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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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**DEPARTMENT’S MOTION TO DISMISS**

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The Wyoming Department of Environmental Quality (Department), through the Attorney General’s Office, moves to dismiss claims made by Protect Our Water Jackson Hole (Petitioner) relating to enforcement of provisions of a January 25, 2018, delegation agreement between Teton County and the Department (Delegation Agreement) and the Department’s perceived lack of authority to issue Permit No. 2023-025 (Permit) for lack of standing and failure to state a claim upon which the Council can provide relief.

**BACKGROUND**

**A. Procedural History**

This matter involves an appeal of the Department’s issuance of an individual permit to construct a sand mound septic system to Basecamp Teton WY SPV LLC (Basecamp) on July 13, 2023. Pet’r’s Appeal of Notification of Coverage – Permit No. 2023-025, Attachment E. In issuing the permit, the Department determined the proposed

sand mound septic system meets minimum applicable construction and design standards imposed by Wyoming statutes and Department regulations. *Id.*

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

For the first time, on October 10, 2023, Petitioner raised arguments pertaining to the Delegation Agreement and the Department's perceived lack of authority to issue the permit in its Motion to Suspend Permit. The Department made both Petitioner and the Council aware of Petitioner's failure to plead issues related to the Delegation Agreement and authority to issue the Permit in its October 24, 2023, Response Opposing Motion to Suspend Permit. (p.10). Despite being notified that it had failed to allege any claims related to the Delegation Agreement, Petitioner continues to inappropriately raise such claims in its Reply to Department's Response Opposing Motion to Suspend Permit, and during the November 17, 2023, Council hearing on Basecamp's Motion to Intervene. Further, over a month following notification by the Department of Petitioner's failure to plead claims related to the Delegation Agreement, and as of the date of this filing, Petitioner has failed to amend its complaint to specifically allege any claims related to the Delegation Agreement or the Department's authority to issue the Permit.

## **B. Delegation Agreement**

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

## **LEGAL STANDARD**

Chapter 2 of the Department’s Rules of Practice and Procedure specifically incorporates Rule 12(b)(6) of the Wyoming Rules of Civil Procedure, which allows a court to dismiss an action brought for failure to state a claim upon which relief can be granted. Dismissal is only appropriate “when it is certain from the face of the complaint that the plaintiff cannot assert any facts which would entitle him to relief.” *Wyoming Guardianship Corp. v. Wyoming State Hosp.*, 428 P.3d 424, 432 (Wyo. 2018) (quoting *Herrig v. Herrig*, 844 P.2d 487, 490 (Wyo. 1992)).

“Standing is a jurisprudential rule of jurisdictional magnitude.” *Matter of Adoption of L-MHB*, 431 P.3d 560, 568 (Wyo. 2018) (quoting *Heinemann v. State*, 413 P.3d 644, 647 (Wyo. 2018)). If a party “lacks standing under the statute at issue, their ‘claim should be dismissed for failure to state a claim upon which relief can be granted, not for lack of subject matter jurisdiction.’” *Id.* at 567 (quoting *Roberts v. Hamer*, 655

F.3d 578, 581 (6<sup>th</sup> Cir. 2011)). ““A party generally has standing if it is “properly situated to assert an issue for judicial determination.””” *Matter of Phyllis v. McDill Revocable Trust*, 506 P.3d 753, 762 (Wyo. 2022) (quoting *Matter of Est. of Stanford*, 448 P.3d 861, 864 (Wyo. 2019), *Gheen v. State ex rel. Dep’t of Health, Div. of Healthcare Financing/EqualityCare*, 326 P.3d 918, 923 (Wyo. 2014), and *Cox. V. City of Cheyenne*, 79 P.3d 500, 505 (Wyo. 2003)).

## **ARGUMENT**

The Council should dismiss Petitioner’s claims related to the Delegation Agreement and any perceived lack of authority by the Department to issue the Permit pursuant to the Delegation Agreement and Wyo. Stat. § 35-11-304 for lack of standing and failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Wyoming Rules of Civil Procedure. Even though Petitioner never formally plead the issue of the Delegation Agreement in its Appeal of Notification of Coverage – Permit No. 2023-025, Petitioner is now clearly attempting to raise such issues before the Council. *See* Motion to Suspend Permit; Reply in Support of Motion to Suspend Permit; and November 17, 2023, Hearing on Basecamp’s Motion to Intervene.

Petitioner, however, cannot bring these claims before the Council due to a lack of standing. The Wyoming Supreme Court has identified two types of standing: prudential and statutory. *Matter of Phyllis v. McDill Revocable Trust*, 506 P.3d at 762 (Wyo. 2022) (citing *Matter of Est. of Stanford*, 448 P.3d 861, 864 (Wyo. 2019)). Petitioner lacks both statutory and prudential standing to bring before the Council claims against the Department regarding the Delegation Agreement.

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

No statute provides Petitioner with a right to bring a declaratory action before the Council to enforce the terms and conditions of a contract, to determine whether the Department complied with Wyo. Stat. § 35-11-304, or to interpret the contract. Statutory standing “looks to whether ‘this plaintiff’ has a cause of action under [the subject] statute.” *Matter of Phyllis v. McDill Revocable Trust*, 506 P.3d at 762 (quoting *Matter of Est. of Stanford*, 448 P.3d 861, 864 (Wyo. 2019), *In re L-MHB*, 431 P.3d 560, 567 (Wyo. 2018), and *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 n.2 (1998)). In Wyoming, declaratory judgment actions must be brought in accordance with the Uniform Declaratory Judgements Act. *See* Wyo. Stat. § 1-37-101 et seq. Further, any claim brought under the Environmental Quality Act alleging the failure of the Department to perform any act or duty under this act which is not discretionary must be brought in the District Court for Laramie County. *See* Wyo. Stat. § 35-11-904(a)(ii).

Petitioner cites the following authority for its appeal: “W.S. § 35-11-801(d) provides that ‘[a]ny aggrieved party may appeal the authorization as provided in this act.’” August 11, 2023, *Appeal of Notification of Coverage – Permit No. 2023-025* at 2. Petitioner, however, misleadingly failed to include the entirety of Section 801(d). Section 801(d) in its entirety provides that such appeal only applies to general permits:

(d) General permits shall be issued solely in accordance with procedures set forth by regulation adopted by the council. Procedures for the issuance of general permits shall include public notice and an opportunity for comment. All department authorizations to use general permits under this section shall be available for public comment thirty

(30) days. Any aggrieved party may appeal the authorization as provided in this act.

Wyo. Stat. § 35-11-801(d). Section 801(d) only authorizes an appeal of a general permit, not an individual permit, such as the Permit at issue in this case. *Id.* Section 801(d) also does not authorize Petitioner to appeal the Department’s administration of a contract, nor does the law authorize the Council to determine whether the Department properly entered into the Delegation Agreement pursuant to Wyo. Stat. § 35-11-304, or to generally interpret the contract. *See id.*

Finally, even the Council’s own power to “hear and determine all cases” is limited to those “cases and issues arising under the laws [. . .] administered by the [D]epartment.” 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)) (alteration added).

The Delegation Agreement issue Petitioner attempts to bring before the Council is essentially a declaratory judgment claim that this Council is without jurisdiction to hear under Wyo. Stat. § 35-11-112. *See also*, Wyo. Stat. § 1-37-101 et seq. (Wyoming Uniform Declaratory Judgments Act, which generally vests the courts—not this

Council—with the interpretation of contractual rights and obligations, as well as the validity of said contracts.).

Without jurisdiction to determine the interpretation or validity of the Delegation Agreement, this Council cannot provide Petitioner with the remedy it seeks—revocation of the permit. *See* Wyo. Stat. Ann. § 36-11-112(c). As such, Petitioner lacks statutory standing to bring its appeal attempting to challenge the Delegation Agreement.

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

Petitioner also lacks prudential standing to raise issues pertaining to the Delegation Agreement before the Council. Prudential standing requires application of the *Brimmer v. Thomson* test, wherein the Wyoming Supreme Court adopted a four-part test for standing:

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

*Allred v. Bebout*, 409 P.3d 260, 270 (Wyo. 2018) (quoting *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974).) 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, 731

(Wyo. 2009). A “tangible interest” is not an interest that is “indistinguishable from that which could be raised by any citizen of Wyoming.” *Jolley v. State Loan & Inv. Bd.*, 38 P.3d 1073, 1077 (Wyo. 2002). “Claims of injury of a broad and general nature are not sufficient to demonstrate that [a party] was aggrieved or adversely affected in fact.” *Id.* (quotation omitted) (alteration added). 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.

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

Petitioner cannot attempt to enforce the Delegation Agreement between the State of Wyoming and Teton County, to which Petitioner is not a party. While *Brimmer* is the generic test for prudential standing, the Wyoming Supreme Court has acknowledged that it has applied prudential standing principles even when not labeled as such. *In re L-MHB*, 431 P.3d at 567 (Wyo. 2018). One example given by the Court is when it conducted a prudential standing analysis, but employed principles of contract interpretation to determine if the party had a cause of action. *Id.* (citing *Essex Holding, LLC v. Basic Properties, Inc.*, 427 P.3d 708, 721-722 (Wyo. 2018)). A long-standing rule in Wyoming has been that a non-party to a contract has no standing to bring a claim concerning that contract. *Southwestern Public Service Co. v. Thunder Basin Coal Co.*, 978 P.2d 1138, 1144 (Wyo. 1999) (citing *Central Contractors Co., Inc. v. Paradise Valley Utility Co.*, 634 P.2d 346, 348 (Wyo. 1981)). Privity of contract is an essential element for a cause of action on a contract. *Central Contractors Co., Inc.* at 348. It is well settled that in no case



can a stranger to a contract maintain an action upon it, or for the breach of it [. . .].”

*Mountain West Farm Bureau Mut. Ins. Co. v. Hallmark Ins. Co.*, 561 P.2d 706, 710 (Wyo 1977) (quoting *McCarteney v. Wyoming National Bank*, 1 Wyo. 386, 391 (1877)).

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

Petitioner is not a party to the Delegation Agreement between Teton County and the Department and therefore has no enforceable rights under the Delegation Agreement. Allowing a proceeding to go forward without privity of contract, especially in this case, would lend itself to a proceeding before the Council that seeks a purely political

conclusion by Petitioner. Finally, any evidence Petitioner could put on relative to this argument would be purely speculative that the County, acting under laws that are “at least as stringent as” the State’s, would not have issued the permit. *See* Wyo. Stat. § 35-11-304(a)(iii). With respect to the Delegation Agreement claims, Petitioner’s arguments are purely speculative and argumentative without any sort of binding effect on the rights of the parties to the Delegation Agreement. As such, Petitioner lacks standing to raise these issues.

**2. Petitioner lacks standing to enforce Wyoming Statute § 35-11-304, which requires delegation to the extent requested by the County.**

The Department has entered into a Delegation Agreement, pursuant to Wyo. Stat. § 35-11-304, to the extent requested by the County. Pet’r’s Motion to Suspend, Exhibit A. Petitioner appears to allege that the Department has not complied with Wyo. Stat. § 35-11-304, because it disagrees that the Department could retain residual permitting authority for a Permit that requires increased monitoring conditions placed on the permit to comply with the Wyoming Environmental Quality Act. *See generally* Pet’r’s Motion to Suspend. Petitioner, however, lacks prudential standing to bring this claim.

In applying the *Brimmer* test to whether the Department has complied with Wyo. Stat. § 35-11-304, Petitioner has failed to assert any tangible harm it suffered by the Department issuing the Permit instead of Teton County. Further, 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’s goal of protecting water quality. 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 Wyo. Stat. § 35-11-304.

## CONCLUSION

For the foregoing reasons, the Department asks the Council to dismiss any claims brought by Petitioner relating to the Delegation Agreement due to lack of a statutory authority by the Council to hear such claims, and lack of the standing by Petitioner to bring such claims before the Council. The Department requests the Council to set a hearing on this issue at its earliest convenience.

Submitted this 29<sup>th</sup> day of November 2023.

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