rules of Practice and Procedure (hereinafter, "Subsection C") expressly authorizes the Council to grant temporary relief pending final determination of an appeal. DEQ adopted Subsection C in 2017 via a rulemaking to revise several DEQ Rules of Practice and Procedure. *See* EQC Docket No. 16-1101. The Petitioners did not locate any evidence in the rulemaking file indicating the Council cannot use Subsection C to stay a permit while an appeal is pending. To the contrary, the text and purpose of Subsection C clearly authorize the EQC to grant exactly the type of temporary relief Petitioners request.

Subsection C was included in initial proposed draft rules submitted in EQC Docket No. 16-1101. In an August 16, 2016 memorandum attached as Exhibit A, the Wyoming Assistant Attorney General confirmed the "Proposed Rules are within the Division's statutory authority . . .

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<sup>1</sup> The Council's April 16<sup>th</sup> Order specifically requested that "Petitioners must explain in their motion why their request for a stay is distinguishable from the Council prior decisions and precedent," and cited and attached orders in EQC Docket Nos. 23-3801 and 07-2801.

.” (signed Aug. 18, 2016). Governor Mead granted the DEQ permission to proceed with the rulemaking on August 29, 2016 (*see* attached Exhibit B). The online rulemaking docket does not contain any documents or statements restricting the Council’s use of Subsection C or specifically prohibiting the Council from using Subsection C to temporarily stay a permit. Similarly, the online rulemaking docket does not contain any documents or statements indicating the DEQ did not have the authority to promulgate Subsection C. The Statement of Principal Reasons for Adoption of the revised rules merely notes the revisions include “[c]larifications regarding temporary relief pending appeal in section 8” (*see* attached Exhibit C at p. 4). On April 24, 2017, Governor Mead certified that the rules, inclusive of Subsection C, are “within the scope of the statutory authority delegated to the adopting agency” (*see* attached Exhibit D at p. 2).

The Wyoming Administrative Procedure Act (“APA”) requires both the agency and the governor to determine a proposed rule is within the scope of the statutory authority delegated to the agency. Wyo. Stat. Ann. § 16-3-103(a)(i)(G) and (d). The APA mandates that any challenge to a promulgated agency rule be commenced within two years of the effective date of the rule. Wyo. Stat. Ann. § 16-3-103(c). Subsection C took effect on April 24, 2017, and was not challenged.

**B. The Petitioners’ Request Meets the Four Requirements Necessary for the Council to Stay the Permit While the Appeal is Pending**

The Petitioners meet all applicable requirements for the Council to temporarily stay the effectiveness of the Permit pending resolution of this Appeal. As a threshold matter, Petitioners requested a hearing under subsection b of Chapter 1, Section 8 in their Appeal. Given Petitioners’ hearing request, the Council may grant temporary relief while the Appeal is pending if the request satisfies all criteria detailed in Subsection C, which the Petitioners meet as follows:

**i. All Parties Have Been Notified and Given the Opportunity to Be Heard**

The Petitioners provided initial notice of their stay request in the Appeal. In accordance with the Chapter 2, Section 4 of the Rules of Practice and Procedure, the Petitioners served the Appeal, request for a contested case hearing, and request for stay on the Council, DEQ Director Todd Parfitt, and the permittee: Mr. Corey Felton of Arbor. Further, Petitioners filed and served this Motion for Stay on counsel for DEQ and to the permittee, even though the permittee has not entered an appearance in this matter.

All parties and relevant non-parties are adequately on notice and will have the opportunity to respond to this Motion for Stay, and request a hearing on the Motion for Stay. *See* WY Rules and Regulations 020.0008.2 § 11.

**ii. Petitioners are Likely to Prevail on the Merits of the Final Proceeding**

To demonstrate a substantial likelihood that they will prevail on the merits, the moving party must only “establish a reasonable probability of success, and not an ‘overwhelming’ likelihood of success” because “[p]reserving the status quo is quite different from finally determining the cause itself.” *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). For a comprehensive review, Petitioners point the Council to the Appeal, which details the numerous ways in which the Permit is unlawful. The Appeal demonstrates at least a reasonable probability of success on the merits for at least six reasons.

First, the Permit does not include legally and practically enforceable terms and conditions to protect public health and safety, and the environment. In the Appeal, the Petitioners listed more than twenty terms and conditions that AQD should have included in the Permit. Appeal at pp. 15–17. Second, the available administrative record indicates AQD did not adequately consider the impacts of Arbor’s operation in several material respects: failing to model and assess all emissions

associated with the Burner and associated equipment and activities; authorizing the Burner to operate without temporal limits despite modeling only six hours of operations; failing to assess whether carbon monoxide emissions from the Burner would exceed the threshold for a “major source”; and failing to adequately address other important issues like why the Burner is the best available control technology, truck traffic emissions, or potential regional haze impacts to the Class I Grand Teton National Park Airshed. Appeal at pp. 17–19. Third, AQD violated its general obligation to protect public, health, welfare, and the environment by issuing the Permit without considering or imposing appropriate terms and conditions to prevent the Burner from operating in windy conditions and becoming a major fire hazard. Appeal at pp. 19–20. Fourth, the available administrative record did not contain any evidence that the State Land Board has authorized Arbor to operate the Burner on Section 36. Appeal at p. 20. Fifth, AQD did not adequately consider and respond to all public comments, including concerns related to public safety and potential environmental harms caused by operating the Burner without sufficiently protective and legally enforceable terms and conditions in the Permit. Appeal at p. 21. And finally, AQD violated the procedural due process rights of the Petitioners and the general public by failing to provide an opportunity to review and comment on new information that it added to the record after issuing its permit application analysis dated April 13, 2023. Appeal at pp. 22–23. Prevailing on any one of these issues would be sufficient to support the requested relief, and taken together, more than satisfy the Petitioners’ burden of demonstrating a reasonable probability of success.

**iii. The Requested Stay Will Benefit Public Health and Safety and Avoid Significant Environmental Harm**

Subpart iii of Subsection C permits the Council to grant temporary relief if the relief will not “adversely affect the public health or safety or cause significant imminent environmental harm

to land, air, or water resources . . . .” A stay of the Permit is necessary to avoid adverse public health, safety, and imminent environmental harm.

After submitting the Appeal, Petitioners confirmed the Burner is already operating in Section 36. This fact transforms the potential risks identified in the Petitioners’ Appeal from hypothetical or even potentially imminent harms to actual, present, and ongoing dangers demanding precisely the kind of temporary relief provided for under Subsection C. Most urgently, the Burner presents a severe fire risk because it is located in a high-wind, fire-prone area, and the risks are exacerbated during the windy spring and hot and dry summer months. DEQ failed to include any reasonable or common-sense conditions prohibiting Arbor from operating the Burner when wind speeds are 20 MPH or higher, even though the Burner’s manual states it should not be operated when wind speeds are 20 MPH or higher. Appeal at pp. 19–20. Nor did DEQ impose any reasonable or common-sense setback, site clearance, or other conditions to reduce the fire risk.

Based on the Petitioners’ understanding of the EQC’s calendar and ability to hear this matter, the Petitioners expect a hearing will not occur until the end of the summer or the fall at the earliest (i.e., at least four to six months in the future). Fire risk is highest during the spring and summer due to high winds, high temperatures, and plentiful dry fuel—both naturally occurring dry grasses and branches as well as the Arbor’s own stockpiles of biomass located on Section 36. If the Council denies the Petitioners’ request for a stay, Arbor will continue to operate the Burner without appropriate and legally enforceable terms and conditions to protect public health and safety, and the environment during the most fire-prone months of the year.

**iv. Petitioners' Requested Relief is Not Issuance of an Otherwise Denied Permit**

The Petitioners' seek to stay a Permit that has been issued by the Director, not issuance of a Permit that has been denied by the Director. The latter is prohibited by Subsection C, subpart iv. Subsection C does not prohibit staying an issued permit like the Permit in this matter.

**C. The Council's Prior Orders are Distinguishable**

In its April 16<sup>th</sup> Order, the Council directed the Petitioners to differentiate this request from the Council's orders denying requests for permit suspensions or stays in EQC Docket Nos. 23-3801 and 07-2801. Those cases and orders are distinguishable and do not bear on Petitioners' request for a stay for two reasons: (1) unlike either case cited in the Council's April 16<sup>th</sup> Order, the Petitioners' request for stay is grounded in Subsection C, and (2) the Petitioners seek a stay of the Permit (i.e., temporary relief), not a suspension of the Permit.

First, unlike the orders cited in the Council's April 16<sup>th</sup> Order, the Petitioners' request for a stay is grounded in Subsection C, which specifically authorizes the Council to grant temporary relief while an appeal is pending. Neither order entered by the Council in EQC Docket No. 23-3801 or No. 07-2801 addressed whether the Council may stay a permit pursuant to Subsection C. As explained in Section III.A, above, Subsection C is a valid rule promulgated pursuant to DEQ's statutory authority. The rule took effect on April 24, 2017, and is currently in effect. Importantly, the Council promulgated Subsection C nine years after the Council entered its August 21, 2008 order in EQC Docket No. 07-2801. With regard to EQC Docket No. 23-3801, petitioner Protect Our Water Jackson Hole filed a "Motion to Suspend Permit" and moved the Council "to stay the effectiveness or suspend" a permit to construct a wastewater system. Notably, Protect Our Water Jackson Hole did not cite the Council's Subsection C authority to grant temporary relief in its motion or reply. As a result, neither order cited in the Council's April 16<sup>th</sup> Order considered



whether it has the authority to temporarily stay a permit pending resolution of an appeal, making these orders irrelevant to the issue here.

Second, both petitioners in EQC Docket Nos. 23-3801 and 07-2801 filed motions to “suspend” the contested permits, not to “stay” the contested permits. While the petitioners in those matters used the terms “suspend” and “stay” interchangeably, the Council distinguished the terms in its August 21, 2008 order in EQC Docket No. 07-2801:

A permit “suspension” is the outcome of a contested case proceeding in which an existing permit is suspended as a consequence of a finding that the permittee has violated the terms of its permit. A “suspension” is not the temporary cessation or delay granted at the request of a third party. This Council does not have the authority to suspend a permit on the ground that an appeal is pending.

The Council’s rationale is sound because the Council cannot issue permanent relief before the matter is resolved and all parties have been fully heard—doing so would violate parties’ due process rights. But, as detailed herein, the Petitioners do not ask for permanent relief; they ask for temporary relief while the appeal is pending consistent with established Council rules.

Finally, the record is, at best, confusing and inconclusive on the nature of the January 12, 2024 order in Docket No. 23-3801. Petitioner Protect Our Water Jackson Hole requested a suspension of the relevant permit, a stay of the relevant permit, and a preliminary injunction. Instead of citing Subsection C as support, the petitioner cited only Section 35-11-112(c)(ii) of the Wyoming Environmental Quality Act and Rule 65 of the Wyoming Rules of Civil Procedure. The Council determined that neither granted it authority to suspend the challenged permit during the appeal.<sup>2</sup> The Council did not address whether it could grant a temporary stay under Subsection C,

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<sup>2</sup> The Petitioners respectfully disagree with the Council’s description of its August 21, 2008 EQC Docket No. 07-2801 order in the Council’s January 12, 2024 Order in EQC Docket No. 23-3801 (both provided in the Council’s April 16, 2024 order in this matter). In the January 14, 2024 order, the Council cites the August 21, 2008 order for the principle that “it concluded it did not have the legal authority to suspend or stay a permit during an appeal” (emphasis added). But in the August 21, 2008 order, the Council explicitly stated, “No grounds to support a stay were presented,” and the Council did not issue a ruling on whether it had the legal authority to stay a permit.

nor did it address, in any manner, the scope or effect of Subsection C. In this matter, the Petitioners solely request a temporary stay of the Permit pending resolution of the Appeal to avoid the significant harms and risks detailed in the Appeal, not a suspension of the Permit. Appeal at pp. 23–24. Unlike a suspension, a temporary stay would preserve the status quo for the permittee allowing Arbor to continue operations as it did prior to the Permit being issued.

**D. Prohibiting Use of Subsection C to Stay a Permit Would be An Absurd Result**

Foundational provisions of statutory and regulatory interpretation require the reviewing body “give effect to every word, clause and sentence, and construe them in *pari materia*” and “strive to avoid an interpretation that produces an absurd result . . . or that renders a portion of the statute meaningless.” *Seherr-Thoss v. Teton Cnty. Bd. of Cnty. Comm’rs*, 329 P.3d 936, 945 (Wyo. 2014) (internal citations omitted); *Wilson Advisory Comm. v. Bd. of Cnty. Comm’rs*, 292 P.3d 855, 863 (Wyo. 2012) (“the rules of statutory construction apply to the interpretation of administrative rules and regulations”).

If the Council were to conclude Subsection C does not authorize it to grant a stay as a form of temporary relief, such an interpretation would fail to give effect to the words of Subsection C and render it meaningless, producing an absurd and impermissible result. As explained above, there is nothing in the rulemaking record for EQC Docket No. 16-1101 that indicates the Council cannot use Subsection C to issue a stay. Indeed, the Petitioners question what type of relief the Council could grant under Subsection C if it determines it is unable to grant a temporary stay pending resolution of an appeal, since a stay is the most common and appropriate type of temporary relief to maintain the status quo while any challenge is pending.

Moreover, such a conclusion would deprive all citizens of the ability to obtain meaningful relief from the Council in cases like this one where significant deficiencies exist with the issued permit that create material human and health and safety, and environmental risks. The significance

of this type of due process deprivation is exacerbated given the Council's schedule and inability to hold contested hearings for many months. And perhaps most importantly, such a conclusion would vest disproportionate power in the permit issuing agency and result in a heightened potential for harm to public health, welfare, and the environment, which is contrary to the Council's fundamental mission.

**IV. Request for Relief**

Based on the foregoing, Petitioners respectfully request that the Council:

A. Grant this Motion for Stay;

Immediately stay the effectiveness of the Permit pending resolution of this A

B. appeal, including during any additional agency reconsideration that may be ordered, consistent with the Council's authority under Wyo. Stat. Ann. § 35-11-112(c)(i) and (ii), and WY Rules and Regulations 020.0008.1 § 8(c);

C. Grant the Petitioners any additional relief this Council deems just and proper.

Respectfully submitted this 29<sup>th</sup> day of April, 2024.

/s/ Courtney M. Shephard  
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**Attorneys for Petitioners Jackson Hole  
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Association**

CERTIFICATE OF SERVICE

The undersigned certifies that on April 29, 2024, the Motion for Stay was served by uploading the Motion for Stay and attachments to Docket No. 24-2801 at wyomingeqc.wyo.gov, in accordance with Rules of Practice and Procedure, Chapter 2, Section 5(b), and by U.S. Mail to the following recipient:

Mr. Corey Felton  
Arbor Works Tree Service  
P.O. Box 1836  
Jackson, WY 83014

*/s/ Kevin J. Cloutier* \_\_\_\_\_  
Paralegal  
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