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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**

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**REPLY TO POWJH REPSONSE TO DEPARTMENT’S MOTION TO DISMISS AND  
SECOND SUPPLEMENTAL MOTION TO DISMISS**

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The Department, through counsel, hereby replies to *Petitioner’s Response to DEQ’s Supplemental Motion to Dismiss* and now brings its *Second Supplemental Motion to Dismiss*.

In addition to the jurisdictional claims already raised by the Department, and in reply to the claims made by Petitioner in its *Response (See Pet’r’s Resp. to DEQ’s Supp. Motion to Dismiss, 5-6)*, the Department has discovered that this Council is without subject matter jurisdiction to hear the entirety of Petitioner’s *Appeal of Notification of Coverage – Permit No. 2023-025*. The Petitioner continues to fail to cite a provision of law in the Environmental Quality Act or its regulations that would give Petitioner the right to appeal this individual small wastewater permit to the Council. Accordingly, the Department itself researched whether such a provision of law exists. The Department discovered that, in fact,

the provision of the Water Quality Rules that would have provided jurisdiction to hear the remainder of Petitioner’s appeal of an individual small wastewater permit as an “interested person,” was repealed by this very Council in 2022. *See Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 3, § 9(a)(x) (in effect from June 29, 2018, to August 19, 2022)<sup>1</sup>; *see generally, Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 3 (effective date of August 19, 2022). No other provision of rule or statute provides this Council with jurisdiction to hear Petitioner’s claims. Because subject matter jurisdiction is paramount in any case, the Council must determine whether it has jurisdiction to hear the entirety of Petitioner’s appeal.

In its Reply, the Department addresses the arguments raised by Petitioner in its Response with respect to statutory standing, jurisdiction to hearing the delegation and contractual claims, and jurisdiction over alleged surface water claims that have yet to be properly brought before the Department.

## ANALYSIS

### **I. Subject matter jurisdiction.**

Because this Council repealed the portion of its rules that would have provided subject matter jurisdiction to hear the remainder of Petitioner’s appeal, the appeal must be dismissed. It is undisputed that the Department issued an individual small wastewater

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<sup>1</sup> Available at:

[https://rules.wyo.gov/DownloadFile.aspx?source\\_id=13242&source\\_type\\_id=81&doc\\_type\\_id=110&include\\_meta\\_data=Y&file\\_type=pdf&filename=13242.pdf&token=173058056066129215107146227063169176045029078192](https://rules.wyo.gov/DownloadFile.aspx?source_id=13242&source_type_id=81&doc_type_id=110&include_meta_data=Y&file_type=pdf&filename=13242.pdf&token=173058056066129215107146227063169176045029078192)

permit. Pet'r's Appeal of Notification of Coverage – Permit No. 2023-025, Attachment E. Petitioner attempts to rely on Section 112 in its *Response* for jurisdiction and statutory standing, but has failed to acknowledge to the Council that the specific right of action that previously would have authorized this appeal was repealed by the Council in 2022. *See* Pet'r's Response to DEQ's Supplemental Motion to Dismiss. Despite a long history where the Council has asserted jurisdiction in appeals, in no case has the Council been presented with a scenario where the exact provision of law, which would have grant this Council with jurisdiction, has been explicitly repealed. Further, Petitioner has not cited, and the Department has not identified any other law or permit language that would grant Petitioner a right of appeal. Upon discovering that the portion of the rule granting jurisdiction has been repealed, the Department must now raise the issue of jurisdiction in this case to the Council.

**A. The Council must have subject matter jurisdiction to hear this appeal.**

Subject matter jurisdiction is the “power to hear and determine cases of the general class to which the proceedings in question belong.” *Amoco Production Co. v. Wyoming State Bd. of Equalization*, 7 P.3d 900, 904 (Wyo. 2000) (citation omitted). “Subject matter jurisdiction is essential to the exercise of judicial power. If a court does not have subject matter jurisdiction, it lacks any authority to proceed, and any decision, judgment, or other order is, as a matter of law, utterly void and of no effect for any purpose.” *Elliot v. Natrona County Board of Commissioners*, 530 P.3d 1078, 1082 (Wyo. 2023) (citation omitted).

Subject matter jurisdiction applies equally to court and administrative agencies. *Amoco Production Co.* 7 P.3d at 903. The right to judicial review of an administrative

decision is entirely statutory. *Id.* (citing *Albertson's Inc. v. City of Sheridan*, 33 P.3d 161 (Wyo. 2001) (quoting *Industrial Siting Council of State of Wyo. v. Chicago and North Western Transp. Co.*, 660 P.2d 776, 778 (Wyo. 1983))). “An administrative agency is limited in authority to powers legislatively delegated. ‘Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim.’” *Hayse v. Wyo. Bd. of Coroner Standards*, 455 P.3d 267, 273 (Wyo. 2020) (quoting *Amoco Production Co.*, 12 P.3d 668, 673 (citations omitted)). An agency is “wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority.” *Id.* (quoting *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)). An agency does not have discretion in determining whether or not it has subject matter jurisdiction; subject matter jurisdiction either exists or it does not. *Amoco Production Co.* 7 P.3d at 904. If an agency lacks subject matter jurisdiction, any proceeding conducted by it has a fundamental defect, “which cannot be cured by waiver or consent by the parties.” *Id.*

The Council must dismiss Petitioner’s appeal if it determines that no statute or regulation exists that gives interested persons the right to an appeal before the Council. Without a statute or regulation giving the Council jurisdiction over this matter, the Council cannot proceed with the appeal and must dismiss Petitioner’s First Amended Appeal of Notification of Coverage Permit No. 2023-025 in its entirety.

**B. The Council repealed the right of appeal for “interested persons” before the Council.**

In order for this Council to have proper subject matter jurisdiction for an appeal of an individual small wastewater permit – a statute or rule must give Petitioner, as an interested person, the right of appeal to the Council. *See Amoco Production Co.* 7 P.3d at 903. Whether intentional, or not, no provision of law provides Petitioner with a right of appeal. *See generally*, Wyo. Stat. Ann. §§ 35-11-101 *et seq.*, 16-3-101 *et seq.*, and *Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, Ch. 1 through 29.

On August 19, 2022, the Council amended *Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, Ch. 3 and removed the right of an appeal for interested persons from its rules. Prior to August 19, 2022, a right of appeal existed in Chapter 3, which provided “interested persons” with the authority to appeal the issuance of an individual permit to construct a small wastewater system to the Council in accordance with the Council’s Rules of Practice and Procedure. *Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 3, § 9(a)(x) (in effect from June 29, 2018, to August 19, 2022).<sup>2</sup> This right of appeal for individual persons dates back to January 4, 2000. *Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 3, § 11(a)(x) (dated January 4, 2000).<sup>3</sup> Prior to January 4, 2000, and as

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<sup>2</sup> Available at:

[https://rules.wyo.gov/DownloadFile.aspx?source\\_id=13242&source\\_type\\_id=81&doc\\_type\\_id=110&include\\_meta\\_data=Y&file\\_type=pdf&filename=13242.pdf&token=173058056066129215107146227063169176045029078192](https://rules.wyo.gov/DownloadFile.aspx?source_id=13242&source_type_id=81&doc_type_id=110&include_meta_data=Y&file_type=pdf&filename=13242.pdf&token=173058056066129215107146227063169176045029078192)

<sup>3</sup> Available at:

[https://rules.wyo.gov/DownloadFile.aspx?source\\_id=3867&source\\_type\\_id=81&doc\\_type\\_id=110&include\\_meta\\_data=Y&file\\_type=pdf&filename=3867.pdf&token=187254166244060157037207107108227036168123122107](https://rules.wyo.gov/DownloadFile.aspx?source_id=3867&source_type_id=81&doc_type_id=110&include_meta_data=Y&file_type=pdf&filename=3867.pdf&token=187254166244060157037207107108227036168123122107)

far back as 1988, no right of appeal to the Council existed for “interested persons” to appeal small wastewater permits. *See Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 3(dated March 18, 1988).<sup>4</sup>

The current Chapter 3 rule only provides a right of appeal to a “permittee” who contests the modification, suspension, termination, or revocation of its individual permit. *See Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 3 §§ 12 and 13 (2024). With respect to denials of individual permit applications, the rule is now silent and defaults to the statutory right of appeal in Wyo. Stat. Ann. § 35-11-802, which only allows an applicant the right to petition for a hearing before the Council to contest the denial. *See generally, Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 3 and Wyo. Stat. Ann. § 35-11-802. Petitioner is not the “permittee” under the plain language of Chapter 3, nor is Petitioner the “applicant” under the plain language of Wyo. Stat. Ann. § 35-11-802.

Without a right of appeal to the Council continuing to exist for “interested persons” under the law, Petitioner has no right of appeal to bring its protest before this Council. As a result, without specific statutory authority, this Council lacks subject matter jurisdiction to hear an appeal of a small wastewater permit by an “interested person.” The Council only has jurisdiction to hear appeals from the applicant or permittee for permitting decisions on individual small wastewater systems. For this reason, the Council must dismiss Petitioner’s First Amended Appeal of Notification of Coverage Permit No. 2023-025 in its entirety.

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<sup>4</sup> Available at:

[https://rules.wyo.gov/DownloadFile.aspx?source\\_id=552&source\\_type\\_id=81&doc\\_type\\_id=110&include\\_meta\\_data=Y&file\\_type=pdf&filename=552.pdf&token=212023030225217100249092251177170117031113054073](https://rules.wyo.gov/DownloadFile.aspx?source_id=552&source_type_id=81&doc_type_id=110&include_meta_data=Y&file_type=pdf&filename=552.pdf&token=212023030225217100249092251177170117031113054073)

**C. Section 112 of the Act does not provide general subject matter jurisdiction.**

The issue before this Council is whether, in the total absence of any other statute, rule, or permit language that would authorize or even suggest a right of appeal, does Section 112 authorize *any* appeal of *any* issue before the Council. Petitioner argues that Wyo. Stat. Ann. § 35-11-112 provides general subject matter jurisdiction to this Council. *See* Pet'r's Resp. to DEQ's Supp. Motion to Dismiss, 5-7. Section 112, however, does not generally provide a right of action to specific types of cases to be brought before the Council; it merely authorizes this Council to conduct its own hearings in contested cases, assuming that the Council otherwise has jurisdiction to hear such appeals. Section 112 of the Environmental Quality Act simply outlines the Council's power to preside over contested cases, generally, **if a right to a contested case is granted elsewhere in the Act or administrative rule.** *See Wyo. Dep't of Env'tl. Quality v. Wyo. Outdoor Council*, 286 P.3d 1045 (Wyo. 2012); *see generally*, Wyo. Stat. Ann. § 35-11-101 et seq; *see also*, *Rules, Wyo. Dep't of Env'tl. Quality, Practice and Procedure*, ch 1, Section 8(a) ("Where authorized by the Wyoming Environmental Quality Act [. . .]"). Accordingly, this Council cannot rely on Section 112 as a statute granting it general subject matter jurisdiction and must dismiss Petitioner's First Amended Appeal of Notification of Coverage Permit No. 2023-025.

**1. Interpreting Section 112 of the Act to be a general right of appeal for any and all claims brought by any person would nullify a multitude of specific rights of action through the Act.**

Petitioner urges this Council to interpret Section 112 as a “broad mandate” of authority to the Council to hear any and all appeals. Pet’r’s Resp. to DEQ’s Supp. Motion to Dismiss, 5. Section 112, however, cannot be read in isolation from the remainder of the Act. The “power to hear and determine cases” for both administrative and judicial review is statutory and this Council must read the Act in *pari materia* to determine the scope and magnitude of Section 112.

In construing a statute, this Council’s primary consideration is to determine the intent of the legislature. *Skoric v. Park Cnty. Cir. Ct., Fifth Judicial Dist.*, 532 P.3d 667, 669 (Wyo. 2023) (citing *Amoco Prod. Co.*, 94 P.3d 430, 444 (Wyo. 2004)). To discern legislative intent, the Council must first determine whether the statute is ambiguous. *Sinclair Oil v. Wyo. Dep’t of Revenue*, 238 P.3d 568, 570 (Wyo. 2010). The Council should first look at the plain language used by the legislature. *Skoric*, 532 P.3d at 669. If the statute is “sufficiently clear and unambiguous, the Court simply applies the words according to their ordinary and obviously meaning.” *Id.* (citing *In re BG*, 528 P.3d 402, 407 (Wyo. 2023)). A statute is clear and unambiguous if “its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability.” *Id.* (quoting *Spence v. Sloan*, 515 P.3d 572, 581-82 (Wyo. 2022)). The Council must also consider statutory language *in pari materia*, which means the Council “construes statutes as a whole, giving effect to every word, clause, and sentence, and we construe together all parts of the statutes on the same subject.” *Id.* (quoting *In re BG*, 528 P.3d at 407). Finally, the rules of statutory

construction require the Council to read the statute in a way to avoid making provisions meaningless. *Britain v. Britain (Matter of Est. of Britain)*, 425 P.3d 978, 987 (Wyo. 2018).

Petitioner would have this Council stop after the first step of any statutory interpretation analysis, and interpret Section 112 in isolation from the remainder of the Act. While it is true the plain language of Section 112 requires the Council to “hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the Department.” Wyo. Stat. Ann. § 35-11-112(a). In performance of that general directive, Section 112 also requires the Council to “promulgate rules and regulations necessary for the administration of the Act;” “conduct hearings in any case contesting the administration or enforcement of any law, rule, regulation, standard or order issued or administered by the [D]epartment;” and “conduct hearings in any case contesting the grant [. . .] of any permit.” Wyo. Stat. Ann. §§ 35-11-112(a)(i), (iii)-(iv). In fact, the plain language of Section 112 defers to the “the laws, rules, regulations, standards or orders issued or administered by the Department” in defining the scope of Section 112. Wyo. Stat. Ann. § 35-11-112(a).

The Department urges this Council to look at the plain language of Section 112 in context with the remainder of the Act. Section 112, when read in *pari materia* with the remainder of the Act and its rules, demonstrates that the legislature and this Council did not intend Section 112 to grant such extensive jurisdiction to hear any and all claims. Rather, the Act itself, and the regulations promulgated by the Council pursuant to Section 112, provide persons with a right to a contested case before the Council far beyond Section 112. In fact, approximately twenty six other statutory rights to an appeal to the Council

exist outside of Section 112. *See* Appendix A. This Council, through its mandatory rulemaking authority under Wyo. Stat. Ann. § 35-11-112, has identified as necessary for the administration of the Act, the need for an additional twenty eight rights of appeal through rule. *See* Appendix A. If Petitioner’s claim that any person can bring any appeal under Section 112 is upheld by this Council, such a decision would render the over fifty statutory and regulatory rights of appeal identified in Appendix A, superfluous.

To further compound the issue, the Act and Council’s rules also vary in the specific language used to describe who may seek administrative or judicial review. The Supreme Court presumes that “the legislature acts intentionally when it uses particular language in one statute, but not another.” *Rodriguez v. Casey*, 50 P.3d 323, 327 (Wyo. 2002). For example, Wyo. Stat. Ann. § 35-11-801(d) states that “[a]ny aggrieved party may appeal” the Department’s authorizations under a general permit “as provided in this act.” The Act even goes so far as to define “aggrieved party” as “any person named or admitted as a party to any proceeding under this act because of damages that person may sustain or be claiming because of his unique position in any proceeding held under this act[.]”.” Section 802 explicitly provides only permit “applicants” with the right to “petition for hearing before the council to contest” the Director’s refusal to grant any permit under the Act. Wyo. Stat. Ann. § 35-11-802. By contrast, Wyo. Stat. Ann. § 35-11-526(c) provides an “applicant or other interested party” with the right to appeal a determination by the Director and specifically states that the decision of the Council is the final agency action. Wyo. Stat. Ann. § 35-11-526. In examining Appendix A, the Council will see that the statutes enacted by the Legislature contain a variety of language granting other rights of appeal. To allow

Section 112 to be a statute of general jurisdiction would render superfluous all of these distinctions enacted by the Legislature.

In accordance with the Council's rulemaking authority under Section 112, the Council's rules contain additional rights of appeals to fill in various gaps between the statutory rights of appeal, as determined necessary by the Council to administer the Act. *See* Appendix A. Of note in the Water Quality Rules is a provision that pertains to WYPDES permitting and states that, "[i]n any case where the director makes a decision to issue, modify, or terminate a permit [. . .] **any interested person** may request a hearing before the Environmental Quality Council." *Rules, Wyo. Dep't of Envtl. Quality, Water Quality*, ch. 2, § 17 (Emphasis added). This is the provision of law the Court in the *Wyoming Outdoor Council* case chose to defer to when upholding a right of appeal. *See Wyo. Outdoor Council*, 286 P.3d 1045. The small wastewater permitting rules no longer have this right of appeal. *See Rules, Wyo. Dep't of Envtl. Quality, Water Quality*, ch. 3.

In reading the Act as a whole, it becomes evident that the Legislature did not intend for the Council to be a court of general jurisdiction for all types of claims from every type of complainant. If that was the case, the Legislature would have ended its drafting exercise after Section 112. Rather, the Legislature and this Council, over the years, have enacted and repealed a multitude of statutes and administrative regulations providing various statutory and regulatory rights of actions to a variety of types of complainants. To find that Section 112 grants jurisdiction to this Council for every type of claims, including those brought by interested persons for all types of issues, would render these multitudes of

statutory and regulator provisions, and the distinctions between them, meaningless. Such a conclusion cannot be supported by the canons of statutory construction.

**2. The Wyoming Supreme Court has relied upon the Department’s regulations in determining whether an “interested person” has a right of appeal to the Council.**

Although the Department has identified relevant case law for this Council to consider, none answer the precise question of whether the Council has jurisdiction under Section 112 in the total absence of any other right of appeal. In all of the cases reviewed by the Department, some other rule or permit language was identified in conjunction with Section 112. As such, the Department argues that Section 112 is not a general jurisdictional statute. Rather, Section 112 defers to other statutes, or rules, to shore up this Council’s jurisdiction over various rights of action under the Act.

The case most relevant to the issue of whether the Council has jurisdiction over appeals brought by “interested persons” is *Wyo. Dep’t of Env’tl. Quality v. Wyo. Outdoor Council*, 286 P.3d 1045 (hereinafter referred to as “*Wyoming Outdoor Council*”). That case involved the Department’s issuance of two general permits governing the discharge of produced water. *Id.* at 1047. The Department issued the permits pursuant to Chapter 2 of the Department’s Water Quality Rules, which regulates point-source discharges into surface waters. *Id.* at 1048. Chapter 2 of the Water Quality Rules, both at the time of the *Wyoming Outdoor Council* case and still today, explicitly grants a right of appeal to “interested persons.” *See Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 2, § 17. Chapter 2 states, “In any case where the director makes a decision to issue, modify, or terminate a permit [. . .] **any interested person** may request a hearing before the

Environmental Quality Council.” *Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality*, ch. 2, § 17 (emphasis added).<sup>5</sup>

The general rule in Wyoming is that there is “no inherent right to appeal from administrative action; rather, any such right is limited as described in statute.” *Mountain Cement Co. v. South of Laramie Water & Sewer Dist.*, 255 P.3d 881, 887 (Wyo. 2011) (citing *Holding’s Little Am. v. Bd. of County Comm’rs of Laramie County*, 670 P.2d 699, 702 (Wyo. 1983)(and cases cited therein)). The *Wyoming Outdoor Council* case examined whether, when the Act itself was silent, the Council and Department could grant the Wyoming Outdoor Council (WOC), as an interested party, the right of appeal through rulemaking. See *Wyoming Outdoor Council*, 286 P.3d at 1047. The Court in *Wyoming Outdoor Council* expounded on its holding from *Holding’s Little America* by stating that “to preclude judicial review, the statute, if not specific in withholding that review, must give clear and convincing evidence of an intent to restrict. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold.” *Id.* at 1052, (quoting *Holding’s Little America*, 670 P.2d at 702 (Wyo. 1983)). The Court found that no statute clearly and convincingly precluded administrative, nor was there evidence of legislative intent to restrict administrative review. *Wyoming Outdoor Council*, 286 P.3d at 1052. In the absence of “clear and convincing evidence” in statute of an intent by the

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<sup>5</sup> Chapter 2 of the Water Quality Rules deals with surface water permitting for which the State has primacy delegated from the Environmental Protection Agency. Chapter 3 of the Water Quality Rules wholly derives its authority from State law and is not dependent on the EPA for primacy.

Legislature to restrict administrative review, the Court found that Section 112 of the Act “strongly indicates the legislature’s intent to allow EQC review [. . .].” *Id.*

The Court in *Wyoming Outdoor Council* then turned to the specific language in Chapter 2, Section 17 of the Water Quality Rule and the Council’s General Rules of Practice and Procedure to establish whether WOC had a right to bring an appeal as an interested party under the Council’s rulemaking authority. *Id.* at 1053. The Court determined that the language of Chapter 2, Section 17 was consistent with the statutory presumption of Section 112 to “allow EQC review” and deferred to the Council’s ability to interpret its statutes through rule. *Id.* at 1052-53. The Court held that in the absence of clear statutory intent to the contrary, the Council was free to grant additional rights of appeal through rule that were necessary to administer the Act.

In a second case, which was referenced by the *Wyoming Outdoor Council* Court, the Council relied upon Section 112 in conjunction with administrative rules and language in the permit itself to determine it had jurisdiction. *See In the matter of: Basin Electric Power Cooperative Dry Fork Station Air Permit CT-4631*, EQC Docket No. 07-2801, Order Denying Basin Electric Power Cooperatives Inc’s Motion to Dismiss Appeal; *see also Wyoming Outdoor Council*, 286 P.3d 1045. Jurisdiction was not raised upon appeal, presumably because the permittee who had raised the jurisdictional question ultimately prevailed before the Council. *See Powder River Basin Res. Council v. Wyo. Env’tl. Quality Council*, 226 P.3d 809 (Wyo. 2010). In its order upholding its own jurisdiction, the Council cited to the broad authority of Section 112, but also cited to the agency’s contested case rules and permit language for authority. *In the matter of: Basin Electric*, EQC Docket No.

07-2801, Order Denying Motion to Dismiss, ¶¶ 8-12. The contested case rules in place at the time defined a “protestant” as “any person desiring to protest the application of a permit or any person requesting a hearing before the Environmental Quality Council in accordance with the Environmental Quality Act and who is objecting to an action of the Department of Environmental Quality and desiring affirmative relief.” Chapter 1, Section 2(a)(ii), General Rules of Practice and Procedure (in effect on August 21, 2008), *See also In the matter of: Basin Electric*, EQC Docket No. 07-2801, Order Denying Motion to Dismiss, ¶ 12. This provision of law has since been repealed and the Council’s rules of Practice and Procedure now simply defer to the Act. *See Rules, Wyo. Dep’t of Env’tl. Quality, Practice and Procedure*, ch. 1, § 8.

Similar to the approach taken by the Court in *Wyoming Outdoor Council*, the Council, in its application of principles of law, first began by stating that the Act granted the Council broad authority to promulgate rules to govern hearings contesting the grant of a permit. *In the matter of: Basin Electric*, EQC Docket No. 07-2801, Order Denying Motion to Dismiss, ¶ 13. The subsequent analysis conducted by the Council in the 2008 *Basin Electric* Order was cursory and did not follow the statutory interpretation rules outlined by the Wyoming Supreme Court. *Id.* ¶¶ 13-20. Ultimately the Council deferred to its longstanding practice of hearing cases. *Id.* at ¶16. Even if this Council has, in the past, determined it has jurisdiction, such determinations may not have always been correct. Further, the rules enacted by the Department have changed over the years. The Department encourages this Council to fully develop its statutory analysis in any determination it may make on this issue and to fully interpret the law at issue – especially in the total absence of

any rule or permit language upon which this Council could rely on for jurisdiction for this Permit appeal.

**3. Presumption of judicial review is still maintained through Wyoming Administrative Procedure Act and Section 1001 of the Act.**

Finally, Petitioner attempts to argue that because a presumption of review of administrative decisions exists in the law, that Petitioner is entitled to review by this Council. Pet'r's Resp. to DEQ's Supp. Motion to Dismiss, 5. The Department acknowledges the presumption to the right of judicial review of administrative decisions, but believes the issue to be a red herring in this particular case. Prior to 2000, when the Council's rules did not provide interested persons with an explicit right of appeal to the Council, and again today, following the repeal of that rule in 2022, there still exists a right of judicial review of administrative decisions. That right to review exists under the Wyoming Administrative Procedure Act (WAPA), which provides "any person aggrieved or adversely affected in fact by agency action or inaction" an entitlement to judicial review. Wyo. Stat. Ann. § 16-3-114(a).

Petitioner has consistently failed to properly apply administrative law and the various remedies available to it under the law. By misquoting and repeatedly trying to rely on Section 801 of the Act, Petitioner tries to avail itself of the remedies available to parties aggrieved by the Department's granting of an authorization under a general permit. See Wyo. Stat. Ann. § 35-11-801(d). That provision of law, however, by its explicit language, does not apply to decisions to grant individual permits. Individual permit appeals are covered by Section 802 of the Act, which only allows an applicant to appeal, and whatever

other right may be granted in the Council’s rules and regulations, as seen in the *Wyoming Outdoor Council* case. Wyo. Stat. Ann. § 35-11-802; see *Rules, Wyo. Dep’t of Env’tl. Quality, Water Quality Rules*, ch. 2, § 17; see also *Wyoming Outdoor Council*, 286 P.3d 1045.

Further, Petitioner cannot rely on Section 801 and arguments made by the Department with respect to the need to exhaust administrative remedies during Petitioner’s appeal of the general permit authorization granted in 2022, as somehow applying and being relevant to this decision by the Department to grant an **individual** permit in 2023.

The Act also provides a right to judicial review independent of the WAPA through Wyo. Stat. Ann. § 35-11-1001. That law allows “any aggrieved party under [the] act” to obtain judicial review. The only limitation is that a party must meet the Act’s statutory definition of “aggrieved party”. The Department acknowledges the presumption of judicial review, but simply argues to the Council that different types of permits, as demonstrated through the plain language of the Act and the Council’s rules, come with varying degrees of redressability through this Council.

## **II. Section 112 also does not provide Petitioner with statutory standing.**

Petitioner cannot rely on Section 112 for statutory standing because Section 112, being broad in nature with respect to the powers of the Council, does not grant “this” Petitioner a cause of action. *Matter of Phyllis*, 506 P.3d 753, 762. “It is the role of courts to provide relief to claimants [...] who have suffered, or will imminently suffer, actual harm [...]” *HB Family Limited Partnership v. Teton Cnt’y Bd. of Cnt’y Commissioners*, 468

P.3d 1081, 1087 (Wyo. 2020) (*quoting Allred v. Bebout*, 409 P.3d 260, 268 (Wyo. 2018)). Even assuming, *in arguendo*, that this Council has jurisdiction to hear Petitioner’s claim under Section 112, that jurisdiction does not equate to a statutory standing provision for this particular Petitioner. Again, subject matter jurisdiction is the “power to hear and determine cases of the general class to which the proceedings in question belong.” *Amoco Production Co.*, 7 P.3d at 904. Standing looks to whether a party is “properly situated to assert an issue for judicial determination.” *Matter of Phyllis*, 506 P.3d at 762.

Petitioner misleadingly tries to argue that the *Wyoming Outdoor Council* case held that Section 112 granted WOC statutory standing. Pet’r’s Response, 9. But *Wyoming Outdoor Council* unequivocally did no such thing; as described above – that case simply found that the Council had subject matter jurisdiction for the claim attempted to bring. The term “standing” was never used once in that case. It is likely that the question of standing never came up in *Wyoming Outdoor Council* because at that time the Chapter 2, Section 17, Water Quality Rule provided statutory standing to “interested persons.” That provision of law has been repealed from the Chapter 3, Water Quality Rules applicable to this case.

Petitioner also quotes *HB Fam. Ltd. P’ship v. Teton Cnty. Bd. of Cnty. Commissioners* in its Response. Pet’r’s Response to DEQ’s Supp. Motion to Dismiss, 10 (*citing HB Fam. Ltd. P’ship v. Teton Cnty. Bd. of Cnty. Commissioners*, 468 P.3d 1081).. The *HB Fam. Ltd. P’ship* case was a WAPA appeal of final agency action to the district court. The Court relied upon Wyoming Statute § 16-3-114 for statutory standing, which applies to judicial review of agency action. This appeal is not judicial review of agency action, but rather is still at the administrative level of review before the Council. As such,

Wyoming Statute § 16-3-114 does not provide Petitioner with statutory standing before this Council.

If Petitioner ever had statutory standing before this Council, it was through the repealed language in Chapter 3 that formerly authorized “interested persons” to appeal individual small wastewater permits to the Council. Without that provision of law in effect, Petitioner lacks a statutory right of action. As shown by the Department in Appendix A to this Reply, there are various statutory and regulatory rights of action in the Act and its rules. None of these apply to Petitioner’s appeal.

Without statutory standing, Petitioner must meet the *Brimmer* test. *See Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974). Petitioner has never once applied the four-part *Brimmer* test to show this Council how it has prudential standing for its Delegation Agreement claims. The reason being that Petitioner cannot meet the *Brimmer* test due to a lack of harm. As decided by the district court – any harm Petitioner has tried to allege is merely speculative which does not rise to standing under *Brimmer*. *See* Department’s Supp. Motion to Dismiss, Attachment A. As such, this Council must dismiss Petitioner’s Delegation Agreement claims for lack of standing.

### **III. Pursuant to Wyoming contract law, Petitioner lacks privity of contract.**

Petitioner attempts to cite to random cases from jurisdictions across the country to somehow support its standing to raise contractual claims without privity of contract. Pet’r’s Resp. to DEQ’s Supp. Motion to Dismiss, 11. Wyoming case law is clear that without privity of contract, a person does not have standing to litigate and enforce the terms of an agreement. Petitioner consistently keeps trying to raise issues that would be properly

enforced by Teton County, if Teton County truly felt the issues to be of concern. The Department has complied with Section 304 of the Act and entered into a contract with Teton County for the delegation of authority pursuant to Section 304. See Pet'r's First Amended Appeal of Notification of Coverage – Permit No. 2023-025, ¶ 33. Petitioner attempts to litigate before this Council, as some sort of guardian angel on the behalf of Teton County, that Teton County and the Department's cooperation is somehow disallowed by the terms of the Delegation Agreement. Petitioner, however, has not pled any facts that would demonstrate it has privity of contract.

Further, Petitioner's citation to the WAPA in support of its argument for standing to sue over the contract is again misguided. While the Department would gladly have this Council dismiss this case for a lack of jurisdiction, and allow Petitioner to proceed with any remedies available to it under the WAPA – at this juncture, the case is still pending before the Council, the administrative body. As such, the standard for judicial review from an administrative action is inapplicable to this Council. Under Wyoming law, Petitioner cannot sue to interpret and enforce the contract to which it is not a party. This Council must dismiss Petitioner's contractual claims for lack of standing.

#### **IV. This Council must dismiss Petitioner's WYPDES claims.**

The Department defers to its original arguments with respect to the WYPDES claims Petitioner attempts to bring in its appeal of an individual permit for a small wastewater system. Petitioner put forth no arguments in its Response that would overcome its failure to allege a point source discharge under the Act. Petitioner seems to hang its hat upon Chapter 3, Section 11 of the Water Quality Rules. Pet'r's Resp. to DEQ's Supp.

Motion to Dismiss, 13 (*quoting in part Rules, Wyo. Dep't of Env'tl. Quality, Water Quality*, ch. 3, § 11(a)(2)). Again, that provision of law is only applicable to the Department's ability to deny a "general permit" or coverage under a "general permit." *Rules, Wyo. Dep't of Env'tl. Quality, Water Quality*, ch. 3, § 11. Even if that provision was applicable, Petitioner again misquotes the law and the provision of Rule actually states the Department "may" deny coverage. *Id.* at 11(a). It is not required. *Id.* This similar provision of law does not exist in the Chapter 3 Water Quality Rules for the denial of individual permits, such as Permit 2023-025. *See Rules, Wyo. Dep't of Env'tl. Quality, Water Quality*, ch. 3, § 4. The way Chapter 3, and the Act, handle potential surface water violations from small wastewater systems is pursuant to Chapter 3, Section 13, the Department may suspend, revoke or terminate an individual small wastewater permit due to noncompliance with the Water Quality Rules or Environmental Quality Act. *See Rules, Wyo. Dep't of Env'tl. Quality, Water Quality*, ch. 3, § 13. Any suspension, termination or revocation could then be appealed to this Council for review. *Id.* For the reasons stated in its Supplemental Motion to Dismiss, and as further addressed in this Reply, the Council must dismiss Petitioner's surface water claims.

## CONCLUSION

Based on the plain language of Section 112, and the Court's analysis and holding in the *Wyoming Outdoor Council* case, this Council must look to other statutes and its own rules to establish its jurisdiction over appeal. The Council's Chapter 3 Water Quality Rules pertaining to small wastewater system permits are clear in that the Rule no longer provides interested persons with a right of appeal before this Council. With respect to Section 112,

when read in context with the remainder of the Act and its regulations, that provision of law does not create in the Council a court of general jurisdiction for any and all cases. This Council is thus without jurisdiction to hear this appeal.

The Council must recognize that a reasonable doubt as to the existence of its power to hear this case exists and the Council must be resolved against the exercise of jurisdiction when jurisdiction is not clear. *See Mayland v. Flitner*, 28 P.3d 838, 854 (Wyo. 2001), (citing *French v. Amax Coal West*, 960 P.2d 1023, 1027 (Wyo. 1998)) “A doubtful power does not exist.” *Id.* An agency does not have discretion in determining whether or not it has subject matter jurisdiction; subject matter jurisdiction either exists or it does not. *Amoco Production Co.*, 7 P.3d at 904. If the Council has any question or doubt as to its jurisdiction over this appeal in light of the Chapter 3 right of action for interested persons being repealed, this Council must dismiss Petitioner’s First Amended Appeal of Notification of Coverage Permit No. 2023-025 in its entirety, and allow the issue to be briefed and decided upon appeal.

At minimum, if this Council determines it has general jurisdiction, the Council must dismiss Petitioner’s claims with respect to the surface water discharges because the issue is not properly before this Council without a prior action by the Department. This Council can provide Petitioner with no relief on that issue. Further, the Council must dismiss Petitioner’s claims with respect to the Delegation Agreement issues due to a lack of standing.

Submitted this 18<sup>th</sup> day of September 2024.

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## APPENDIX A

### STATUTES

- **Wyo. Stat. Ann. § 16-3-113(a)** (Gives permit applicants the right to a contested case pursuant to WAPA);
- **Wyo. Stat. Ann. 35-11-211(d)** (“The operator may appeal the assessment to the Council [. . .].”);
- **Wyo. Stat. Ann. § 35-11-404(g)** (“Waivers shall be in writing and may be appealed [. . .].”);
- **Wyo. Stat. Ann. § 35-11-406(b)(x)** (“the applicant may request a hearing before the environmental quality council.”);
- **Wyo. Stat. Ann. § 35-11-406(b)(xii)** (“the applicant may request a hearing before the environmental quality act.”);
- **Wyo. Stat. Ann. § 35-11-406(o)** (“after opportunity for hearing”);
- **Wyo. Stat. Ann. § 35-11-406(p)(iii)** (“The applicant or objector may appeal the director’s written decision after an informal conference to the council”);
- **Wyo. Stat. Ann. § 35-11-406(q)(iii)** (“The applicant or objector may appeal the director’s written decision to the council.”);
- **Wyo. Stat. Ann. § 35-11-409(c)** (“Opportunity for a public hearing before the council shall be provided.”);
- **Wyo. Stat. Ann. § 35-11-414(e)** (“The decision of the administrator may be appealed through the director to the council.”);
- **Wyo. Stat. Ann. § 35-11-425(a)** (“Any person having an interest which is or may be adversely affected may petitioner the council [. . .].”);
- **Wyo. Stat. Ann. § 35-11-432** (“The decision of the administrator may be appealed through the director to the council.”);
- **Wyo. Stat. Ann. § 35-11-437** (“[. . .] if the operator or any person having an interest which is or may be adversely affected files a petition for review [. . .] The council shall [. . .] provide a public hearing, if requested.”).
- **Wyo. Stat. Ann. § 35-11-502(k)** (“Any interested person has the right to file written objection to the proposed permit [. . .] If substantial written objections are filed, a public hearing shall be held [. . .].”).
- **Wyo. Stat. Ann. § 35-11-502(n)(iv)** (“provided that any such permit shall be subject to appeal under the provisions of this act.”);
- **Wyo. Stat. Ann. § 35-11-515(k)** (“The director, subject to appeal to the council, [. . .].”);

- **Wyo. Stat. Ann. § 35-11-517(e)** (“The owner may appeal the assessment to the council [ . . . ]”);
- **Wyo. Stat. Ann. § 35-11-518(b)** (“any disputes concerning implementation of the order shall be resolved by appeal to the council as provided in this act.”);
- **Wyo. Stat. Ann. § 35-11-526(c)** (“The applicant or other interested party may appeal the administrator’s determination.”);
- **Wyo. Stat. Ann. § 35-11-601(g)** (“an aggrieved party as defined by this act in writing may request a hearing before the council.”);
- **Wyo. Stat. Ann. § 35-11-701(c)(ii)** (“Any order is final unless [ . . . ] the persons or persons named therein request, in writing, a hearing before the council.”).
- **Wyo. Stat. Ann. § 35-11-801(d)** (“Any aggrieved party may appeal the authorization as provided in this act.”).
- **Wyo. Stat. Ann. § 35-11-802** (“If the director refuses to grant any permit under this act, the applicant may petition for a hearing before the council to contest the decision.”);
- **Wyo. Stat. Ann. § 35-11-802** (“the person charged with the penalty shall [ . . . ] either: (i) pay [ . . . ]; or Petition the council for review [ . . . ].”);
- **Wyo. Stat. Ann. § 35-11-1611** (“If a person and the department are unable after good faith efforts to resolve a dispute arising under this article pursuant to the provisions of an agreement, the person may appeal the department’s decision to the council.”);
- **Wyo. Stat. Ann. § 35-11-1612** (“The owner of the eligible site may appeal the assessment to the council [ . . . ].”).

## **REGULATIONS**

- **Chapter 6, Section 7(a)(iii), Air Quality Rules** (“The Administrator’s decision issued as a result of the hearing may be appealed to the Environmental Quality Council in the manner set forth in the Environmental Quality Act [ . . . ]”);
- **Chapter 11, Section 2, Air Quality Rules** (incorporating federal right of appeal);
- **Chapter 1, Section 3 and 5, Hazardous Waste Rules** (incorporating federal right of appeal);
- **Chapter 2, Section 2, Solid Waste Management Rules** (If substantial written objections are received [ . . . ] a public hearing will be held [ . . . ].”);
- **Chapter 7, Section 15(h), Solid Waste Management Rules** (providing right to appeal under Wyo. Stat. Ann. § 35-11-515(k)”);
- **Chapter 10, Section 4(e)(iii), Solid Waste Management Rules** (providing right to appeal under Wyo. Stat. Ann. § 35-11-802);

- **Chapter 17, Section 4, Solid Waste Management Rules** (Denial of entry into the program is a final decision by the Administrator which can be contested to the Environmental Quality Council for a hearing pursuant to W.S. 35-11-112(a)(iii).”).
- **Chapter 13, Section 3 (c)(iv), Land Quality – Coal Rules** (“The applicant or objector may appeal the Director’s decision to the Environmental Quality Council in accordance with W.S. § 35-11-406(p).”)
- **Chapter 13, Section 4, Land Quality – Coal Rules** (“An operator may appeal the Administrator’s decision to the Environmental Quality Council in accordance with W.S. § 35-11-112(a)(iii).”).
- **Chapter 15, Section 2, Land Quality – Coal Rules** (Any affected person has the right to file written [ . . . ] objections [ . . . ] If written objections are filed, and public hearing requested, the Council shall hold a public hearing [ . . . ]”).
- **Chapter 7, Section 4, Land Quality Rules – Non Coal** (An operator may appeal the Administrator’s decision to the Environmental Quality Council in accordance with W.S. § 35-11-112(a)(iii).”).
- **Chapter 1, Section 44(b)(iii), Storage Tank Rules** (“Administrative Orders may be appealed to the Environmental Quality Council.”).
- **Chapter 1, Section 8(b), Practice and Procedure Rules** (“following an informal conference governed by Chapter 9, Section 2 of these rules, the applicant or any person with an interest that is or may be adversely affected may appeal the decision to the Council for a hearing [ . . . ]”).
- **Chapter 1, Section 44(b)(iii), Storage Tanks Rules** (“Administrative Orders may be appealed to the Environmental Quality Council.”).
- **Chapter 1, Section 49(c), Storage Tanks Rules** (“Revocation of licenses is a final department action subject to appeal to the Environmental Quality Council [ . . . ]”).
- **Chapter 4, Section 15(d), Uranium Recovery Rules** (“The final decision is subject to review by the Environmental Quality Council and judicial review in accordance with Wyoming law.”).
- **Chapter 2, Section 17, Water Quality Rules** (“In any case where the director makes a decision to issue, modify, or terminate a permit or storm water permit authorization, or where the director makes a decision to deny issuance of modification of a permit or storm water permit authorization, any interested person may request a hearing before the Environmental Quality Council.”).
- **Chapter 3, Section 12(b), Water Quality Rules** (“The modified permit is effective [ . . . ] unless within that time the permittee requests a contested case hearing before the Environmental Quality Council.”).

- **Chapter 3, Section 13(b), Water Quality Rules** (“The suspension, revocation, or termination is effective [ . . . ] unless the permittee requests a contested case before the Environmental Quality Council.”).
- **Chapter 5, Section 16(b), Water Quality Rules** (“The Administrator shall suspend or revoke an operator’s certificate by providing notice and an opportunity for hearing to the operator.”).
- **Chapter 9, Section 18, Water Quality Rules** (“The Administrator shall provide an opportunity for the applicant or any interested person to request a public hearing [ . . . ]”).
- **Chapter 20, Section 14(c)(ii), Water Quality Rules** (“The applicant may request a contested case hearing before the Environmental Quality Council [ . . . ]”).
- **Chapter 20, Section 18(d), Water Quality Rules** (“[ . . . ] the permittee shall request a hearing before the Environmental Quality Act [ . . . ]”).
- **Chapter 22, Section 7, Water Quality Rules** (“The final decision of the department may be appealed to the Environmental Quality Council [ . . . ]”).
- **Chapter 27, Section 7(a)(v), Water Quality Rules** (“Determinations of deficiency by the Department are appealable by the applicant to the Environmental Quality Council.”).
- **Chapter 27, Section 7(b), Water Quality Rules** (“A denial of the application by the department is appealable by the applicant to the Environmental Quality Council [ . . . ]”).
- **Chapter 27, Section 7(d)(ii), Water Quality Rules** (“Denials by the administrator may be appealed for hearing to the Environmental Quality Council.”).
- **Chapter 27, Section 21(j), Water Quality Rules** (“During the public comment period, any interested person [ . . . ] may request a public hearing.”).

## CERTIFICATE OF SERVICE

I, Abigail Boudewyns, hereby certify that on the 18th day of September 2024, I electronically filed the forgoing REPLY TO POWJH REPSONSE TO DEPARTMENT'S MOTION TO DISMISS AND SECOND 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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