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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL STATE OF WYOMING

IN THE MATTER OF THE APPEAL	)	
THE PERMIT TO CONSTRUCT # 2023-025	)	
PROTECT OUR WATER JACKSON	)	Docket No. 23-3801
HOLE	)	

PETITIONER PROTECT OUR WATER JACKSON HOLE'S SURREPLY IN OPPOSITION TO DEQ'S MOTION TO DISMISS

Comes now, Petitioner, Protect Our Water Jackson Hole ("***POWJH***"), by and through undersigned counsel, and submits the following *Surreply in Opposition to DEQ's Motion to Dismiss*:

INTRODUCTION

Over a year after POWJH filed its initial appeal, the DEQ is still trying, through every available means, to avoid a substantive review of the primary question in this case: whether the DEQ violated W.S. § 35-11-304 when it issued the Septic Permit despite a valid delegation agreement with Teton County. Initially, the DEQ's position was that while POWJH could bring challenges to issues like compliance with setback and impairment of Class 1 waters in front of the EQC, POWJH could not bring a claim that the DEQ had violated W.S. § 35-11-304 because asking the EQC to opine on whether the DEQ complied with W.S. § 35-11-304 was essentially "a declaratory action before the Council" and that "declaratory judgment actions must be brought in accordance with the Uniform Declaratory Judgements Act." DEQ *Motion to Dismiss* at 5.

POWJH, in its initial response, noted that there was no fundamental difference between a claim that, for example, the DEQ did not follow an appropriate setback regulation and a claim the DEQ did not follow W.S. § 35-11-304. Both issues deal directly with whether the DEQ complied with an existing statute or regulation. POWJH did, however, file a Declaratory Judgement action directly in district court while the DEQ's *Motion to Dismiss* was pending in a good faith attempt to exhaust available procedural avenues.

The District Court then ruled, under a different standing approach than the one used for administrative appeals, that POWJH could not bring a Declaratory Judgment action regarding DEQ's compliance with W.S. § 35-11-304. While POWJH disagrees with this ruling and is appealing it, this practical result highlights that DEQ's insistence that a Declaratory Judgment Act claim is available to address DEQ's compliance with W.S. § 35-11-304 is not guaranteed.

Despite the fact the District Court's ruling indicated that the EQC might be only forum to raise the DEQ's compliance with W.S. § 35-11-304, the DEQ then argued to this Council, in a supplement to its motion to dismiss, that the EQC should not reach the issue of whether the DEQ violated W.S. § 35-11-304 using the same analysis as the District Court. Again, however, the DEQ maintained that these arguments only applied to DEQ's non-compliance with W.S. § 35-11-304, and all POWJH's other claims could proceed.

At this point, POWJH provided a detailed response highlighting the myriad of ways in which the DEQ's arguments regarding the EQC's ability to hear claims regarding W.S. § 35-11-304 were wrong. First, POWJH pointed out that while the District Court decided whether POWJH had standing under the "prudential" standing test, the appropriate test for standing in front of the EQC is the "statutory" standing test. The DEQ's brief appears to concede this point.

Next, POWJH highlighted that, in *Wyoming Outdoor Council* ("***WOC***")*,* the Wyoming Supreme Court explicitly stated that, unless the Environmental Quality Act ("***EQA***") explicitly precludes EQC review, "the right to review is presumed" and that W.S. § 35-11-112 "strongly indicates the legislature's intent to allow EQC review of 'all cases or issues' arising under the Wyoming Environmental Quality Act." 2012 WY 135, ¶28.

The *WOC* decision is particularly important in this case because it explicitly conferred a statutory right of review to a third-party environmental group claiming the DEQ did not have the statutory authority to issue a challenged permit. *See id.* Accordingly, both claims and claimants in this case and *WOC* are identical. Precedent requires that the EQC hears POWJH's claims that the EQC violated W.S. § 35-11-304.

The DEQ then, in its reply, functionally conceded that, if the EQC followed the guidance in *WOC*, POWJH would be able to bring its claims under W.S. § 35-11-304. To try and prevent this result, however, the DEQ has advanced a new, and extraordinarily broad, line of argument, which is that the EQC does not have authority to hear any of POWJH's claims. This line of argument is plainly contrary to both explicit guidance from the Wyoming Supreme Court and the EQC's longstanding practice.

ARGUMENT: *WYOMING OUTDOOR COUNCIL* EXPLICITLY FOUND THAT W.S. § 35-11-112 CREATED A RIGHT FOR THIRD-PARTY ENVIRONMENTAL GROUPS TO SEEK EQC REVIEW OF THE DEQ'S COMPLIANCE WITH THE EQA, REGARDLESS OF THE LANGUAGE OF THE DEQ'S REGULATIONS.

As a preliminary matter, it is important to start with the actual holding in *Wyoming Outdoor Council*, as it is the dispositive case in this dispute. The explicit holding was:

> [t]he Wyoming Environmental Quality Act may be silent about the right of an interested third party to seek EQC review of DEQ decisions, but that silence should not be read to preclude EQC review. To the contrary, the opinion in *Holding's Little America* indicates that statutory silence raises a presumption that EQC review is not precluded.

Wyoming Dep't of Env't Quality v. Wyoming Outdoor Council, 2012 WY 135, ¶ 30. The DEQ regulations cited were "consistent with this interpretation of the statute." *Id.* As a result, the Court's holding only had to go so far as "defer[ing] to that interpretation," but the Court still provided its opinion on the correct interpretation of the EQA, in order to confirm the DEQ's regulations were consistent with the statute. *Id.*

In the context of evaluating the conformance of the DEQ's regulations with the EQA, the Court explicitly stated that the EQA, read as a whole, contained "no statute that clearly and convincingly precludes [EQC] review" of claims by third-party environmental groups that the DEQ violated the EQA, "and, in the absence of any such restriction, the right to review is

presumed." *Id.* at ¶ 28. The Court then further stated, "that [W.S. § 35-11-112] strongly indicates the legislature's intent to allow EQC review of 'all cases or issues' arising under the Wyoming Environmental Quality Act." *Id.* at ¶ 28. As a result, the explicit rule of *WOC* is that Section 112 of the EQC presumptively conferred a right for third-party environmental groups to challenge the DEQ's statutory authority to issue a permit, and a general presumption of a right to EQC review. This was a necessary holding for the Court in *WOC* to confirm that the DEQ's own regulations complied with the language of the EQA.

The DEQ, however, is trying to take the position that, in the absence of any DEQ rule either allowing or disallowing third-party environmental groups to seek review, the presumption should be that the EQA does not allow a right to review.

As the above quotes indicate, this argument by the DEQ ***is literally the exact opposite*** of the rule announced in *WOC*. Again, it's worth highlighting the actual language the Wyoming Supreme Court used: "in the absence of any such restriction, the right to review is presumed." *Id.* At ¶ 28. This presumption of the right of review is then heightened in the context of the EQA because "[W.S. § 35-11-112] strongly indicates the legislature's intent to allow EQC review of 'all cases or issues' arising under the Wyoming Environmental Quality Act." *Id.* at ¶ 28. This is all the legal analysis the EQC needs to make its decision. The DEQ concedes its regulations are silent on whether third-party environmental groups have a right to appeal. *See* DEQ's *Reply in Support of Motion to Dismiss* at 6 ("With respect to denials of individual permit applications, the rule ios now silent..."). The Wyoming Supreme Court has said, in turn, that where the EQA or the departments regulations are silent on an appeal right, the "presumption" is that third-party environmental groups have an appeal right, and that "presumption" is further supported by the general grant of power to the EQC in W.S. § 35-11-112.

While this can be the end of the EQC's analysis, it is worth addressing a few of the DEQ's discrete arguments, in the interest of clarity and to show how inconsistent the DEQ's position is with *WOC*. First, the DEQ argued, "[w]ith respect to denials of individual permit applications, the [DEQ's regulations are] now silent and default[] 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." This argument was expressly considered and rejected by the Wyoming

Supreme Court in *WOC*. Specifically, the Wyoming Supreme Court noted that the appellants in *WOC*:

> assert that there is no provision in the Wyoming Environmental Quality Act that expressly gives interested third parties like WOC the right to EQC review of DEQ's water quality decisions. They also point to Wyo. Stat. Ann. § 35–11–802, which provides that, "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." (Emphasis added.) This statute, [the appellants] maintain, gives the right to administrative review only to the permit applicant, thereby implying that interested third parties do not have the right to seek administrative review.
>
> *Wyoming Outdoor Council*, 2012 WY 135, ¶ 26.

This is the ***exact same*** position the DEQ takes at multiple points in its briefing, arguing that the current language of Section 802 precludes anyone but the applicant from seeking review. *See e.g.* DEQ's *Reply in Support of MSJ* at 6; 10. The Supreme Court, in *WOC*, of course, expressly rejected this position, finding that Section 112 of the EQC could confer jurisdiction generally for EQC review despite the specific grants of more detailed appellate rights located elsewhere in the EQA.

Similarly, the DEQ has maintained that the presumption of judicial review in § W.S. 35-11-1001 maintains a right to judicial review, so Section 112 should not be read as allowing an appeal right. *See e.g.* DEQ's *Reply in Support of MSJ* at 16-17. Again, this argument was explicitly made in *WOC*, where the appellants maintained "that [Wyoming Outdoor Council] was not entitled to EQC review of the DEQ's decision to issue general permits, but was limited to judicial review [under Section 1001]." *Wyoming Outdoor Council*, 2012 WY 135, ¶ 26. And, once again, the Supreme Court rejected this argument when it found that the EQC nevertheless presumptively provided ***administrative*** review in front of the EQC, which was further supported by the language of Section 112. *Id.* at ¶ 28.

The DEQ's position is also a facially incorrect reading of how to treat the DEQ's own regulations. As *WOC* explicitly states, the prior language of Chapter 3, which allowed interested parties to maintain an appeal, was "the agency's interpretation [of] the Environmental Quality Act." *Wyoming Outdoor Council*, 2012 WY 135, ¶ 29. The DEQ's position in its current briefing is that while the DEQ previously interpreted Section 112 to allow appeals by third-party

environmental groups, it has now revoked that prior interpretation. As a preliminary matter, this revocation only means that the DEQ has no relevant interpretation, and the language of Section 112 alone governs, as discussed above.

Even if the EQC were to consider this revocation a "change" in the DEQ's interpretation of Section 112, that alleged change is immaterial because the Wyoming Supreme Court has instructed reviewing courts and boards to give more weight to a previous and longstanding agency interpretation, when there has been a recent change in the agency's interpretation. In a tax appeal, the Wyoming Supreme Court laid out the relevant rules for a change in interpretation as follows:

> We will defer to an administrative agency's construction of its rules unless that construction is clearly erroneous or inconsistent with the plain meaning of the rules. *Pinther v. Department of Admin. & Info*., 866 P.2d 1300, 1302 (Wyo.1994). The Department has applied different interpretations of Rule § 4b over time, initially taking an approach consistent with Taxpayers' position in this appeal. We are inclined to attribute more weight to this earlier interpretation. "[A]dministrative interpretation developed during, or shortly before, the litigation in question is entitled to less weight than that of a long-standing administrative interpretation of administrative rules." Norman J. Singer, 1A Statutes and Statutory Construction § 31:6, p. 730 (6th ed.2002). More importantly, we must reject the Department's current interpretation of Rule § 4b because it is contrary to the rule's plain language.

RME Petroleum Co. v. Wyoming Dep't of Revenue, 2007 WY 16, ¶ 44.

In this case, the application of the relevant principles are straightforward. First, the DEQ's "new" rule was adopted less than a year before the instant appeal was filed, while the prior interpretation of Section 112, which the DEQ concedes would allow POWJH's appeal, was in force for over 20 years. As a result, the DEQ's prior interpretation of Section 112, and not any new interpretation, is entitled to deference as the DEQ's position.

Moreover, Section 112 explicitly provides a right to "[c]onduct hearings in any case contesting the grant… of any permit… authorized or required by this act." W.S. § 35-11-112. Based on this plain language, which contemplates challenges to "granted" permits, not just challenges to denied permits by an applicant, an interpretation of Section 112, which only allowed permit applicants to appeal decisions, would be inconsistent with the Language of Section 112. Similarly, the Wyoming Supreme Court has already stated "that [W.S. § 35-11-112] strongly indicates the legislature's intent to allow EQC review of 'all cases or issues' arising under the

Wyoming Environmental Quality Act." *Wyoming Outdoor Council*, 2012 WY 135, ¶ 26. As a result, an interpretation of Section 112 that did not allow third-party environmental groups to appeal DEQ permit issuances would be "contrary to the [statute's] plain language."

Finally, the DEQ has also tried to obscure the clear holding of *WOC* by claiming it was a decision about *jurisdiction* and about *standing*. The *WOC* decision, however, does not specify whether it addresses the EQC's jurisdiction or WOC's standing. Instead, the *WOC decision* simply addresses whether the "WOC was entitled to administrative review before the EQC." *Id.* at ¶ 26. This is because the question of jurisdiction is coextensive with the question of standing. As discussed extensively in POWJH's *Response in Opposition to the DEQ's MTD*, "[w]here the question is statutory standing, prudential considerations do not play a role in the standing determination. Statutory standing, therefore, looks to whether a plaintiff has a cause of action under the statute, not to whether the plaintiff satisfies the *Brimmer* test." *HB Fam. Ltd. P'ship v. Teton Cnty. Bd. of Cnty. Commissioners*, 2020 WY 98, ¶ 19 (internal citations and formatting omitted). In this case, the relevant precedent, *Wyoming Outdoor Council*, is that third-party environmental groups are entitled to review of claims that the DEQ exceeded its statutory authority under Section 112. As a result, POWJH has standing, under Section 112, as a third-party environmental group to challenge the DEQ's decision to issue a permit in excess of its statutory authority.

CONCLUSION

At this juncture, it should be clear that POWJH has a statutory right to proceed with its claims in front of the EQC. The DEQ appears to have largely abandoned the position that POWJH can bring some, but not all, of its claims. This is the right approach if POWJH has a statutory right to bring any of its claims, *Wyoming Outdoor Council* clearly forbids carving out those claims the DEQ violated W.S. § 35-11-304.

This concession means the only basis for dismissing any of POWJH's claims is to dismiss all of POWJH's claims. Dismissing all of POWJH's claims, however, is also a bridge too far under *Wyoming Outdoor Council*. The Wyoming Supreme Court has explicitly held that absent any specific regulation of statutory section to the contrary, the Environmental Quality Act presumptively creates a right for third-party environmental groups to seek review of issued permits under the broad language of W.S. § 35-11-112. This is consistent with both the EQC's historical

practice, and the numerous cases third-party environmental groups have brought in front of the EQC over the years. As a result of the presumption of review and historical practice, POWJH's claims should proceed to a hearing on the merits.

DATED this 7th day of October, 2024.

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Certificate of Service

Based on the foregoing signature, I, John Graham, certify that on October 7, 2024, a true and correct copy of the foregoing served via the EQC's electronic filing system to the following:

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