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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 SUPPLEMENTAL MOTION TO DISMISS

In accordance with the Council's July 3, 2024, Order Setting Deadline For Department to Supplement Motion to Dismiss[1], the Wyoming Department of Environmental Quality (Department), through the Attorney General's Office, hereby amends and supplements its November 29, 2023, Motion to Dismiss to include claims made by Protect Our Water Jackson Hole (Petitioner) in its First Amended Appeal of Notification of Coverage, filed with this Council on June 20th, 2024.

[1] The Council set a deadline of 10 business days following entry of a final order by the district court for the Department to supplement its original motion to dismiss. The district court entered its final order granting the Department's Motion to Dismiss in *Protect Our Water Jackson Hole v. Wyoming Department of Environmental Quality*, Civil No. 2024-CV-0019048, on July 30, 2024.

The Department requests that the Council dismiss Petitioner's claim that the Department lacked authority to issue the Permit, as set out in paragraphs 30-32[2] of Petitioner's amended complaint, pursuant to rules 12(b)(1) and (6) of the Wyoming Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted due to a lack of standing. The Department further requests this Council to dismiss Petitioner's new claims related to surface water violations, generally found in Paragraphs 37 through 40 of Petitioner's amended complaint, pursuant to Rule 12(b)(6) because the Council cannot provide Petitioner the relief requested. These claims are beyond the scope of the Council's authority with respect to reviewing a permitting decision on a small wastewater system and must be brought as a separate action before the proper jurisdiction.

BACKGROUND

A. Delegation Agreement with Teton County

Wyoming Statute § 35-11-304 directs the Department to delegate, "to the extent requested by," a county, the authority to enforce and administer Wyo. Stat. § 35-11-301(a)(iii), which pertains to small wastewater facilities. Section 304 further requires any delegation of authority to be by written agreement. Wyo. Stat. Ann. § 35-11-304. On January 25, 2018, the Department entered into such an agreement (Delegation Agreement) with Teton County. (Pet'r's Motion to Suspend, Exhibit A). Parties to the

[2] In its First Amended Appeal of Notification of Coverage, Petitioner has two paragraphs identified as "33" but failed to identify any paragraph as paragraph "32". To avoid confusion, the Department hereby refers to the first paragraph 33 in Petitioner's First Amended Appeal of Notification of Coverage as paragraph 32.

Delegation Agreement are the Wyoming Department of Environmental Quality and Teton County.

B. Procedural History

This matter involves an appeal of the Department's issuance of an individual permit to construct a sand mound septic system to Basecamp Teton WY SPV LLC (Basecamp) on July 13, 2023. (Pet'r's Appeal of Notification of Coverage – Permit No. 2023-025, Attachment E). In issuing the permit, the Department determined the proposed sand mound septic system meets minimum applicable construction and design standards imposed by Wyoming statutes and Department regulations. (*Id.).*

On August 11, 2023, Petitioner filed an appeal of the Department's decision to issue the Permit pursuant to Wyo. Stat. § 35-11-801(d). (Pet'r's Appeal of Notification of Coverage – Permit No. 2023-025, ¶1). In its Appeal of Notification of Coverage, Petitioner failed to plead any issues pertaining to compliance with the Delegation Agreement itself or the Department's alleged lack of authority to issue the permit pursuant to Wyo. Stat. § 35-11-304(a). (*Id*.). Plaintiff also failed to plead issues related to unlawful surface water discharges.

Even though it did not plead those claims, Petitioner repeatedly raised arguments pertaining to the Delegation Agreement and the Department's alleged lack of authority to issue the permit in its Motion to Suspend Permit during the fall of 2023. Despite being notified by the Department of Petitioner's failure to plead those claims, Petitioner inappropriately continued to raise them. In response, the Department filed a Motion to Dismiss on November 29, 2023. Finally, on March 4, 2024, Petitioner filed for leave to

amend its Appeal of Notification of Coverage to add its Delegation Agreement claims and to raise new claims. Simultaneously, Petitioner also filed a declaratory action in district court regarding the same Delegation Agreement claims. The Department moved to dismiss Petitioner's delegation agreement claims in the district court and the district court received oral argument on July 11, 2024. On July 30, 2024, the district court granted the Department's motion to dismiss in a written order. *See* Order Granting Motion to Dismiss, *Protect Our Water Jackson Hole v. Wyoming Department of Environmental Quality*, Civil No. 2024-CV-0019048 (Attached as Attachment A to this Motion to Dismiss).

ARGUMENT

A. The Council lacks Authority to hear contractual claims and declare the rights and relations of parties under Wyo. Stat. Ann. § 35-11-304.

The Department asks this Council to dismiss the claims identified in paragraphs 30, 31, and 32 of Petitioner's First Amended Appeal of Notification of Coverage because the Council lacks jurisdiction to hear those claims. Petitioner asks this Council to interpret and determine the rights and relations of the Department and Teton County by declaring that the Department lacked authority to issue the Permit. (Pet'r's First Am. Appeal¶ 33). This claim, however, exceeds the jurisdiction and authority of the Council. The Council's power to "hear and determine all cases" is limited to those "cases and issues arising under the laws [. . .] administered by the [D]epartment." See Wyo. Stat. Ann. § 35-11-112(a). An agency is limited to the powers the Legislature chose to delegate and is "wholly without power to modify, dilute or change in any way the

statutory provisions from which it derives its authority." *Platte Dev. Co. v. EQC*, 966 P.2d 972, 975 (Wyo. 1998). "[R]easonable doubt of the existence of a power must be resolved against the exercise thereof. A doubtful power does not exist." *Mayland v. Flitner*, 28 P.3d 838, 854 (Wyo. 2001), (*citing French v. Amax Coal West*, 960 P.2d 1023, 1027 (Wyo. 1998)).

The Delegation claim Petitioner attempts to bring before the Council is essentially a declaratory judgement claim that this Council is without jurisdiction to hear under Wyo. Stat. § 35-11-112. *See also* Wyo. Stat. § 1-37-101 et seq. The Wyoming Uniform Declaratory Judgments Act vests the courts—not this Council—with the interpretation of contractual rights and obligations, as well as the validity of contracts. Wyo. Stat. Ann. § 1-37-101 et seq. In fact, Petitioner filed such an action in district court on March 5, 2024, one day after filing its amended complaint to include the delegation issue in this case. The district court dismissed Petitioner's declaratory action regarding the delegation agreement claim on July 30, 2024, finding that Petitioner lacked standing to raise claims related to the Delegation Agreement and that the Court lacked subject matter jurisdiction due to the untimely filing of the action and the State retaining sovereign immunity for the relief Petitioner sought. *See* Order Granting Motions to Dismiss, *Protect Our Water Jackson Hole v. Wyoming Dep't of Envir. Quality*, Civil No. 2024-CV-0019048 (attached as Attachment A). Petitioner is likely to appeal that decision to the Supreme Court. Petitioner should not be allowed to simultaneously and repetitiously litigate identical claims in multiple jurisdictions. The Department asks this Council to recognize its jurisdictional limitations and defer to the district court on this issue.

Plaintiff also asks this Council to determine whether the Department complied with Teton County's regulations. (Pet'r's First Am. Appeal ¶ 30-32). The Council has authority to determine issues "arising under" the laws administered by the Department. In contrast to Petitioner's claim that the Department failed to comply with Teton County regulations and that Teton County is the proper permitting entity. (Pet'r's First Am. Appeal ¶ 30-32). Even if Petitioner's claims are true, this Council plainly lacks jurisdiction to determine whether an entity has complied with Teton County's regulations. The Council only has authority to determine whether the Department complied with its rules when issuing the Permit. Anything beyond that determination is beyond the jurisdiction of this Council.

For these reasons, the Council should dismiss the claims set out in Petitioner's First Amended Appeal of Notification of Coverage, paragraphs 30-32, due to a lack of authority by which this Council could render a decision.

B. Petitioner lacks standing to enforce Wyo. Stat. Ann. § 35-11-304 and the Delegation Agreement.

The Council should dismiss Petitioner's Delegation Agreement claims for lack of standing under to Rule 12(b)(6) of the Wyoming Rules of Civil Procedure. Rule 12(b)(6) allows the Council to dismiss the Delegation Agreement claims because the Petitioner—because it lacks standing—has failed to state a claim upon which relief can be granted. Dismissal is only appropriate "when it is certain from the face of the complaint that the plaintiff cannot assert any facts which would entitle him to relief." *Wyoming Guardianship*

Corp. v. Wyoming State Hosp., 428 P.3d 424, 432 (Wyo. 2018) (*quoting Herrig v. Herrig*, 844 P.2d 487, 490 (Wyo. 1992)).

"'Standing is a jurisprudential rule of jurisdictional magnitude.'" *In re L-MHB*, 431 P.3d 560, 568 (Wyo. 2018) (*quoting Heinemann v. State*, 413 P.3d 644, 647 (Wyo. 2018)). If a party "lacks standing under the statute at issue, their 'claim should be dismissed for failure to state a claim upon which relief can be granted, not for lack of subject matter jurisdiction.'" *Id.* at 567 (*quoting Roberts v. Hamer*, 655 F.3d 578, 581 (6th Cir. 2011)). "'A party generally has standing if it is 'properly situated to assert an issue for judicial determination.'" *Matter of Phyllis v. McDill Revocable Trust*, 506 P.3d 753, 762 (Wyo. 2022) (*quoting Matter of Est. of Stanford*, 448 P.3d 861, 864 (Wyo. 2019), *Gheen v. State ex rel. Dep't of Health, Div. of Healthcare Financing/EqualityCare*, 326 P.3d 918, 923 (Wyo. 2014), and *Cox. V. City of Cheyenne*, 79 P.3d 500, 505 (Wyo. 2003)).

The Wyoming Supreme Court has identified two types of standing: statutory and prudential. *Matter of Phyllis*, 506 P.3d at 762 (Wyo. 2022) (*citing Matter of Est. of Stanford*, 448 P.3d 861, 864 (Wyo. 2019)). Petitioner lacks both statutory and prudential standing to bring its Delegation Agreement claims before the Council.

1. Petitioner lacks statutory standing to challenge the Delegation Agreement before the Council.

No statute provides Petitioner with a right to bring a declaratory action before the Council to determine whether the Department complied with Wyo. Stat. § 35-11-304, nor does a statute provide Petitioner a right to have this Council to interpret and declare the rights of parties under a contract and thereby enforce the terms and conditions of a

contract. Statutory standing "looks to whether 'this plaintiff' has a cause of action under [the subject] statute."' *Matter of Phyllis*, 506 P.3d at 762 (*quoting Matter of Est. of Stanford*, 448 P.3d 861, 864 (Wyo. 2019), *In re L-MHB*, 431 P.3dat 567 (Wyo. 2018), and *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998)). In Wyoming, declaratory judgment actions must be brought in accordance with the Uniform Declaratory Judgements Act. *See* Wyo. Stat. § 1-37-101 et seq.

Petitioner cites the following authority for its appeal: "W.S. § 35-11-801(d) provides that '[a]ny aggrieved party may appeal the authorization as provided in this act.'" (Pet'r's First Am. Appeal ¶ 2). Petitioner, however, misleadingly failed to include the entirety of Section 801(d). Section 801(d) only applies to general permits:

> (d) General permits shall be issued solely in accordance with procedures set forth by regulation adopted by the council. Procedures for the issuance of general permits shall include public notice and an opportunity for comment. All department authorizations to use general permits under this section shall be available for public comment thirty (30) days. **Any aggrieved party may appeal the authorization as provided in this act**.

Wyo. Stat. § 35-11-801(d) (emphasis added). Section 801(d) only authorizes an appeal of a general permit, not an individual permit, such as the Permit at issue in this case. *Id*. Section 801(d) also does not authorize Petitioner to appeal the Department's administration of a contract, authorize the Council to determine whether the Department properly entered into the Delegation Agreement pursuant to Wyo. Stat. § 35-11-304, or authorize the Council to interpret the Delegation Agreement. *See id*.

To the extent the Environmental Quality Act allows the Council to hear "cases and issues arising under the laws" administered by the Department – the law relied upon by

the Petitioner does not provide it with statutory standing. *See* Wyo. Stat. Ann. § 35-11-112(a). Because no statute gives Petitioner standing to bring its Delegation Agreement claims, it lacks statutory standing to assert those claims.

2. Petitioner lacks prudential standing to challenge the Delegation Agreement before the Council.

Petitioner claims that Teton County is the rightful permitting authority for the Permit because the Department delegated its authority to the County. (Pet'r's First Am. Appeal ¶ 32). Petitioner, however, lacks prudential standing to raise issues pertaining to the Delegation Agreement on the behalf of Teton County. Prudential standing requires application of the *Brimmer v. Thomson* test, wherein the Wyoming Supreme Court adopted a four-part test for standing:

> First, a justiciable controversy requires parties having existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion. Third, it must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities be of such great and overriding public moment as to constitute the legal equivalent of all of them. Finally, the proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues. Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution.

Allred v. Bebout, 409 P.3d 260, 270 (Wyo. 2018) (*quoting Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974).) Because the Petitioner cannot demonstrate harm to a tangible interest, it cannot satisfy any of four elements of the *Brimmer* test.

The First element of the *Brimmer* test requires a "tangible interest which has been harmed." *William F. West Ranch v. Tyrrell*, 206 P.3d 722, 730 (Wyo. 2009). A "tangible interest" is not an interest that is "indistinguishable from that which could be raised by any citizen of Wyoming." *Jolley v. State Loan & Inv. Bd.*, 38 P.3d 1073, 1077 (Wyo. 2002). "Claims of injury of a broad and general nature are not sufficient to demonstrate that [a party] was aggrieved or adversely affected in fact." *Id*. (quotation omitted). As recently as 2018, the Wyoming Supreme Court held that no case law in Wyoming granted standing to a party who had no more interest in the matter than that of any citizen. *Allred,* 409 P.3d at 273.

Petitioner appears to allege that the Department unlawfully retained residual permitting authority for an advanced system Permit that requires increased monitoring conditions to comply with the Wyoming Environmental Quality Act. (Pet'r's First Am. Appeal ¶ 32). In applying the *Brimmer* test to whether the Department complied with Wyo. Stat. Ann. §35-11-304, Petitioner fails to assert any tangible harm it suffers by the Department issuing the Permit instead of Teton County. In its First Amended Appeal of Notification of Coverage, Petitioner cites its longstanding interest in Fish Creek and its tributaries, and the general environmental harms that will result from the Department's issuance of the Permit as grounds for standing. The Supreme Court has explicitly stated that broad and general claims of injury are not sufficient to demonstrate that a party has been aggrieved in fact. The general environmental harm Petitioner alleges in the granting of the Permit does not amount to a tangible injury in fact. In fact, Petitioner ignores that the Department's issuance of the Permit actually benefits Petitioner's goal of protecting

water quality by allowing for the more stringent monitoring program pursuant to Chapter 3, Section 14 of the Department Water Quality Regulations. Had Teton County permitted the septic system, it could not have imposed the more stringent monitoring program.

Further, Petitioner has failed to plead any harm related to the specific claims of the delegation issues it attempt to bring before the Council. Petitioner opposes the septic system, regardless of which entity may issue the permit. The environmental harm Petitioner alleged is related to the septic system itself and not the permitting entity. Finally, Petitioner alleges no harm with respect to the Delegation Agreement issue that would give it more interest in the matter than that of any citizen in Wyoming or Teton County. Petitioner cannot litigate the Delegation Agreement claims in place of Teton County when it has not alleged a harm related to the authority issue.

Due to its inability to assert a harm to a tangible interest, Petitioner cannot meet the remaining three elements of the *Brimmer* test. For the second element, "if a plaintiff fails to allege that an interest has been harmed, a judicial decision cannot remedy a nonexistent harm." *Allred,* 409 P.3d at 273 (*quoting Village Road Coalition v. Teton Cnt'y Housing Authority*, 298, P.3d 163, 169 (Wyo. 2013). For the third element of the *Brimmer* test, if a party has not asserted either an "injury or redressability," then it also cannot have a judgement affect the "rights, status or other legal relationships of one or more of the real parties in interest." *Allred,* 409 P.3d at 276 (*quoting Brimmer* at 578). Finally, with respect to the fourth element, when a party fails to allege injury or redressability, the controversy cannot be "genuinely adversary in character and not a mere disruption." *Id.* Petitioner fails to meet any of the elements of the *Brimmer* test and

thus lacks standing. Without standing, Petitioner cannot challenge whether the Department wrongly issued the permit in violation of Wyo. Stat. § 35-11-304.

The Ninth Judicial District, Teton County, recently came to the same conclusion in *Protect Our Water Jackson Hole v. Wyoming Dept. of Environmental Quality* after reviewing briefing and oral argument on a similar motion to dismiss filed by the Department. On March 4, 2024, Petitioner filed a declaratory action in district court requesting a determination on the Department's authority to issue the Permit at issue in this present case before the Council. (*See Protect Our Water Jackson Hole v. Dep't of Environmental Quality*, 2024-CV00019048 (Order Granting Motions to Dismiss attached as Attachment A)). In that declaratory action, the district court found that Petitioner did not have standing to bring suit against the Department in seeking a declaration of the rights and relations between Teton County and the Department. (*See id*.). The district court found that the harm alleged by Petitioner in that case was speculative and not greater than the harm that could be alleged by any citizen. (*See id.).* Due to the speculative nature of the Petitioner trying to litigate claims in the role of the Teton County Board of County Commissioners, Petitioner lacked standing to bring its claims. (*Id*.) (See also Order Denying Motion to Reconsider or Amend attached as Attachment B).

The decision by the district court should be highly persuasive to this Council. That case involved the same parties, the same permitting decision, and the exact same issues as the issues presented Petitioner's amended complaint and this Motion to Dismiss. The

Court in that case repeatedly affirmed the Department's arguments that Petitioner lacked standing on the Delegation Agreement issues. (See Attachment A, Attachment B, and Attachment C). Accordingly, the Council should recognize and adhere to the ruling of the district court. To do otherwise would result in inconsistent decision-making and repetitious lawsuits on identical issues.

3. Petitioner lacks privity of contract to enforce provisions of the Delegation Agreement.

Petitioner also cannot bring claims alleging perceived violations of a contract to which Petitioner is not a party. While the *Brimmer* test is the generic test for prudential standing, the Wyoming Supreme Court has acknowledged that it has applied prudential standing principles even when not labeled as such. *In re L-MHB*, 431 P.3d at 567 (Wyo. 2018). The Court has employed principles of contract interpretation to determine if the party had a cause of action. *Id.* (*citing Essex Holding, LLC v. Basic Properties, Inc.*, 427 P.3d 708, 721-722 (Wyo. 2018)). However, a non-party to a contract has no standing to bring a claim concerning that contract. *Southwestern Public Service Co. v. Thunder Basin Coal Co.*, 978 P.2d 1138, 1144 (Wyo. 1999) (*citing Central Contractors Co., Inc. v. Paradise Valley Utility Co*., 634 P.2d 346, 348 (Wyo. 1981)). Privity of contract is an essential element for a cause of action on a contract. *Central Contractors Co., Inc.,* 634 P.2d at 348. "'It is well settled that in no case can a stranger to a contract maintain an action upon it, or for the breach of it [. . .].'" *Mountain West Farm Bureau Mut. Ins. Co. v. Hallmark Ins. Co.*, 561 P.2d 706, 710 (Wyo 1977) (*quoting McCarteney v. Wyoming National Bank*, 1 Wyo. 386, 391 (1877)).

The four-part test of *Brimmer* is harmonious with the caselaw regarding privity of contract. Without privity of contract, a party cannot assert an existing and genuine, as distinguished from theoretical, right or interest. There is no fact that Petitioner can allege which will show it has a genuine interest in the contract itself that has been harmed by any alleged violation of the Delegation Agreement. Second, without privity of contract, the controversy cannot be one upon which the judgment of the Council may effectively operate – rather lending proceedings to one of a debate or argument evoking a purely political conclusion. Third, without privity of contract, the judicial determination will have no force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, as Teton County is not a party to this appeal. As such, any decision of the Council determining provisions of the Delegation Agreement will not bind Teton County. As a non-party to the Delegation Agreement, Petitioner can have no genuinely adversarial position in the proceeding.

Petitioner is not a party to the Delegation Agreement between Teton County and the Department and therefore has no enforceable rights under the Delegation Agreement. Allowing a proceeding to go forward without privity of contract, especially in this case, would lend itself to a proceeding before the Council that seeks a purely political conclusion by Petitioner. Finally, any evidence Petitioner could put on relative to this argument would be purely speculative that the County, acting under laws that are "at least as stringent as" the State's, would not have issued the permit. *See* Wyo. Stat. § 35-11-304(a)(iii). With respect to the Delegation Agreement claims, Petitioner's arguments are

purely speculative and argumentative without any sort of binding effect on the rights of the parties to the Delegation Agreement. As such, Petitioner lacks standing to raise these issues.

The district court in *Protect Our Water Jackson Hole v. Dep't of Environmental Quality,* also held that the issue of who had authority to issue the Permit was necessarily a contractual claim and that the Petitioner lacked privity of contract to enforce the terms of the Delegation Agreement.

C. Petitioner failed to properly allege violations of surface water standards.

Petitioner claims the Department's decision to grant a permit to construct a small wastewater system will discharge pollutants into surface waters and adjacent wetlands, and thereby "is in violation of the requirement that all point-source discharge of effluent must be permitted". (Pet'r's First Am. Appeal ¶ 40 (citing the Clean Water Act and Chapter 2, Section 5, of the Departments Water Quality Rules as authority)). Petitioner, however, fails to state a claim upon which this Council may offer relief for several reasons. First, Petitioner fails to allege any facts that the potential discharges complained of constitute a "point source" discharge under federal and Wyoming law. Second, the Council may not require a Wyoming Pollution Discharge Elimination System (WYPDES) permit through this action. Third, Petitioner's argument regarding the State's delegated authority from the Environmental Protection Agency lacks any merit whatsoever, and the State incorporates the arguments previously laid out by Basecamp LLC, on this issue in its June 28, 2024, Motion to Dismiss.

Petitioner fails to allege any facts that the alleged discharge under the Permit constitutes a "point source" discharge of pollution. A WYPDES permit is only required "for point source discharges into surface waters of the state." Water Quality Rule, Chapter 2, Section 1(a). The WYPDES program "provide the mechanism for establishing effluent limitations in WYPDES permits which specify maximum amounts or concentrations of pollution and wastes which may be discharged into surface waters of the state." Water Quality Rule, Chapter 2, Section 1(c). "Effluent" is the pollutant or waste stream that is being discharged from any WYPDES "point source" or collection of point sources," with an "effluent limitation" being the restrictions placed on the WYPES permit holder for the discharges from "point sources into surface waters of the state." Water Quality Rule, Chapter 3, Section 2(a)(xxv), (xxvi) and (xxviii). A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged." Water Quality Rules, Chapter 2, Section 3(a)(viii).

Petitioner alleges no facts that would allow this Council to determine whether the alleged hydrological connection between surface and groundwater constitutes a point source. Further, Petitioner has failed to allege or provide the Department with any facts that the alleged discharge into hydrologically connected waters constitute the functional equivalent of a point source discharge. *See County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020). Federal case law interpreting the federal Clean Water Act and what constitutes the functional equivalent of a point source of pollution requires the

Petitioner to bear the burden of establishing the functional equivalent of a point source discharge to be on the party alleging its existence. *Stone v. High Mountain Mining Company, LLC*, 89 F.4th 1245, 1260-61 (10th Cir. 2024). To the extent Petitioner seeks to fault the Department for not conducting additional analysis, the law places the burden on Petitioner to not only allege, but also establish, facts identifying the functional equivalent of a point source. *See Id*. Petitioner has consistently made only broad generalized statements regarding existing groundwater pollution and hydrological connectivity, but failed to provide the Department or this Council with any facts alleging a point source discharge from Basecamp's small wastewater system. (See Pet'r's First Am. Appeal. ¶¶ 37-40, Pet'r's Attachment A, and Pet'r's Attachment B).

Second, even if Petitioner could assert facts that the Permit constitutes the equivalent of a point source discharge the Council could still not provide Petitioner the relief it requests because an appeal to the Council through a small wastewater system permit is not the proper recourse for Plaintiff to pursue this claim. The Department, through its rules, has distinct permitting regimes for permitting small wastewater systems (Chapters 3 and 25) and surface water discharges (Chapter 2). Petitioner, through its amended complaint, attempts to conflate the two and improperly seeks relief through the Council. The case presently before the Council is an appeal of the Department's decision to issue a small wastewater permit to construct, pursuant to Chapters 3 and 25 of its Water Quality Rules.

As discussed above, the Council's authorities are very much limited to reviewing actions of the Department through contested cases on permitting decisions initially made

by the Department. *See* Wyo. Stat. Ann. § 35-11-112(a)(iv). The remedies available to the Council are limited to supporting, deny, or amending the initial decision of the Department on a permit. *See* Wyo. Stat. Ann. § 35-11-112(c)(ii). Petitioner cites no provision of law, and none exists, that would give this Council independent authority to require a WYPDES permit without previous action by the Department. Through this appeal, Petitioner may only seek relief from this Council on claims directly pertaining to the Department's decision to authorize the Permit. Petitioner may not bring perceived violations of the State's WYPDES program to the Council through this appeal. Similarly, federal case law surrounding a determination of a functional equivalent of a point source discharges states that the case law is not intended to disrupt existing permitting regimes. *See Maui,* 140 S.Ct. at 1477; *see also Stone,* 89 F.4th at 1261. Petitioner must follow the existing State permitting and regulatory structures for asserting its claims.

In this instance, Petitioner's appropriate recourse against the Department is likely judicial review via Wyo. Stat. Ann. §§ 35-11-1001 and 16-3-114 for alleged agency inaction.[3] The Department once again argues to the Council that there are different remedies for the varied claims Petitioner has attempted to squeeze into what should be a rather mundane appeal of the Department's decision to issue a permit to construct a small wastewater system. For these reasons, the Department asks the Council to dismiss

[3] Petitioner has repeatedly failed to properly file its many appeals and lawsuits over the two-year history of this litigation. In an attempt to provide clarity to the tribunal, the Department has provided an analysis of the potential way the lawsuits could have been filed. This is such an instance. In providing this analysis to the Council, the Department reserves any defenses regarding the timeliness or propriety of any future filings made by the Petitioner.

Petitioner's claim that the Department violate the law by not requiring a WYPDES permit for the permitted small wastewater system.

CONCLUSION

For the foregoing reasons, the Department asks the Council to dismiss any claims brought by Petitioner relating to the Delegation Agreement due to lack of a statutory authority by the Council to hear such claims, and lack of the standing by Petitioner to bring such claims before the Council. Further, the Department asks the Council to dismiss the surface water claims because the Council could not provide the relief requested through this appeal of a small wastewater permit. The Department requests the Council to set a hearing on this issue at its earliest convenience.

Submitted this 13th day of August 2024.

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CERTIFICATE OF SERVICE

I, Abigail Boudewyns, hereby certify that on the 13th day of August 2024, I electronically filed the forgoing *Department's Supplemental 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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