

facie case for summary judgment by showing that no genuine issue of material fact exists and that judgment should be granted as a matter of law. Wyoming Rule of Civil Procedure 56(a); *Wagner v. Reuter*, 208 P.3d 1317, 1321 (Wyo. 2009). When a motion for summary judgment is made and supported, “the burden then shifts to the party defending against the motion to present for the record facts in the form of admissible evidence which structure a genuine issue of material fact.” *England v. Simmons*, 728 P.2d 1137, 1141 (Wyo. 1986). As part of this process, all reasonable inferences need to be drawn in favor of the party not moving for summary judgment, which, in the context of a futility dispute, is POWJH. *White v. Wheeler*, 2017 WY 146, ¶ 37.

In this case, however, neither Basecamp nor the DEQ have submitted any factual evidence. Instead, both entities, take the position that the issue of whether Basecamp needs a permit to authorize surface water discharge is separate and distinct from the decision to issue Permit No. 2023-025 (the “*Permit*”), which is at issue here. For example, Basecamp argues “the issue of surface water discharges has no bearing on the contested case to determine whether the [DEQ] properly granted the individual small wastewater Permit in accordance with the law.” Similarly, the DEQ takes the position that the “decision *not to require* a WYPEDS permit is a separate decision from the Department’s decision *to grant* Basecamp’s small wastewater permit.” (Emphasis original).¹

Both these arguments, however, plainly contradict the applicable regulations. Specifically, the DEQ is empowered, under Section 11 of Chapter 3, to deny permits for any septic system that

¹ POWJH also notes that the DEQ advanced a futility argument related to POWJH’s proposed amendment regarding the Delegation Agreement between the DEQ and Teton County. This issue is entirely controlled by the already pending *Motion to Dismiss* on this issue.

“does not meet the minimum design standards of this Chapter or *other applicable Water Quality Rules*.” (Emphasis added).

In this case, the record, with all reasonable inferences taken in POWJH’s favor, as required when evaluating opposition to a motion for summary judgment or a proposed amendment for futility, plainly establishes that the issued Permit violates “other applicable Water Quality rules” because it permits a discharge of pollutants that will directly contaminate Fish Creek.

First, the Permit itself authorizes discharges from the permitted septic system. One of the conditions attached to the Permit is that:

Prior to operating the system, the permittee shall conduct a septic tank leakage test under the greatest anticipated hydraulic potential; the test shall last for no less than eight (8) hours. The test must confirm leakage is no more than 5% of design flow.

This condition allows Basecamp to operate a septic system that leaks 5% of the material it handles. As a result, the Permit, on its face, allows a discharge from the septic system.

Second, POWJH’s original complaint alleged that 1) raised mound septic system inherently leak, 2) the materials they leak include *E. Coli* and other polluting materials that qualify the leaked material as effluent, and 3) there is established groundwater connectivity between Basecamp’s site surface waters of the state, including and Fish Creek and its tributaries. These allegations were all supported by an expert report that was both submitted in public comment and included with the POWJH’s original *Petition for Review*. See **Exhibit H** to *Petition for Review*.

Third, recent caselaw from the U.S. Supreme Court has found that surface water point source discharge permits are required “if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source.” See *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

Finally, DEQ Water Quality Rules, Chapter 2, Section 5, plainly requires all point source discharges to surface water to specifically receive a permit for that discharge. *See also* Water Quality Rules, Chapter 2, Section 2 (“Discharges required to be permitted. All discharges into surface waters of the state as defined in (i), (ii), (iii) and (iv) below shall be permitted as described in these regulations.”).

So, for the purposes of summary judgment at this stage and, by extension, an amendment futility analysis, the following is true based on the record to date:

- 1) The *actual permit* issued in this matter allows for up to 5% of the waste that moves through the permitted septic system to be discharged directly without any treatment. This allows Basecamp to begin operating its system under the existing issued permit despite a direct discharge of pollutants.
- 2) POWJH’s preliminary expert review, which needs to be accepted as accurate for a futility analysis as it is the only evidence on the issue, shows that some portion of the 5% discharge allowance will occur because the proposed septic system is inherently susceptible to leaks in the relevant climate.
- 3) POWJH’s preliminary expert review, which again needs to be accepted as accurate for a futility analysis since there is no countervailing evidence, establishes the discharge allowed by the Permit, which will occur based on the system design, is a pollutant and will not stay contained in the local groundwater. Instead, those pollutants will move directly to Fish Creek based on the hydrologic connectivity of the area.
- 4) The pollutant discharged by the permitted system constitutes a “point source” discharge under U.S. Supreme Court caselaw because POWJH’s preliminary expert review

established the connectivity between the groundwater on the site and surface waters including Fish Creek and its tributaries.

- 5) Finally, the DEQ's own rules provide, in Chapter 2, Sections 2 and 5, that a point source discharge needs to be permitted.

As this analysis shows, the permitted septic system, drawing all reasonable inferences in favor of POWJH, is an unpermitted point source discharge in violation of Chapter 2, Section 5. And, because the permitted system plainly violates Chapter 2, Section 5, it should have been denied under Section 11 of Chapter 3, which allows the DEQ to deny a septic permit that “does not meet the minimum design standards of this Chapter or *other applicable Water Quality Rules.*” (Emphasis added).

While the DEQ and Basecamp cannot argue that the record, as it stands, shows anything other than a violation of Chapter 2, Section 5, the DEQ and Basecamp might argue that because Chapter 3, Section 11 provides only that the DEQ “*may*” deny a septic permit because it violates other water quality rules, the DEQ was making a discretionary decision not to deny the permit.

The problem with that argument is that even if a decision regarding whether or not to deny a permit based on a violation of “other applicable Water Quality Rules” is discretionary, such a discretionary decision can still be reviewed for an “abuse of discretion” afforded to the DEQ. *See* W.S. § 16-3-114(c)(ii)(A).

This abuse of discretion review is especially important in this case because the DEQ's briefing suggests that the DEQ neither realized it had the authority under Chapter 3, Section 11 to deny a permit for violations of surface water standards, nor did it undertake an informed consideration of whether it should. For example, the DEQ's briefing states that “the issue of surface water

discharges has no bearing on the contested case” and “surface water connectivity... is not a lawful reason to deny a permit.” Both these quotations are wrong based on the plain language of Chapter 3, Section 11. This line of argument shows that the DEQ did not properly analyze whether it had the authority to deny the Permit, much less engage in any reasoned consideration of whether it should have denied the permit, which constitutes an abuse of discretion because “a material factor deserving significant weight [was] ignored.” *Ianelli v. Camino*, 2019 WY 67, ¶ 21.

The second argument the DEQ and Basecamp may advance, to ~~try and~~ avoid the plain requirement that the DEQ at least consider whether to deny the Permit based on surface water connectivity, is that *Maui* was an interpretation on federal permitting requirements and Wyoming should apply its own, different, definition for what constitutes a “point source” discharge. The problem with this argument is that Wyoming has promulgated its surface water discharge permit regulations in order force the federal government to delegate permitting authority under. 33 U.S.C.A. § 1342(b). As a result, the promulgated regulations are specifically designed to “apply, and ensure compliance with” federal regulations. *Id.* As a result, the U.S. Supreme Court’s interpretation of virtually identical regulations is highly persuasive. Further, to the extent that Wyoming agencies and courts applied a substantially different interpretation of the “point source” definition in *Maui*, the federal government could withdraw Wyoming’s delegation of authority for surface water discharge permitting. 33 U.S.C.A. § 1342(c)(3). For example, Chapter 2, Section 1, of the Water Quality Regulations explicitly state that surface water permitting in Wyoming was enacted

pursuant to Section 402 (b) of the Federal Water Pollution Control Act (Clean Water Act) and amendments to that Act through July 1, 2004 for the purpose of instituting a permit issuance program in conformity with the requirements of the Environmental

Quality Act and the National Pollutant Discharge Elimination System (NPDES), for point source discharges into surface waters of the state.

A decision at odds with federal regulations would undermine this regime.

Accordingly, POWJH's *Motion to Amend* is not futile. Chapter 3, Section 11 of the Water Quality Rules gives the DEQ the authority to deny a septic permit for a violation of Water Quality Rules outside of Chapter 3. In this case, the DEQ received public comment showing that the relevant septic system was functionally equivalent to a point source discharge. The DEQ, nonetheless, permitted the septic system and permitted the system in such a way that explicitly allows discharge. As a result, the system and permit both plainly violate the permitting requirements of Chapter 2, Section 5.

The DEQ's decision not to deny the Permit, despite a violation of other standards, is reviewable, at a minimum, for an abuse of discretion in arriving at that decision. And, given that the DEQ has conceded it did not understand its authority on the issue, and an abuse of discretion likely occurred. This Council should, therefore, grant POWJH's *Motion to Amend* and proceed to a full and fair hearing that includes this issue.

Respectfully submitted this 8th day of April, 2024.



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Certificate of Service

Based on the foregoing signature, I, John Graham, certify that on April 8, 2024, a true and correct copy of the foregoing **Reply in Support of Motion to Amend** was electronically filed with the Environmental Quality Council and was served via the Environmental Quality Council's electronic notification to the following:

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