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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE APPEAL	)	
OF PROTECT OUR WATER	)	
JACKSON HOLE FROM	)	
PERMIT NO. 2023-025	)	**Docket No. 23-3801**

DEPARTMENT'S RESPONSE OPPOSING MOTION TO SUSPEND PERMIT

The Wyoming Department of Environmental Quality (Department), through the Attorney General's Office, asks the Environmental Quality Council to deny Protect Our Water Jackson Hole's (Petitioner) Motion to Suspend Permit Number 2022-025 (Permit). Petitioner has requested that the Council grant some form of equitable injunctive relief for which the Council has no authority to grant. As such, the Department requests the Council to deny Petitioner's Motion to Suspend the Permit.

Additionally, the Department requests clarification from the Council as to whether the hearing scheduled for November 17th will be an evidentiary hearing, or whether the Council will only hear arguments regarding the Council's authority to grant the requested relief.

BACKGROUND

On July 13, 2023, the Department issued the Permit to construct a sand mound septic system to Basecamp Teton WY SPV LLC (Basecamp). Pet'r's Appeal of Notification of Coverage – Permit No. 2023-025, Attachment E. In issuing the Permit, the Department determined the proposed sand mound septic system meets minimum applicable construction and design standards imposed by Wyoming statutes and the Department's regulations. *Id.* On August 11, 2023, Petitioner filed an appeal of the Department's decision to issue the Permit pursuant to Wyoming Statute § 35-11-801(d). Pet'r's Appeal of Notification of Coverage – Permit No. 2023-025, ¶ 1. On October 10, 2023, Petitioner filed its Motion to Suspend Permit.

ARGUMENT

Without citing direct authority, Petitioner asks this Council to "stay the effectiveness of, or suspend," the Permit pending the outcome of this appeal. Pet'r's Motion to Suspend Permit, page 1. Petitioner's broad request may be categorized as a request for two potential but similar types of relief: summary suspension of the Permit or injunctive relief. However, the Council lacks authority to grant a summary suspension or an injunction.

The Environmental Quality Act and the Wyoming Administrative Procedure Act reserve the power of permit suspension to the Department in enforcement actions. The Council's statutory role is to hear contested cases on any appeal of the Department's decision to suspend a permit. Furthermore, the Council has no authority to grant injunctive relief. Even if the Council did have authority to grant injunctive relief,

Petitioner has failed to clearly show it will succeed on the merits and that it will suffer irreparable injury if the injunctive relief is not granted. Finally, the Department is not judicially estopped from asserting the Council has no authority to suspend the Permit or provide injunctive relief.

A. The Environmental Quality Council lacks authority to summarily suspend the Permit during this appeal.

Petitioner asks the Council to summarily suspend Basecamp LLC's Permit. Agencies only have the powers granted to them by the legislature. *Amoco Prod. Co. v. State Bd. of Equalization*, 12 P.3d 668, 673 (Wyo. 2000). The legislature has not granted the Council authority to summarily suspend a permit in the first instance. Instead, the Council only has authority to review a permit suspended by the Department. As a creature of statute, the statute must provide an agency with its authority to act. *Id.*; *see also Pedro/Aspen, Ltd., v. Bd. of County Commr's for Natrona County*, 2004 WY 84, ¶ 29, 94, 94 P.3d 412, ¶ 29 (Wyo. 2004) (an agency is not a "super legislature" empowered to change statutes under the cloak of assumed delegated power). An agency is limited to the powers the Legislature chose to delegate and is "wholly without power to modify, dilute or change in any way the statutory provisions from which it derives its authority." *Platte Dev. Co. v. EQC*, 966 P.2d 972, 975 (Wyo. 1998). "[R]easonable doubt of the existence of a power must be resolved against the exercise thereof. A doubtful power does not exist." *Mayland v. Flitner*, 28 P.3d 838, 854 (Wyo. 2001), *citing French v. Amax Coal West*, 960 P.2d 1023, 1027 (Wyo. 1998).

The Department Director, not the Council, has the authority to suspend permits. The Environmental Quality Act and the regulations promulgated pursuant to that Act outline a process by which a permit may be suspended. By law, the Director of the Department shall "[i]ssue, deny, amend, suspend or revoke permits and licenses [. . .]" Wyo. Stat. Ann. § 35-11-109(a)(xiii); see also Wyo. Stat. Ann. § 35-11-110 (administrator recommends to the director the "suspension [. . .] of permits and licenses"). Chapter 3, Section 13 of the Department's regulations explicitly addresses how the Department may suspend a wastewater permit. Chapter 3, Section 13 provides six reasons for which the Director, "may suspend [. . .] an individual permit." Section 13 goes on to provide a permittee with procedural due process by stating that if the Director chooses to suspend a permit, a permittee is required to be notified in writing of the Director's intent to suspend a license and the specific reason for the proposed suspension. Chapter 3, Section 13(a). The suspension is then effective twenty days after the permittee receives the Director's notice of suspension, unless the permittee requests a contested case hearing before the Council. Chapter 3, Section 13(b).

Petitioner's request also ignores Basecamp's due process rights. The Wyoming Administrative Procedure Act places procedural due process requirements on the Department with respect to any permit suspended by the Department. The Act, defining a license to include any permit issued by a state agency, states that:

> [N]o revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show conduct which

> warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.

Wyo. Stat. Ann. §§ 16-3-101 and 133. The Act goes on to state that an agency may only order "summary suspension" of a license, pending proceedings for revocation or other action, upon a finding by the agency that public health, safety or welfare imperatively require emergency action. Wyo. Stat. Ann § 16-3-133(c). Here, Petitioner asks the Council to violate Basecamp's due process rights by suspending Basecamp's Permit in an action to which Basecamp is not even a party. Such an action would violate the Wyoming Administrative Procedure Act.

The statutory role of the Environmental Quality Council is to "act as the hearing examiner for the department," and to "hear and determine all cases or issues arising under the law, rules, regulations, standards or orders issued or administered by the department." Wyo. Stat. Ann. § 35-11-112(a). In its role as the hearing examiner for the Department, statute requires the council to specifically conduct hearings, "contesting the [. . .] suspension [. . .] of any permit [. . .] authorized or required by [the Environmental Quality Act]." Wyo. Stat. Ann. § 35-11-112(a)(iv). Statute also outlines the various actions the Council may take at the conclusion of a contested case. With respect to the appeal of a permitting action by the Department, the Council may "order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified[.]" Wyo. Stat. Ann. § 35-11-112(c)(ii). In a previous case, the Council recognized its role in permit suspensions when it held:

> A permit "suspension" is the outcome of a contested case proceeding in which an existing permit is suspended as a consequence of a finding that the

> permittee has violated the terms of its permit. A "suspension" is not the temporary cessation or delay granted at the request of a third party. This Council does not have the authority to suspend a permit on the grounds that an appeal is pending.

In the Matter of: Basin Electric Power Cooperative Dry Fork Station Air Permit CT-4631, EQC Docket No. 07-2801 (2008).

Wyoming law provides for a specific process by which a permit may be suspended, and that process cannot be changed or upended by a unilateral action of the Council. Petitioner attempts to shoehorn its request for a "stay" with the Council's statutory power to order a permit "suspension" following an enforcement action by the Department to suspend a permit. The Council, however, does not have the power to independently enforce the Environmental Quality Act in the first instance. That power is reserved to the Department, and in exercising that power, the Department must afford the Permittee the procedural due process outlined in the Environmental Quality Act and Administrative Procedure Act. The Council's job is to serve as the independent hearing examiner for any appeal of a permit suspension initiated by the Department. This delineation of duties provides a permittee with the requisite procedural due process.

B. The Council lacks authority to grant a preliminary injunction.

In its motion, Petitioner also requested a "stay, as a form of preliminary injunctive relief," without citing to any law authorizing the Council to grant injunctive relief. For clarification, a "stay" is not a form of "preliminary injunctive relief." A "stay" is, "the postponement or halting of a proceeding, judgment, or the like," or "an order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." *Stay*,

Black's Law Dictionary (10th ed. 2009). Actions for injunctive relief are specifically authorized by Wyoming Statutes §§ 1–28–101 et seq.. Injunctions are essentially, "requests for equitable relief which are not granted as a matter of right but are within the lower court's equitable discretion." *Weiss v. Pedersen*, 933 P.2d 495, 498 (Wyo.1997) (overruled on other grounds by *White v. Allen*, 2003 WY 39, 65 P.3d 395 (Wyo.2003)). Injunctive relief pursuant to Title 1 of the Wyoming statutes is a form of equitable relief available to only "the district court or a judge thereof, or in the absence from the county of the judge, by the court commissioner of the county[. . .]." Wyo. Stat. Ann. § 1-28-103. A preliminary injunction, specifically, is a remedy available to parties litigating in Wyoming district courts through Rule 65 of the Wyoming Rules of Civil Procedure. Rule 65 allows a party to request from a district court a preliminary injunction or temporary restraining order in accordance with the specific requirements of Rule 65.

While Wyoming courts have the authority to grant injunctive relief in proper cases, the Council does not. As an administrative body, the Council, "has no inherent or common-law powers," but rather, "has only the power and authority granted by the constitution or statutes creating the same[.]" *Tri-County Elec. Ass'n v. City of Gillette*, 525 P.2d 3, 8 (Wyo. 1974). As a result, the Council has no general authority to grant equitable relief.

Further, the Council has not adopted Rule 65 of the Wyoming Rules of Civil Procedure. Wyoming Statute § 35-12-112(f) requires the Council to conduct all hearings in accordance with the Wyoming Administrative Procedure Act. The Wyoming Administrative Procedure Act itself has only incorporated certain rules of the Wyoming

Rules of Civil Procedure. *See* Wyo. Stat. Ann. § 16-3-107(g) (incorporating Rules 26, 28 through 37 (excepting Rule 37(b)(1))). The Administrative Procedure Act requires agencies to adopt uniform rules on contested cases. Wyo. Stat. Ann. § 16-3-103(j). The Council adopted the uniform contested case rules when it enacted Chapters 1 and 2 of its Practice and Procedure rules. Chapter 2, Section 2 and Section 26 specifically incorporate Rules 11, 12(b)(6), 24, 45, 52, 56, and 56.1 of the Wyoming Rules of Civil Procedure. The Council's contested case rules do not incorporate Rule 65 of the Wyoming Rules of Civil Procedure. Without expressly incorporating Rule 65 in its rules, the Council has no mechanism or authority by which to grant Petitioner a preliminary injunction pursuant to Rule 65. *See Painter v. Abels*, 998 P.2d 931, 938 (Wyo. 2000) (stating that "[a]n administrative agency is bound to strictly follow its own rules and regulations.")(citation omitted).

To support its request for a preliminary injunction, the Petitioner cites cases from the Ninth Circuit and Wyoming Supreme Court. However, those cases are not applicable to this action before the Council because both cases were before Courts who have adopted Rule 65 of the Wyoming Rules of Civil Procedure, or its federal equivalent. Petitioner has cited no provision of law authorizing the Council to grant injunctive relief.

C. Even if the Council could grant injunctive relief, Petitioner is not entitled to a preliminary injunction.

The Petitioner is not entitled to the extraordinary remedy of a preliminary injunction. As recently as 2021, the Wyoming Supreme Court summarized and applied the current law on preliminary injunctions. *Brown v. Best Home Health and Hospice,*

LLC, 491 P.3d 1021,1026 (Wyo. 2021). In that case, the Court stated that a preliminary injunction is an "extraordinary remedy," which will not be granted unless the Petitioner provides a "clear showing" of 1) "probable success on the merits of the suit," and 2) "possible irreparable injury to the plaintiff," *Brown* at 1026 (Wyo. 2021)(*citing BM Geosolutions, Inc. v. Gas Sensing Technology Corp.*, 215 P.3d 1054, 1057 (Wyo. 2009) (citing *Weiss v. State ex rel. Danigan*, 434 P.2d 761, 762 (Wyo. 1967)). While Petitioner is correct that the purpose of a preliminary injunction is to preserve the status quo, that purpose is balanced by a need for a court to protect the freedom of the defendant if no wrong has been committed. *Id.* The Court in *Brown* stated that "preliminary injunction rests upon an alleged existence of an emergency, or a special reason for such an order, before the case can be regularly heard." *Id.*

Petitioner has not clearly shown that it will have probable success on the merits of the suit. First, with respect to the Delegation Agreement, the Department had authority to issue the permit pursuant to the Delegation Agreement. Second, even if the Department lacked that authority, Petitioner does not have standing as a wholly unaffiliated third party to challenge the Department's or Teton County's performance under the Delegation Agreement. Third, the Department was not required to obtain a formal wetlands delineation from the U.S. Army Corps of Engineers. Fourth, Petitioner has not clearly shown that it will suffer possible irreparable injury. Finally, the relief sought by Petitioner cannot be accomplished by a preliminary injunction because the party against whom the injunction is sought is not a party to this action.

1. The Department had authority to issue the Permit.

Even though Petitioner failed to raise the issue during public comment on the Permit, or specifically allege the issue in its Appeal of Notification of Coverage, Petitioner now argues the Department lacked authority to issue the Permit. According to Petitioner, the Department lacked authority to issue the Permit because it delegated that authority to Teton County. However, the Department did have authority to issue the Permit.

The Department's delegation to Teton County was not absolute. Wyoming Statute § 35-11-304(a) only requires the State to delegate authority, "to the extent requested by," a local county. Teton County has not established an equivalent discretionary environmental monitoring program that the Administrator determined to be appropriate for the Permit. *See* Pet'r's Appeal of Notification of Coverage, Attachment E, permit conditions 5, 7, 8, 9, 10, and 11. Further, a local county's permitting procedures must only be "as stringent as," not the same as, the State's permitting procedures as found in Chapter 3 of the Department's Water Quality regulations in order to receive delegated authority. Wyo. Stat. Ann. § 35-11-304(a)(iii).

Teton County chose not to incorporate Chapter 3 in its entirety and chose not to adopt an equivalent Chapter 3, Section 14, which allows for a broader and more stringent discretionary monitoring program. Chapter 3, Section 14 of the Department's Water Quality Regulations states:

> As determined by the Administrator, whenever a facility may cause, threaten, or allow the discharge of any pollution or wastes into Waters of the State or may alter the physical, chemical, radiological, biological or bacteriological

> properties of any Waters of the State, the permittee shall develop and implement an environmental monitoring program.

Teton County only adopted a limited monitoring program when required by a State or local approved water quality management plan or systems not covered by the local rules. See Teton County Small Wastewater Facility Regulations, Section 9-2-15. The State issued the Permit, in cooperation with Teton County, to better protect the State's water quality because Teton County does not have the same authority to impose the more stringent monitoring conditions the State placed on the permit pursuant to Chapter 3, Section 14. See Pet'r's Appeal of Notification of Coverage, Attachment E, permit conditions 5, 7, 8, 9, 10, and 11; See also Pet'r's Motion to Suspend Permit, Ex. A, ¶ 3.

2. Petitioner lacks standing to challenge any perceived breach of the Delegation Agreement.

Even if the Department issued the Permit in violation of Wyoming Statute § 35-11-304 and its Delegation Agreement with Teton County, Petitioner lacks standing to enforce the Delegation Agreement. In *Brimmer v. Thomson*, the Wyoming Supreme Court adopted a four-part test for standing:

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

> major issues. Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution.

Allred v. Bebout, 409 P.3d 260, 270 (Wyo. 2018) (quoting *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974).) The First element of the *Brimmer* test requires a "tangible interest which has been harmed." *William F. West Ranch v. Tyrrell*, 206 P.3d 722, 726 (Wyo. 2009). A "tangible interest" is not an interest that is "indistinguishable from that which could be raised by any citizen of Wyoming." *Jolley v. State Loan & Inv. Bd.*, 38 P.3d 1073, 1078 (Wyo. 2002). "Claims of injury of a broad and general nature are not sufficient to demonstrate that [a party] was aggrieved or adversely affected in fact." *Id.* As recently as 2018, the Wyoming Supreme Court held that no case law in Wyoming granted standing to a party who had no more interest in the matter than that of any citizen. *Allred* at 273.

Petitioner has failed to assert any tangible harm it suffered by the Department issuing the permit instead of Teton County. In fact, the Department's issuance of the permit, which allowed for the more stringent monitoring program pursuant to Chapter 3, Section 14 of the Department Water Quality Regulations, actually benefits Petitioner. Had Teton County permitted the septic system, it could not have imposed the more stringent monitoring program. Further, the Supreme Court has explicitly stated that broad and general claims of injury are not sufficient to demonstrate that a party has been aggrieved in fact. The general environmental harm Petitioner alleges in the granting of the Permit does not amount to a tangible injury in fact. Finally, Petitioner alleges no harm

that would give it more interest in the matter than that of any citizen in Wyoming concerned about potential groundwater pollution.

By failing to properly assert a harm to a tangible interest, Petitioner cannot meet the remaining three elements of the *Brimmer* test. For the second element of the *Brimmer* test, "if a plaintiff fails to allege that an interest has been harmed, a judicial decision cannot remedy a nonexistent harm." *Allred* at 273 (*quoting Village Road Coalition v. Teton Cnt'y Housing Authority*, 298, P.3d 163, 169 (Wyo. 2013). For the third element of the *Brimmer* test, if a party has not asserted either an "injury or redressability," then it also cannot have a judgement affect the "rights, status or other legal relationships of one or more of the real parties in interest." *Allred* at 276 (*quoting Brimmer* at 578). Finally, with respect to the fourth element of the *Brimmer* test, when a party fails to allege injury or redressability, the controversy cannot be "genuinely adversary in character and not a mere disruption." *Id.* Petitioner fails to meet any of the elements of the *Brimmer* test and thus lacks standing. Without standing, Petitioner cannot challenge whether the Department wrongly issued the permit in violation of the Delegation Agreement.[1]

[1] Additionally, "[i]t is well settled that in no case can a stranger to a contract maintain an action upon it, or for the breach of it [. . .].'" *Mountain West Farm Bureau Mut. Ins. Co. v. Hallmark Ins. Co.*, 561 P.2d 706, 710 (Wyo 1977) (*quoting McCarteney v. Wyoming National Bank*, 1 Wyo. 386, 391 (1877)). Petitioner is not a party to the Delegation Agreement between Teton County and the Department and therefore has no enforceable rights under the agreement.

3. The Department was not required to obtain a formal wetlands delineation prior to issuing the Permit.

Petitioner also argues that the Department wrongly issued the Permit because it failed to obtain a formal wetlands delineation from the U.S. Army Corps of Engineers. Petitioner, however, cites no provision of law that requires the State or any permittee to obtain a formal wetlands delineation from the U.S. Army Corps of Engineers. Further, Petitioner could have provided information during public comment that the Department misidentified the potential wetlands, but instead submitted a wetland delineation that aligned with the wetland delineation submitted by the Permittee, both of which were relied upon by the Department. See Pet'r's Appeal of Notification of Coverage, Attachment F at page 13. With the facts being undisputed regarding the wetland delineation, Petitioner's only argument is whether the Department was required to obtain a formal delineation from the U.S. Army Corps of Engineers prior to issuing the permit. No provision of law requires the Department to obtain a formal wetland delineation, therefor Petitioner is not likely to have success on the merits of its claim.

4. Petitioner has not clearly shown that it will suffer possible irreparable injury.

Petitioner fails to show how it will suffer possible irreparable injury by the installation and future use of a brand new, state-of-the art, septic system. First, Petitioner provides zero evidence that the brand new septic system will fail. Petitioner also provides the Council no evidence that the septic system is even operational. A septic system cannot fail if it is never used. Further, Petitioner provides no evidence that even if the septic system fails, that any leaching from the septic system into the groundwater will

contaminate groundwater. Finally, Petitioner, again, provides no evidence that any potential groundwater contamination will rise to such a level as to cause possible irreparable injury to Protect Our Water Jackson Hole. Citing only broad general environmental harm, without a demonstration that the septic system is operational or will become operational during the pendency of this action, fails to provide the requisite clear showing to this Council that Petitioner will suffer a possible irreparable harm during the pendency of this action.

Further, any preliminary injunction issued by the Council would not prevent any perceived irreparable harm because Petitioner has not asked the Council to enjoin an activity conducted by the Department. The relief Petitioner actually seeks is to enjoin Basecamp from constructing or discharging under the Permit issued by the Department. Rule 65 of the Wyoming Rules of Civil Procedure, however, only allows a court to enjoin a party to the action, or its officer, agent, servant, employee or attorney, or a person in active concert with either of the parties. See Rule 65(d)(2)(C). Basecamp does not fall into any of the categories enumerated in Rule 65. Basecamp is a permitee who operates entirely independent and has no other association with the Department. If Petitioner would like to enjoin Basecamp from discharging into its small wastewater system, that remedy must be pursued through an action separate from the administrative permit appeal presently before this Council.

D. The Department cannot be judicially estopped from arguing the Council lacks authority to suspend a permit.

Petitioner argues that the doctrine of judicial estoppel prevents the Department from arguing that the Council lacks the authority to issue a suspension or injunction. Judicial estoppel is a doctrine that binds parties to their judicial declarations in previous proceedings involving the same issue and parties. *Wright v. Wright*, 344 P.3d 267, 273 (Wyo. 2015). The Wyoming Supreme Court has repeatedly stated that the doctrine is to be applied narrowly. *See Baker v. Speaks*, 295 P.3d 847 (Wyo. 2013); *Robertson v. TWP, Inc.*, 656 P.2d 547 (Wyo. 1983). Judicial estoppel is only to bar changing positions of fact and does not apply to legal conclusions based upon facts. *See Allen v. Allen*, 550 P.2d 1137 (Wyo. 1976); *See also City of Gillette v. Hladky Const., Inc.*, 196 P.3d 184 (Wyo. 2008). Moreover, a party "may not contradict [judicial declarations in prior proceedings] in a subsequent proceeding involving the same issues and parties [. . .]." *Wright v. Wright*, at 273. The party arguing for the existence of judicial estoppel has the ultimate burden of showing how the other party has taken an inconsistent position. *Matter of Parental Rights to ARW*, 716 P.2d 353, 356 (Wyo. 1986), *overruled on other grounds by Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998). Additionally, the Court maintains the freedom to not invoke judicial estoppel at its own discretion if it determines the ends of justice requires it so. *Baker v. Speaks*, 295 P.3d 847 (Wyo. 2013).

Petitioner argues that the Department's non-opposition to a stay in a different appeal prevents the Department from arguing here that the Council lacks authority to grant an injunction. In the Big Horn LLC case cited by Petitioner, the Department issued

a permit renewal to Big Horn LCC that modified material terms of the original permit. *See In the Matter of: Petitioner Big Horn LLC Permit No. WYW0027731*, EQC Docket No. 21-3601, Pet'r's Appeal of Discharge Permit Renewal and Request for Stay. Big Horn LLC appealed its own permit renewal objecting to some of the modified permit terms. *Id.* The Department did not oppose Big Horn LLC's request to operate under the old permit and due to the "unique circumstances" supported the requested stay. *See Id.* at Dep't's Notice of Nonopposition to Pet'r's Request for Stay. Subsequently, the Department and the permittee came to an agreement that the permit renewal needed to be reconsidered and Big Horn LLC and the Department requested a stay of the proceedings pending a permit modification to be issued by the Department of the renewed permit. *See Id.* at Joint Status Report and Request for Stay. The Department and Big Horn LLC then filed a Stipulated Motion to Dismiss with Prejudice once the modified permit renewal had been issued to Big Horn LLC. *See Id.* at Stipulated Motion to Dismiss with Prejudice.

The situation in Big Horn LLC could not be any different from this case. First, the Department's non-opposition to a stay in the Big Horn LLC case involved different issues and different parties. Second, the Department made no affirmative statement regarding the Council's authority to order the stay. *See Id.*, at Dep't's Notice of Nonopposition to Pet'r's Request for Stay. Even if the Department had made such a statement, the statement would be a legal conclusion and not a factual assertion to which the Department would be bound in this matter. Finally, as discussed above, the Department has every right under the Environmental Quality Act to initiate a permit suspension and to utilize other tools at its disposal to enforce the Environmental Quality

Act. In this case, unlike the case in Big Horn LLC, the Department and the permitee agree that the Permit should remain in effect and should not be suspended or enjoined by the Council.

CONCLUSION

For the foregoing reasons, the Department asks the Council to deny Petitioner's Motion to Suspend Permit. Additionally, the Department requests clarification from the Council as to whether the hearing scheduled for November 17th will be an evidentiary hearing, or whether the Council will only hear arguments regarding the Council's authority to grant the requested relief. The Department respectfully requests that the hearing be limited to legal arguments related to the Council's authority to grant the requested relief.

Submitted this 24th day of October 2023.

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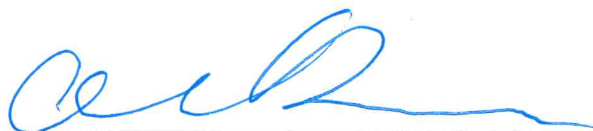
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2023, I electronically filed the forgoing with the Environmental Quality Council and served all parties using the Environmental Quality Council's electronic notification. Basecamp was served via U.S. Mail at:

Basecamp Teton WY SPV LLC
LEGALINC CORPORATE SERVICES INC.
5830 E 2nd St. Suite 8
Casper, WY 82609 USA



Abigail Boudewyns
State of Wyoming – Attorney General