

FILED

NOV 22 2022

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL OF THE STATE OF WYOMING

ENVIRONMENTAL QUALITY COUNCIL STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF PROTECT OUR WATER JACKSON HOLE FROM NOTIFICATION OF COVERAGE— PERMIT NO. 2022-274))))

Docket No. _____

APPEAL OF NOTIFICATION OF COVERAGE - Permit No. 2022-274

Protect Our Water Jackson Hole (Petitioner), by and through its undersigned attorney, submits this Notice of Appeal and Petition challenging the NOTIFICATION OF COVERAGE Teton Village Resort—Onsite Wastewater System Improvements Project, Permit No. 2022-274, Teton County, issued by the Department of Environmental Quality/Water Quality Division dated October 6, 2022, for failure to comply with the terms of the General Permit and violations of the Wyoming Environmental Quality Act the the DEQ’s water quality rules and regulations.

I. Name and Address of Petitioner and Petitioner’s Attorney.

Protect Our Water Jackson Hole P.O. Box 1014 Wilson, WY 83014

Petitioner is represented in this matter by Daniel Heilig, 9 Juniper Drive, Lander, WY 82520. Correspondence and information related to this Petition should be served on the undersigned counsel at the Lander address shown above.

II. Action Upon Which Hearing is Requested. Petitioner hereby appeals the issuance of the “NOTIFICATION OF COVERAGE, Teton Village Resort - Onsite Wastewater System Improvements Project, Permit No. 2022-274, Teton County, WY” issued by James Brough, P.E., Northwest District Engineer, Wyoming Department of Environmental Quality/Water Quality Division, dated October 6, 2022. Notification of Permit No. 2022-274 was published on the WDEQ’s website on October 28, 2022.

III. Statement of Facts and Specific Allegations.

Petitioners have standing to appeal this decision

- 1. W.S. § 35-11-801(d) provides that “[a]ny aggrieved party may appeal the authorization as provided in this act.”
2. W.S. § 35-11-112(a)(iv) authorizes the Environmental Quality Council (EQC) to “[c]onduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act.”
3. W.S. § 35-11-112(c)(ii) authorizes the EQC to “[o]rder that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.”

4. Protect Our Water Jackson Hole (POWJH) is a 501(c)(3) tax exempt, non-profit corporation registered in the State of Wyoming. Its mission is to serve as a powerful advocate for the protection of ground and surface waters in Teton County, Wyoming.
5. POWJH and its predecessor organization, Friends of Fish Creek, have invested heavily in efforts to restore and protect water quality in Fish Creek and its tributaries.
6. The operation of the onsite wastewater system contested herein will discharge pollutants — including E.coli— to Fish Creek and its tributaries, diminishing the use and enjoyment that Petitioners and its members and supporters enjoy and appreciate.
7. The WDEQ/WQD has determined that Fish Creek is impaired by concentrations of E.coli that exceed the quality standards for primary contact recreation contained in WQRR Chapter 1.
8. High concentrations of E.coli that exceed applicable water quality standards have diminished and negatively affected Petitioners' use and enjoyment of Fish Creek.
9. POWJH's members and supporters are adversely affected by the above-referenced permit and by the activities authorized thereunder, including but not limited to the construction and operation of a raised mound, pressure dosed commercial septic system in the headwaters of Fish Creek, a DEQ-designated Class 1 surface water that is heavily used year-round by Teton County residents and visitors alike for a variety of recreational, scenic, and aesthetic purposes.

The Temporary Use Permit

10. The Office of State Lands and Investments (OSLI) issued a Temporary Use Permit (TUP-03345) to Utah-based Mountain Ventures/Basecamp Hospitality, LLC ("Basecamp") on June 24, 2022, authorizing Basecamp to construct and operate "11 low-impact accommodations for single and multi-night vacation rental."
11. According to Basecamp's proposal to the OSLI, its development will include a "shower house trailers, a welcome center, retail/rental space, food offering, sauna, storage and maintenance shed, and small staff living quarters."
12. The TUP authorizes a number of other "improvements" on the site, including a septic system and leach field. Engineering drawings obtained by Petitioner show that a Public Water Supply well is planned on the property.
13. This complex of eleven geodesic domes and three prefabricated wood frame buildings is called Teton Village Resort, apparently a reference to the Jackson Hole Mountain Resort which lies a few miles to the north on Highway 390, the Teton Village Road.
14. Paragraph 8 of the TUP's General Conditions expressly requires Basecamp Hospitality, LLC, as the permittee, to "observe all state, federal and local laws and regulations."
15. The TUP issued by the OSLI granted the permittee the right to temporary occupancy and use of a small portion of land (OSLI Site 9) on a state trust section but expressly did not grant the permittee unfettered rights to construct and operate its geodesic dome hotel complex without permits required by federal, state and local regulations.

16. Basecamp began construction on the site soon after receiving the TUP, which included clearing and grading several acres and the partial installation of a raised-mound commercial wastewater system without first obtaining necessary permits and authorizations from the State of Wyoming and Teton County.

17. At some point following the commencement of construction activities on the parcel, the DEQ initiated conversations with Basecamp which ultimately led to the issuance of the contested permit in this dispute, Permit No. 2022-274.

18. In the process of reviewing Basecamp's September 16, 2022, application for a permit to construct an onsite wastewater system, the DEQ determined that the system is a commercial, i.e., non-residential, system, which is defined in the DEQ's rules as:

(c) "Commercial/industrial waste and wastewater facilities" means any facility not defined as a municipal or single family residence facility." See WQRR Chapter 11, Section 4.

The General Permit relied on by DEQ has expired

19. The contested authorization, Permit No. 2022-274, was issued under the following general permit:

GENERAL PERMIT

AUTHORIZATION TO CONSTRUCT, INSTALL, MODIFY OR OPERATE A SMALL WASTEWATER FACILITY IN ACCORDANCE WITH WYOMING WATER QUALITY RULES AND REGULATIONS CHAPTER 3, CHAPTER 11, AND CHAPTER 25.

20. The general permit was signed by the Administrator of the Water Quality Division on June 17, 2017, and by the Director of the DEQ on June 19, 2017.

21. The signature page of the general permit states: "This permit becomes effective on the date of issuance and shall be reviewed every five years, modified as needed and **reissued** in accordance with the Wyoming Water Quality Rules and Regulations Chapter 3, Section 7(c)." (emphasis added).

22. Chapter 3, section 12(d) of the DEQ's Water Quality Rules and Regulations (WQRR) provides that: "The Director shall review each general permit at least every five (5) years from the date of issuance, make modifications as needed, **and reissue** the general permit." (emphasis added).

23. The general permit relied upon by the DEQ to support the issuance of Permit No. 2022-274 has not been reissued.

24. Permit No. 2022-274 was issued on October 6, 2022, several months after the June 19, 2022, expiration of the general permit.

25. The DEQ maintains a website where it provides important and useful information to the public. A page on the website maintained by the Water Quality Division's water and wastewater section states that: "DEQ develops and issues a new general permit every 5 years for each of the four types of facilities listed below. The general permits were last issued June 19, 2017, and are valid until June 19, 2022." See <https://deq.wyoming.gov/water-quality/water-wastewater/permitting/general-permits/>. (emphasis added).

26. A permit that is valid until June 19, 2022, is invalid thereafter, and may not be used to authorize the system approved in Permit No. 2022-274.

27. The general permit that purportedly provided the basis for the issuance of the NOTIFICATION OF COVERAGE, Permit No. 2022-274 has expired and is therefore invalid, and any authorization made under the expired general permit is also invalid.

28. Without proper authorization from the DEQ, the onsite commercial wastewater system constitutes an un-permitted discharge of pollutants into ground and surface waters of the state in violation of the Wyoming Environmental Quality Act, § 35-11-301(a).

Violations of the terms and conditions of the general permit

29. Even if, for purposes of argument only, the general permit somehow remains valid after its June 19, 2022, expiration, the DEQ violated multiple terms and conditions of the general permit in the course of authorizing Permit No. 2022-274.

30. The DEQ improperly and unlawfully determined that it could issue Permit No. 2022-274 under the general permit despite terms and conditions in the general permit that explicitly exclude from coverage the type of wastewater system approved in Permit No. 2022-274.

- Systems that do not meet the definition of a small wastewater facility;
- Class V injection wells and facilities regulated by the Underground Injection Control Program under DEQ's WQRR, Chapter 27;
- Small wastewater facilities regulated by local governments in accordance with W.S. § 35-11-304;
- Facilities that have or are required to obtain an individual permit in accordance with WQRR Chapter 3; and,
- Facilities that do not meet the minimum design and construction standards of WQRR Chapter 25; or
- Facilities that should be covered under an individual permit.

31. The onsite system approved by DEQ in Permit No. 2022-274 is not a small wastewater system and therefore requires an individual permit.

32. The Wyoming Environmental Quality Act defines a small wastewater system to mean: "(ix) any sewerage system, disposal system or treatment works having simple hydrologic and engineering needs which is intended for wastes originating from a single residential unit serving no more than four (4) families or which distributes two thousand (2,000) gallons or less of domestic sewage per day;" W.S. § 35-11-103(c).

33. The wastewater system approved by DEQ under the general permit, Permit No. 2022-274, is an unconventional, raised-mound, pressure dosed system requiring advanced engineering and a continuous electric power supply. The system is located in the headwaters of Fish Creek, an E.coli impaired Class 1 surface water, in an area with a shallow water table where groundwater flows on the surface at certain times of year. It is clearly not a system with "simple hydrologic and engineering needs." Reliance on the general permit to authorize an unconventional system utilizing a raised sand mound and pressure dosing that requires a continuous electricity supply is unlawful under the Act, its implementing regulations, and the general permit itself.

34. When design flows are properly calculated, the septic system approved by Permit No. 2022-274 exceeds 2,000 gallons per day, triggering a requirement for an individual UIC Class V permit under WQRR Chapter 27.

35. In reaching its conclusion that Basecamp's wastewater facility is a "small" wastewater facility, the DEQ relied on design flows contained in WQRR Chapter 25, Section 5, Table 2, which displays "Non-Residential Wastewater Design Flow Rates." Based on an incomplete and erroneous understanding of the nature of water use and effluent flows at the geodesic dome hotel complex, the DEQ determined that the appropriate analog was "campground." Using the design flows displayed in Table 2, the DEQ then calculated that total effluent flows would be less than 2,000 gallons per day (gpd). As specified in W.S. §35-11-103(c), flows below 2,000 gpd are by definition considered small wastewater facilities.

36. The geodesic dome hotel complex under construction on the site is by definition not a "campground" and the DEQ's classification as such for purposes of calculating wastewater design flow rates is incorrect, and unlawful. See WQRR Chapter 11, Section 4(b).

37. The proper analog for this geodome hotel complex is "Motel/Hotel/Resort." Chapter 25, Section 5, Table 2. The higher design flows for these types of establishments — 140 gpd per bedroom— coupled with two employee housing units and the guest welcome center places the total in excess of 2,000 gpd.

38. Commercial wastewater systems that produce effluent exceeding 2,000 gpd are regulated as U.I.C. Class V injections under WQRR Chapter 27 and require an individual permit. Class V facilities, and facilities with design flow rates exceeding 2,000 gpd, may not be authorized under the GENERAL PERMIT, Part II.D. — Facilities Not Covered Under This Permit. The absence of a proper permit for the Basecamp wastewater system is unlawful, and constitutes a violation of W.S. § 35-11-301, and WQRR Chapters 3, 11, 25 and 27.

39. The Wyoming DEQ has granted to the Teton County Board of County Commissioners the authority to regulate small wastewater systems in Teton County pursuant to a delegation agreement under W.S. § 35-11-304. The plain terms of the general permit prohibit the DEQ from authorizing small wastewater systems in areas where small wastewater systems are regulated by a county government under a delegation agreement executed pursuant to W.S. § 35-11-304.

40. WQRR Chapter 11 contains design and construction standards for sewerage systems, treatment works, disposal systems and other facilities capable of causing or contributing to pollution, and standards for mobile home park and campground sewerage and public water supply distribution systems.

41. Part C of Chapter 11 contains additional specific requirements for commercial/industrial waste and wastewater facilities, including those specified in Section 25, quoted below:

"This part contains the minimum standards for the design and construction of commercial/ industrial wastewater facilities. The applicant shall demonstrate to the Administrator that any discharge or seepage from the wastewater facility will not cause a violation of the Surface and/ or Groundwaters of the State in accordance with Chapter 1, "Quality Standards for Wyoming Surface Waters" and Chapter 8, "Quality Standards for Wyoming Groundwaters." Due to the wide variety of wastes, wastewater and site conditions, the latest available scientific information shall be used to demonstrate that violations will not occur."

42. The DEQ's October 6, 2022, authorization under the general permit fails to ensure that "any discharge or seepage from the wastewater facility will not cause a violation of the Surface and/ or Groundwaters of the State in accordance with Chapter 1, "Quality Standards for Wyoming Surface Waters" and Chapter 8, "Quality Standards for Wyoming Groundwaters." The DEQ's failure to require compliance with this rule is a violation of Chapter 11 and otherwise is arbitrary and capricious, unlawful, and an abuse of discretion within the meaning of W.S. § 16-3-114(c).

The system approved by DEQ fails to meet required setbacks

43. Mandatory setbacks for commercial facilities are specified in WQRR Chapter 25, Section 19. "Commercial and Industrial Wastes and/or Domestic Wastes Greater Than 2000 Gallons per Day." Section 19 provides that: "(e) The minimum horizontal setback distances (in feet) shown in Table 7 shall be maintained for commercial and industrial wastes and/or wastes greater than 2000 gallons per day but less than 10,000 gallons per day." See Table 7. Minimum Horizontal Setbacks for Commercial and Industrial Wastes in Feet. The setback prescribed by the rule from surface water is 100 feet; from a public water supply well, the minimum setback is 500 feet.

44. Engineering drawings completed for Basecamp show that the raised-mound absorption field is 50 feet or less from a pond, well within the 100 foot setback from surface water required for commercial septic systems, and potentially within the 50 foot setback required for residential wastewater systems under WQRR Chapter 25, Section 7, Table 4.

45. Field observations confirm that the raised mound septic system has been constructed within the mandatory setback from surface waters, in violation of Chapter 25, Section 19.

46. Engineering drawings completed for Basecamp show that the raised-mound pressure dosed absorption field is approximately 280 feet from a public water supply well planned for the site, considerably less than the 500 feet separation distance required by DEQ's rules, in violation of Chapter 25, Section 19.

Violations of ground and water quality standards

47. Basecamp's wastewater facility is under construction in the headwaters of Fish Creek, a WDEQ-designated Class 1 surface water. Pursuant to Chapter 1, Appendix A, the entire Fish Creek drainage is designated Class 1, along with all adjacent wetlands.

48. A number of studies and reports show a hydrologic connection between ground and surface water in the Fish Creek drainage.

49. The regulatory objective for Class 1 surface waters is to protect and maintain water quality that existed at the time of designation. Chapter 1, Section 4 and Section 7.

50. The DEQ's October 6, 2022, authorization to permit the construction of the commercial wastewater facility without proper safeguards and best management practices violates WQRR Chapter 1 by failing to protect Class 1 surface waters and adjacent wetlands in the Fish Creek drainage.

51. The commercial septic system authorized by DEQ in Permit No. 2022-274 will introduce a variety of pollutants into ground and surface water and adjacent wetlands in the headwaters of Fish Creek, including E.coli, further exacerbating an existing E.coli impairment documented in the DEQ's combined 305(b)/303(d) water quality assessment (2020). The WDEQ's decision

allowing a discharge of E.coli and other dangerous pathogens into a tributary of Fish Creek is a violation of the Wyoming Environmental Quality Act and is unlawful agency action within the meaning of W.S. § 16-3-114(c).

IV. Request for Hearing. Petitioner hereby requests a hearing before the Environmental Quality Council and requests that the Council reverse and vacate the DEQ's decision to issue Permit No. 2022-274, and grant the Petitioner such relief as they are entitled to by law or regulation.

Respectfully submitted this 21st day of November, 2022.

Daniel Heilig (WSB No. 5-2872)

Dan Heilig

9 Juniper Dr.
Lander, WY
Phone: (307) 206-4144
Email: <heiliglaw@gmail.com>

Attorney for Petitioner Protect Our Water Jackson Hole

CERTIFICATE OF SERVICE

I certify that on the 21ST day of November, 2022, I served a true and correct copy of the foregoing by depositing the same in the U.S. Mail, Certified, Return Receipt Requested, postage prepaid and addressed to:

Todd Parfitt, Director
Department of Environmental Quality
200 West 17th St.
Cheyenne, WY 82002

Basecamp Hospitality, LLC
c/o Ryan Thomas
1616 Gooseneck Drive
Payson, UT 84651

Cogency Global, Inc.
Registered Agent
1912 Capitol Ave., Suite 500
Cheyenne, WY 82001

Dan Heilig

Dan Heilig