

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

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

ORDER DENYING MOTIONS TO DISMISS

On October 23, 2024, the Council heard oral arguments on Basecamp Teton WY SPV LLC's and the Department of Environmental Quality's (DEQ) separate motions to dismiss Protect Our Water Jackson Hole's First Amended Appeal of Notification of Coverage Permit No. 2023-025 filed on June 20, 2024.¹ The Council, having heard and considered the relevant filings and oral arguments in this case and being fully advised, finds and concludes (by a 6-0 vote) that the motions to dismiss are denied.

DEQ's Water Quality Division issued a permit to Basecamp authorizing Basecamp to construct and install a sand mound septic system (the permit). Protect Our Water Jackson Hole appealed DEQ's decision, requesting that the Council reverse and vacate DEQ's decision and requesting a contested case hearing. Protect Our Water alleges that the permit is not in accordance with law and that DEQ does not have authority to issue the permit.

¹ In its motion, Basecamp did not request that the entire appeal be dismissed but only certain allegations/claims. Conversely, DEQ requested that the entire appeal be dismissed.

Basecamp's Motion to Dismiss

In its motion to dismiss, Basecamp requests that the Council dismiss paragraphs 32², 40, 47-49 and 51(1) of Protect Our Water's amended appeal. Basecamp claims that in each of those paragraphs, Protect Our Water attempts to bring a claim for which the Council cannot grant relief. Accordingly, Basecamp contends that the Council should not consider the allegations/claims in those paragraphs. In paragraph 32, Protect Our Water alleges that DEQ exceeded its authority when it issued the permit because DEQ had already delegated the permitting authority to Teton County (delegation issue/allegation) under Wyo. Stat. Ann. § 35-11-304. In paragraph 40, Protect Our Water alleges that the permit was inappropriately granted because a WYPDES permit was not also included or required (WYPDES issue/allegation). Last, in paragraphs 47-49 and 51(1), Protect Our Water requests that the Council grant a stay of the permit pending the appeal.³

DEQ's Motion to Dismiss

DEQ's motion to dismiss made many of the same arguments as Basecamp. DEQ argues that the Council cannot address or decide the delegation or WYPDES issues/allegations.

DEQ also makes a much broader argument and claims that Protect Our Water cannot appeal DEQ's decision to the Council and, therefore, the Council has no authority to decide this case. Accordingly, DEQ is requesting that the Council dismiss the entire appeal. DEQ argues that no statute or rule authorizes Protect Our Water to appeal the issuance of the permit

² Paragraph 32 is incorrectly numbered paragraph 33 in the First Amended Appeal of Notification of Coverage Permit. The Council will refer to that paragraph as paragraph 32.

³ It does not appear that Protect Our Water is still requesting a stay of the permit during its appeal, however, if it is, the Council denies that request. The Council previously denied that request as part of Protect Our Water's original appeal.

which means the Council has no authority to consider the appeal. In other words, DEQ is asserting that the Council is without jurisdiction to consider this appeal.

Protect Our Water's Contentions

Protect Our Water contends that the Council has the authority to review whether the permit was issued in conformance with the Environmental Quality Act and DEQ's rules, which necessarily includes a review of whether DEQ had the authority issue the permit, and whether all the requirements were met when DEQ issued the permit. Protect Our Water contends that the issue of whether DEQ had the authority to issue the permit goes hand-in-hand with the issue of whether the permit was issued in accordance with law.

Protect Our Water also asserts that the WYPDES permit issue/allegation goes to the validity or appropriateness of the permit. Protect Our Water asserts that when DEQ issued the permit, it was required to make sure that the permit complied with all other relevant DEQ rules which according Protect Our Water, includes a WYPDES permit. Last, Protect Our Water contends that *Wyoming Dep't of Env't Quality v. Wyoming Outdoor Council*, 2012 WY 135, 286 P.3d 1045 (Wyo. 2012) confirms that it has the authority to appeal DEQ's issuance of this permit.

Analysis

The Council believes that the delegation and WYPDES issues/allegations ultimately go to whether the permit was issued in accordance with the Environmental Quality Act and DEQ's rules. Under Wyo. Stat. Ann. § 35-11-112(a), the "Council shall act as the hearing examiner for [] [DEQ] and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards, or orders issued or administered by [DEQ.]" Wyo. Stat. Ann. § 35-11-112(a). In addition, under Wyo. Stat. Ann. § 35-11-112(a)(iv), the Council shall "[c]onduct

hearings in any case contesting the grant . . . of any permit . . . authorized or required by this act[.]” Wyo. Stat. Ann. § 35-11-112(a)(iv). Whether DEQ issued the permit to Basecamp in accordance with the Environmental Quality Act and DEQ’s rules fit within the Council’s authority under § 35-11-112(a) and (a)(iv) to hear this appeal and consider the parties’ arguments.

The Council interprets Protect Our Water’s appeal as asking the Council to make a determination whether DEQ issued the permit in accordance with the Act and DEQ’s rules and whether the permit complies with the Act and DEQ’s rules. The Council believes it has the authority to review DEQ’s decision to issue the permit to Basecamp.

Last, DEQ claims that the entire appeal must be dismissed because the Council is without the legal authority to hear this appeal brought by Protect Our Water. Wyoming Statute § 35-11-112(a)(iv) provides that the Council shall conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit. Although there is no specific statute or rule that provides for an interested third party to appeal an individual small wastewater permit to the Council, the Wyoming Supreme Court in 2012 addressed a similar issue and concluded that although the Wyoming Environmental Quality Act may be silent about the right of an interested third party to seek the Council’s review of a DEQ decision, that silence should not be read to preclude Council review. *Wyoming Dep’t of Env’t Quality v. Wyoming Outdoor Council*, 2012 WY 135, ¶ 30, 286 P.3d 1045, 1053 (Wyo. 2012). To the contrary, statutory silence raises a presumption that Council review is not precluded. *Id.* The Court held that the right to review is presumed and Council review is precluded only if the Legislature provides clear and convincing evidence of an intent to restrict Council review. *Id.* at ¶ 27.

The Council has not found any law that provides clear and convincing evidence of an intent to restrict the Council’s review of Protect Our Water’s appeal. The Council believes that Wyo. Stat. Ann. § 35-11-112(a)(iv) indicates the Legislature’s intent to allow the Council to review this type of case—that statute provides that the Council shall conduct hearings in any case contesting the grant of any permit authorized or required by the Wyoming Environmental Quality Act. Accordingly, the Council concludes that it has the authority to hear Protect Our Water’s appeal.

IT IS HEREBY ORDERED that DEQ’s and Basecamp’s motions to dismiss are denied.

IT IS FURTHER ORDERED that if Protect Our Water is still seeking a stay of the permit in its first amended appeal as it did in its original appeal, that request is denied because the Council previously denied that request when it concluded “that it does not have the legal authority to suspend or stay the Basecamp permit during the pendency of Protect Our Water’s ongoing appeal.” See *Order Denying Protect Our Water Jackson Hole’s Motion to Suspend Permit*, January 12, 2024.

DATED this 18th day of December, 2024



Steve Lenz (Dec 18, 2024 16:10 MST)

Steve Lenz, Hearing Examiner
Environmental Quality Council