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**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 DEQ’S SUPPLEMENTAL MOTION TO DISMISS

The issues raised in the Department of Environmental Quality’s (“**DEQ**”) Supplemental Motion to Dismiss have been raised multiple times and extensively briefed. The issue presented in the current motion can be phrased concisely as follows:

Under W.S. 35-11-304, the DEQ is required to “delegate to municipalities, water and sewer districts or counties which apply the authority to enforce and administer within their boundaries the provisions” of the Environmental Quality Act (“**EQA**”) related to the administration of septic systems. In this case POWJH has alleged that Teton County requested, and the DEQ granted, exclusive delegated authority to Teton County to issue septic permits in Teton County.

At the same time, the Environmental Quality Council (“**EQC**”) is vested with the authority to “hear and determine all cases or issues arising under the laws, rules, regulations, standards or

orders issued or administered by the department” and within that purview, “[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” W.S. 35-11-112. As a result, the EQC has the authority to review whether the Septic Permit issued to Basecamp (the “*Septic Permit*”) was issued in conformance with the EQA, which necessarily includes a review of whether the DEQ had the authority to issue that permit under W.S. 35-11-304.

The DEQ has presented two lines of argument against the straightforward requirement that the EQC review DEQ’s permit issuance for compliance with 35-11-304. First, the EQC has argued that no one has a right, not a neighbor to the Basecamp property, not a fishing guide who uses waters polluted by Basecamp, and not a non-profit that has previously invested in cleaning up Fish Creek, to raise this compliance with W.S. 35-11-304 in front of the EQC. This argument is indefensible as the EQC has the authority to determine whether the DEQ acted in accordance with the applicable provisions of the EQA when reviewing a permit.

Second, the EQC has argued that, even if some permit challengers could potentially bring a claim the EQC violated W.S. 35-11-304, POWJH is not the proper party to bring these claims. This argument is also wrong. The Wyoming Supreme Court has repeatedly endorsed the right of environmental nonprofits to bring EQC claims.

BACKGROUND

As the parties have already provided the background to this case in multiple filings, the following is a limited recitation of facts relevant to the instant motion. POWJH is a 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 includes the specific accounting for approximately \$300,000 in 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, which is attached to POWJH's Petition for Review, it turns out there was cause for concern. Even well-designed septic systems in Teton County tend to leak exactly the pollutants that already contaminated Fish Creek, and there is likely groundwater connectivity between the site and Fish Creek.

As the science suggested the proposed septic system would pollute Fish Creek, POWJH naturally reviewed 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 made under an expired general permit and, therefore, invalid. POWJH filed an initial appeal for that earlier permit, and the DEQ ultimately withdrew.

The DEQ then went back to try to permit the site for a second time. This time, they elected to issue a site-specific permit to Basecamp, but as commentators noted at the time, it was not clear that DEQ had the authority to do so. As POWJH noted in its initial petition for review, the decision

to permit this facility under the DEQ rules raised questions about unaddressed Teton County regulations that were stricter than the DEQ regulations.

Accordingly, POWJH specifically raised the issue of whether the DEQ could legally permit Basecamp's site when it had delegated its permitting authority to Teton County in its 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 Basecamp's Motion for Stay laid bare that 1) DEQ did not have a good legal justification for why it had the authority to issue the Permit, that 2) Teton County should have issued the Permit, and 3) the septic permit for Basecamp's site is, once again, defective. To circumvent this ultimate conclusion, the DEQ then filed a Motion to Dismiss on November 19, 2023, which was fully briefed by January 2, 2024.

After the matter sat on the EQC's docket without action for approximately two months, POWJH filed a Motion to Amend its Complaint and a Declaratory Judgment Action in District Court on March 4, 2024, out of an abundance of caution. The EQC then granted POWJH's Motion to Amend but gave the DEQ leave to refile its Motion to Dismiss if it believed POWJH's amendments did not cure the alleged defects in its complaint.

At the same time, the District Court dismissed POWJH's Complaint for Declaratory Judgment after finding that POWJH lacked standing to pursue a declaratory judgment claim. While this decision is ultimately immaterial to the matter at hand here because it addressed "prudential"

and not “statutory” standing, the decision was also wrong and is currently being appealed to the Wyoming Supreme Court.

The DEQ has now renewed its Motion to Dismiss arguments under this supplement, reiterating its old unavailing standing arguments and adding that the District Court’s opinion should control, despite the fact the District Court addressed a materially different standing standard. The EQC should reject these arguments because the EQC has the authority to review individual permitting decisions, and the Wyoming Supreme Court has repeatedly authorized third-party environmental groups to bring WQA claims.

1. The EQC has the authority to hear issues regarding the validity of individual permits.

The Environmental Quality Act gives the EQC the broad mandate to “act as the hearing examiner for the department and [] hear and determine ***all cases or issues*** arising under the laws, rules, regulations, standards or orders issued or administered by the department.” W.S. 35-11-112 (emphasis added). As part of this mandate, the EQA affirmatively requires that the “[EQC] 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.” *Id.* The Septic Permit at issue in this case was, putatively, “authorized... by this act” and POWJH is “contesting the grant... of [a] permit.” As a result, the plain language of a generally applicable review statute requires that, to the extent the permit issuance is contested, it must be contested before the EQC.

This reading of the EQC’s authority is also entirely consistent with the Wyoming Supreme Court’s guidance on the scope of the EQC’s powers, which is that “the right of review is presumed” and that the language identified above “strongly indicates the legislature’s intent to allow EQC

review of ‘all cases or issues’ arising under the Wyoming Environmental Quality Act.” *Wyoming Dep't of Env't Quality v. Wyoming Outdoor Council*, 2012 WY 135, ¶ 28.

Further, this line of argument is *identical* to the line of argument the DEQ initially advanced to remove POWJH’s challenge of the DEQ’s initial septic permit to Basecamp from the District Court. The DEQ’s original argument on this issue, reproduced in full, was:

The Legislature tasked the Environment Quality Council with jurisdiction over applying the Environmental Quality Act in the first instance. The Council "shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the [D]epartment [...]." Wyo. Stat. Ann. § 35-11-112(a). Specifically, regarding appeals such as the Petitioner's challenge of the Wastewater permit, the Council shall, "conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit." Wyo. Stat. Ann. § 35-11-112(a)(iv). Such hearings shall be conducted in accordance with the Wyoming Administrative Procedures Act as a contested case. Wyo. Stat. Ann § 35-11-112(f).

Exhibit A to Response to Motion to Dismiss

In this argument, the DEQ made no distinction between challenges to general or individual permits and, instead, argued that all disputes about permitting decisions need to go to the EQC before the District Court.

Without delving into the technical detail of whether this argument, made in front of the District Court, prevents the DEQ from asserting the opposite position now, it is sufficient to highlight that the language of the EQA, the Wyoming Supreme Court’s prior precedent, and even the DEQ’s prior arguments all maintain that EQC can review the validity of an issued permit.

2. POWJH has statutory standing to contest an individual permit’s validity.

After establishing that a decision to grant an individual septic permit is reviewable by the EQC, the next question is whether POWJH has sufficient standing to maintain that appeal. In the only decision the Wyoming Supreme Court has issued directly on standing in front of the EQC,

and not on a subsequent review of an EQC decision, the Court stated, “[t]he Wyoming Environmental Quality Act may be silent about the right of an interested third party to seek EQC review of DEQ decisions, but that silence should not be read to preclude EQC review. To the contrary, the opinion in *Holder’s Little America* indicates that statutory silence raises a presumption that EQC review is not precluded.” *Wyoming Dep’t of Env’t Quality v. Wyoming Outdoor Council*, 2012 WY 135, ¶ 30. As a result, the Wyoming Supreme Court concluded that, based on the language of W.S. 35-11-112, a third-party nonprofit specifically had standing to challenge whether the DEQ had the statutory authority to issue the water quality permits at issue in that case. *Id.* at 28.

This case is indistinguishable. POWJH, as a third-party environmental nonprofit has standing under the specific statutory provisions of the Environmental Quality Act relating to EQC review. And, just as importantly, the specific issue raised by *Wyoming Outdoor Council* was whether the “DEQ lacked the statutory authority to issue the general permits” in dispute because any general permit standards needed to go through a rulemaking process. *Id.* at 5. The issue in this case is whether the DEQ lacks the statutory authority to issue an individual permit because that permit needs to go through Teton County under the relevant delegation statute. There is no way to say one claim that the DEQ exceeded its statutory authorization in issuing a permit is materially different from another. Accordingly, there can be no doubt that POWJH is authorized by statute to bring a claim the DEQ exceeded its statutory authority when it issued the Septic Permit to Basecamp.

As a result, the only limitation on POWJH’s standing, as an environmental nonprofit challenging a DEQ permit, to bring its claims under the EQA is the general requirement that

contested cases comply with the Wyoming Administrative Procedures Act (the “*WAPA*”), and any standing requirements contained therein. *See* § 35-11-112(f). The WAPA’s standing requirements, in turn, provide that to have standing, an individual or group must be “aggrieved or adversely affected in fact” by an issued permit. W.S. § 16-3-114.

The Wyoming Supreme Court, in turn, has already provided clear guidance on when an incorporated 501(c)(3) non-profit organization is “aggrieved or adversely affected in fact” when challenging a permit. In *N. Laramie Range Foundation*, the Wyoming Supreme Court found that a generalized recitation that a proposed wind farm would impact planned but unspecified activities of the organization 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 precisely 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 discharge allowed by the Permit will directly undermine the gains caused by those investments. Under these circumstances, POWJH satisfies the *N. Laramie Range* standard, and a finding POWJH did not have standing would be the functional equivalent of finding incorporated

nonprofits could never have standing, a position the Wyoming Supreme Court explicitly rejected in *Wyoming Outdoor Council*. See 2012 WY 135 at ¶ 30.

3. POWJH does not need prudential standing to challenge an individual permit's validity because POWJH has statutory standing.

To try and the straightforward conclusion that POWJH has standing in this case under the “aggrieved or adversely affected in fact” standard, the DEQ has attempted to argue that the more stringent *Brimmer* test for prudential standing applies to hearings in front of the EQC. It does not. The determination, made in *Wyoming Outdoor Council*, that the EQA creates a statutory right to EQC review of permit reviews, means that POWJH’s standing should be analyzed exclusively under the statutory standing standard. Specifically, the Wyoming Supreme Court has stated that “[w]here the question is statutory standing, prudential considerations do not play a role in the standing determination” *Matter of Est. of Stanford*, 2019 WY 94, ¶ 11, 448 P.3d 861, 864 (Wyo. 2019). In explaining this reasoning, the Court highlighted, citing an analogous US Supreme Court decision, that when the legislature specifically authorizes a party to bring a claim by statute, the issue of whether courts or administrative agencies believe such authorization is “prudent” is not material. *Id.*

As a result, prudential standing review and the *Brimmer* test are only applicable when a claim is not authorized by statute or when a statute incorporates a prudential standing inquiry. So, for example, “an action for breach of contract is not statutorily derived. Accordingly, standing to bring a cause of action for breach of contract is prudential standing and requires application of the *Brimmer* test.” *N. Silo Res., LLC v. Deselms*, 2022 WY 116A, ¶ 58.

Alternatively, when the legislature has authorized a claim via statute, courts, and administrative agencies “look[] to whether a plaintiff has a cause of action under the statute, not to whether the plaintiff satisfies the *Brimmer* test.” *HB Fam. Ltd. P'ship v. Teton Cnty. Bd. of Cnty. Commissioners*, 2020 WY 98, ¶¶ 19-21. In this context, *HB Fam. Ltd. P'ship* expressly found that where a statute authorized review of an issued permit pursuant to WAPA, the only appropriate standing test was whether a complainant was “aggrieved or adversely affected in fact,” and the *Brimmer* test played no role. As a result, the EQC’s standing inquiry is limited to whether a party is “aggrieved or adversely affected in fact,” as required by W.S. § 16-3-114.

For these same reasons, the recent District Court decision on standing in POWJH’s separate declaratory judgment action has no bearing on this contested case. As the Wyoming Supreme Court highlighted in *Forbes v. Forbes*, the Uniform Declaratory Judgment Act is one of the few statutes incorporating a prudential standing requirement. 2022 WY 59, ¶ 33. As a result, the District Court applied the *Brimmer* standard to POWJH’s claims in the District Court, and that analysis is not applicable in front of the EQC. Instead, standing in front of the EQC is governed by the “aggrieved party” standard discussed in *HB Fam. Ltd. P'ship*. Moreover, even if the *Brimmer* standard was applicable, the District Court misapplied it, as highlighted in POWJH’s Motion for Reconsideration, attached as Exhibit A, and POWJH is appealing that decision. *See* Notice of Appeal, attached as Exhibit B.

4. POWJH does not need privity of contract to use a publicly available document to show the DEQ violated the law.

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 the authority to issue a permit when it has delegated that authority to a municipality. 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. Agency actions can always be set aside by “any aggrieved party” raising an unlawful action for judicial review. See W.S. § 16-3-114.

In fact, the exact position the DEQ is taking here, namely that third parties cannot raise issues regarding agreements between governmental entities, has been expressly rejected multiple times in multiple jurisdictions. For example, in *Commonwealth v. Hlubin*, the Pennsylvania Supreme Court held that a DUI arrest was invalid because the arresting officer was outside his jurisdiction, and the intergovernmental agreement that permitted him to act in the foreign jurisdiction was invalid. 652 Pa. 545 (2019). Similarly, the Michigan Court of Appeals allowed a third party to challenge an intergovernmental agreement between two local government transportation authorities and found that the agreement between those entities was invalid.

AFSCME v. Detroit, 704 N.W.2d 712 (2005); *see also Durango Transp., Inc. v. City of Durango*, 824 P.2d 48, 53 (Colo. App. 1991). As these cases show, courts routinely allow non-parties to agreements between governmental agencies to review those intergovernmental agreements as part of an inquiry into whether a government's actions were legal.

5. POWJH has adequately alleged that a WYPEDS permit is required.

Finally, separate from arguments related to the DEQ's actual authority to issue the Septic Permit, the DEQ has argued POWJH has failed to allege facts supporting its claim a point source permit was required or that this requirement supports finding the Septic Permit is invalid. These arguments can be dispensed with quickly, as they require minimal argument. First, the US Supreme Court has stated that "discharge [of pollutants] to groundwater can be the 'functional equivalent of a direct discharge' in certain circumstances, depending on the interplay of the point source, seepage, ground water, subsurface conditions, and the navigable water." *Stone v. High Mountain Mining Co., LLC*, 89 F.4th 1246, 1248 (10th Cir. 2024) (citing *County of Maui v. Hawaii*, 140 S. Ct. 1462, 1476 (2020)). In this case, POWJH has included numerous allegations, supported by an expert review attached to its complaint, that "operation of the onsite wastewater system contested herein will discharge pollutants—including E. coli and nutrients—to Fish Creek and its tributaries," "[a] number of studies and reports show a hydrologic connection between ground and surface water in the Fish Creek drainage," and the "commercial septic system authorized by DEQ in Permit No. 2023-025 will introduce a variety of pollutants into ground and surface water and adjacent wetlands in the headwaters of Fish Creek." First Amended Appeal of Notification of Coverage at ¶¶ 6, 34, and 38.

These allegations, taken together and in the context of the expert analysis attached with POWJH's complaint, more than satisfy the requirement that POWJH allege facts which, if true, would support a claim. POWJH is directly alleging local groundwater connectivity will lead to pollution discharge directly into surface waters. This allegation, if proven, would make the septic system a point source as "the addition of the pollutants through groundwater is the *functional equivalent of a direct discharge* from the point source into navigable waters." *Stone*, 89 F.4th at 1253 (emphasis original).

Similarly, the DEQ's claims that these allegations are not a basis for setting aside the Septic Permit can be dispatched just as quickly. At the risk of repeating material already included in POWJH's response to Basecamp's Motion to Dismiss, Chapter 3 of the DEQ's Water Quality Regulations provides that a permit should be denied when "[t]he facility does not meet the minimum design standards of this Chapter *or other applicable Water Quality Rules.*" See Section 11(a)(2) (Emphasis added). WYPDES permits are required under Chapter 2 of the Water Quality Regulations. So, if a project needs a WYPDES permit under Chapter 2 and does not get one, a separate permit should not be issued under Chapter 3, as Chapter 3 requires compliance with all applicable water quality rules.

CONCLUSION

The DEQ does not want to address the merits of POWJH's claim that the DEQ did not have the authority to issue the Septic Permit, which is being challenged in this case. That position is understandable. The Septic Permit is illegal. Unfortunately for the DEQ, the EQC has the authority and responsibility to decide this issue. *Wyoming Dep't of Env't Quality v. Wyoming Outdoor*

Council, 2012 WY 135, plainly provides that third-party nonprofits can challenge permits by raising the issue of whether the issued permits exceeded the DEQ’s statutory jurisdiction.

The only limitation on third-party environmental groups bringing these claims is that they are “aggrieved or adversely affected in fact” by the DEQ’s decision. In *N. Laramie Range Foundation*, the Wyoming Supreme Court stated that incorporated non-profits could presumptively make this showing 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.” POWJH has done just that, showing the significant amount of work it has done to protect Fish Creek and how the Septic Permit will undermine that work.

There is no basis to conclude that POWJH needs to show any heightened prudential standing under the *Brimmer* standard or that the District Court’s standing analysis under the *Brimmer* standard should impact this case. Instead, this matter is governed by the straightforward guidelines for nonprofit standing the Wyoming Supreme Court has already provided to the EQC in *Wyoming Dep't of Env't Quality v. Wyoming Outdoor Council* and *N. Laramie Range Foundation*.

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

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Respectfully submitted this September 3, 2024.



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Certificate of Service

Based on the foregoing signature, counsel certifies that a true and correct copy of the motion was electronically filed with the Environmental Quality Council and was served on all parties via the Environmental Quality Council's electronic notification.