

Submitted via the Wyoming DEQ Comment Portal

January 4, 2024

Eric Hargett
Wyoming DEQ/WQD
200 W. 17th Street – 4TH floor
Cheyenne, WY, 82002

Re: PROPOSED DISCHARGE OF DREDGED OR FILL MATERIAL IN THE FISH
CREEK DRAINAGE — OPPOSITION TO REQUEST FOR 401 CERTIFICATION

Dear Mr. Hargett:

Thank you for inviting public comments on Jackson Hole Mountain Resort’s (JHMR) proposal to discharge fill material into a headwater tributary of Fish Creek. These comments are submitted on behalf of Protect Our Water Jackson Hole (POWJH), a non-profit, 501(c)(3) tax exempt organization registered in the State of Wyoming. POWJH’s mission is to be a powerful advocate for ground and surface water quality in Teton County. We have significant concerns about the proposal and urge you to deny JHMR’s request for 401 certification.

As you know, discharges of dredged or fill material into waters of the United States are unlawful under section 404 of the Clean Water Act without a permit. Two general types of permits are available to satisfy section 404 requirements: Nationwide permits (NWP), which cover broad categories of activities that have only minimal individual and cumulative adverse environmental effects, and individual permits for larger projects or projects that are not covered by any of the 59 existing NWP.

Relatedly, section 401 of the Clean Water Act provides States the opportunity to review proposed federal 404 permitting actions to determine if state water quality standards will be met. If a state determines that applicable standards will not be met, it can deny “certification” pursuant to authority granted under section 401. For the reasons set forth below, we urge you to deny the 401 certification requested by JHMR for its proposed discharge.

Project background

The Upper Amphitheater Redevelopment Project proposed by JHMR is described in a 401 Certification Request submitted on December 8, 2023, by Summit Environmental Solutions, Inc., on behalf of JHMR. See NWO-2023-01506-RWY (Jackson Hole Mountain Resort, Upper Amphitheatre Redevelopment Project, Teton Village, WY) Wyoming Department of Environmental Quality (WDEQ) Individual 401 Water Quality Certification Request submitted by Summit Environmental Solutions, Inc., December 8, 2023 (hereinafter “Section 401 Certification Request”).

The Upper Amphitheater Redevelopment Project is part of a larger project dubbed the “Ski Run 2023 Improvements” which, according to the U.S. Forest Service, is “the first phase of planned improvements slated for implementation within the next 6 years.” The Bridger-Teton

National Forest authorized the 2023 ski run improvements under a Categorical Exclusion to the National Environmental Policy Act, thereby avoiding the preparation of an environmental assessment (EA) that earlier had been planned for the ski run construction project but later abandoned due to time constraints. See Section 401 Certification Request, Attachment C, Copy of the USFS-BTNF Categorical Exclusion Decision Memo (USFS 2023).

According to the DEQ's December 27, 2023, Public Notice, "[t]he purpose of the project is to recontour existing ski runs in the Amphitheater area and widen an existing traverse. This involves elevating an approximate 1,003-foot segment of a steep unnamed gully tributary to Fish Creek to create a more uniform surface to facilitate grooming and expand the existing snowmaking system." This will be accomplished by "the placement of approximately 446 cubic yards of clean rock to elevate the channel to grade, and contour to the existing channel dimension, pattern, and profile."

JHMR has requested that the DEQ provide "State certification of U.S. Army Corps of Engineers (USACE) Nationwide Permit #27, for the discharge of dredged or fill material to an unnamed tributary to Fish Creek near Teton Village, Wyoming." As noted above, POWJH opposes this request.

Wyoming DEQ Regulatory Requirements

Importantly, all waters within the Fish Creek drainage along with adjacent wetlands are state-designated Class 1 surface waters. See Wyoming Department of Environmental Quality Water Quality Rules and Regulations (WQRR), Chapter 1, Appendix A(a)(xiv).

Class 1 waters are protected by comprehensive anti-degradation requirements contained in DEQ WQRR Chapter 1, Section 4 and Section 7.

Chapter 1 Section 4(a) provides, in part, that: "Class 1, Outstanding Waters. Class 1 waters are those surface waters in which no further water quality degradation by point source discharges other than from dams will be allowed. Nonpoint sources of pollution shall be controlled through implementation of appropriate best management practices. Pursuant to Section 7 of these regulations, the water quality and physical and biological integrity which existed on the water at the time of designation will be maintained and protected."

In addition, Chapter 1 Section 7(b) states that, "Storm water and construction-related discharges of pollution to Class 1 waters may be authorized and shall be controlled through applicable water quality permits, Section 401 certifications and/or by the application of best management practices. Such discharges shall not degrade the quality of any Class 1 water below its existing quality or adversely affect any existing use of the water. Temporary increases in turbidity that are within the limits established in Section 23 of these regulations and that do not negatively affect existing uses can be permitted. For purposes of this section, temporary increases in turbidity shall not exceed the actual construction period. The department shall impose whatever controls and monitoring are necessary on point source discharges to Class 1 waters and their tributaries to ensure that the existing quality and uses of the Class 1 water are protected and maintained."

Discussion

For the reasons set forth below, POWJH urges the DEQ to deny the Section 401 certification requested by JHMR. The justification for denial is obvious: Coverage under NWP 27 is not available for the type of discharge proposed by JHMR. Coverage under NWP 27

strictly limited to the “restoration, enhancement or establishment” of aquatic habitat. That is not the purpose of this project, nor will it achieve those outcomes. Rather, as described in the Pre-construction Notification submitted by the applicant, the purpose of the project “is upgrading and improvement of an existing traverse and ski run located at the Jackson Hole ski area.” See Pre-Construction Notification for the Upper Amphitheatre Redevelopment Project, 1.0 Introduction, September 29, 2023. The purpose of the project is not the “restoration, enhancement or establishment” of aquatic habitat.

Additional project-related details are provided in the Pre-Construction Notification, Section 3.0 Project Overview, Need, and Function:

“The entire upper portion of the Amphitheater area, including Upper Amphitheater and Jerry’s runs, will be redeveloped to create a smoother, more uniform surface and facilitate grooming. Snowmaking infrastructure will be installed while the area is disturbed. A short, deep channel (R- 01) below Horn’s Hole Traverse will be filled with waste rock so that the channel is raised approximately 8-10 ft. in elevation, to match with the adjacent regrading activity. This improvement will temporarily disturb about 10.4 acres through construction, including extensive blasting. Tree removal will be minimal. All disturbed areas will be stabilized and revegetated using standard BMPs. The channel will remain in the same exact location and will be the same average width.”

The Pre-Construction Notification submitted by Summit Environmental Solutions, Inc. on behalf of JHMR does not claim the project will provide environmental benefits, nor does it argue that aquatic habitat will be restored or enhanced— the fundamental purpose of NWP 27. See 2021 Nationwide Permits Final Rule, Federal Register Notice, December 27, 2021. In particular, see Part II. D. Response to Comments on Specific Nationwide Permits, Comments on NWP 27, pages 73541 to 73549.

To the contrary, the stream channel that JHMR intends to fill appears from photographs provided in the Section 401 Certification Request to be healthy, unaltered and in a natural condition. Given that, there is clearly no need for restoration, enhancement or establishment of aquatic habitat. In addition, raising the elevation of this stream channel by dumping 446 cubic yards of “waste rock” into it will not achieve any “net gains in aquatic resource functions and services” which is a basic requirement of NWP 27 (“The Corps acknowledges that this NWP provides an expedited authorization process for aquatic habitat restoration, enhancement, and establishment activities that result in net increases in aquatic resource functions and services and have no more than minimal individual and cumulative adverse environmental effects.” See 86 FR 73522, 73542, December 27, 2021).

Any notion that the filling and re-contouring of this stream channel will, over time, produce gains in aquatic resource functions and services is without merit and should be summarily rejected. NWP 27 is available for projects designed to address existing alteration or damage to aquatic habitats. The permit itself is clear about this, and provides numerous examples of legitimate habitat restoration projects that would qualify for coverage under the permit, none of which envision anything like JHMR’s proposal:

“The activities authorized by this NWP include, but are not limited to the removal of accumulated sediments; releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms are removed; the installation of current

deflectors; the enhancement, rehabilitation, or re-establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or re-establish stream meanders; the removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; coral restoration or relocation activities; shellfish seeding; activities needed to reestablish vegetation, including plowing or disking for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.”

See Decision Document Nationwide Permit 27, available online at: <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/19807>

Again, NWP 27 is intended for —and limited to— “Aquatic Habitat Restoration, Establishment, and Enhancement Activities.” The examples described within the permit itself provide a clear indication of the kinds of projects that would qualify for coverage under the permit. To the extent it may be useful, additional clarity is provided in the definitions of each of the operative words found in NWP 27:

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

At the most basic level, the essential requirement contained in all of these definitions is that the proposed dredge and fill activity must rectify an existing aquatic problem or deficiency. The only problem or deficiency here is that the unnamed stream channel JHMR seeks to fill is viewed as an impediment for intermediate skiers, snow making, and ski grooming operations. While that may be a legitimate reason for filling a natural and fully functioning stream channel, it is clearly not a permissible activity under NWP 27. Accordingly, the DEQ should deny Section 401 certification.

Additional concerns

Integrity of newly constructed stream channel. The Pre-construction Notification (PCN) states that the existing stream channel will be filled with 446 cubic yards of waste rock and “will be reconstructed in the exact same location and with the same dimensions as the existing channel, at a higher elevation in order to match the adjacent topography and grading.” What is not explained in the PCN is how water that flows through this drainage will be contained in the newly constructed and elevated stream channel. Will the new channel be lined with an impervious membrane? What will prevent water flowing through the drainage from migrating downward into the original channel?

Lack of water quality monitoring. As noted above, DEQ WQRR Chapter 1 requires that the quality of Class 1 surface waters be maintained. For this requirement to be met, the applicant should collect a full suite of water quality data for a full summer season prior to construction and provide that data to DEQ with any new or revised applications. Without this data, it is impossible to determine whether the Class 1 quality standard is being met.

Nature and description of the impact. The applicant’s Pre-Construction Notification (PCN) describes the impact to the stream channel as “temporary.” (“The proposed Project will temporarily impact approximately 1,003 lf. of R-01, by raising the overall grade of the channel.”). This characterization is incorrect. The placement of 446 cubic yards of fill material into a natural preexisting stream channel for the purpose of raising the elevation to match the surrounding topography is a permanent alteration of the environment, and the stream itself.

In fact, in accordance with USACE definitions, the proposed activity would cause a *Loss of Waters of the United States*, which is defined, in part, as follows: “Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, **increase the bottom elevation of a waterbody**, or change the use of a waterbody.” (emphasis added).

In this case, the location of the stream bed would be elevated 8-10 feet above the existing level, resulting in—by definition—a permanent loss of waters of the U.S.

Failure to Provide All Information Requested by DEQ for USACE Nationwide Permit 27. Section 6 of the DEQ’s Individual 401 Water Quality Certification Request Form states: “The following information is required for requests for individual 401 water quality certification under USACE Nationwide Permit #27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities). In particular, the information required “[f]or projects that would alter channel dimension, pattern, or profile morphology” is missing (i. through ix.)

- A complete description of project purpose including but not limited to, the existing conditions being restored or enhanced and how a net gain in aquatic resource and geomorphic form and function will be achieved;
- Representative on-site pre-construction photographs of existing conditions;
- Purpose and function behind each proposed treatment or structure;
- For projects that would alter channel dimension, pattern, or profile morphology, include the following:
 - i. Summaries of empirical data and results of associated analyses used in project design;
 - ii. A table of the existing, reference, and design values for the channel dimension, pattern, or profile morphological variables to be modified;
 - iii. Explanation for the basis of the design criteria and whether it conforms to stable reference morphological conditions. Note that reference is typically derived from a natural stable channel segment that has not been previously restored or modified;
 - iv. Typical plan, profile, and cross-section design illustrations along with associated design specifications (e.g., bankfull width, slope, vane angles) for all proposed treatments;
 - v. Project design plan map(s) with locations of proposed treatments, existing structures, cross-sections, longitudinal profiles, etc.;
 - vi. Overlays of existing and design conditions at the plan, profile, and cross-sectional views;
 - vii. Demonstration that the enhanced or restored channel will effectively transport stream flow and sediment while maintaining a stable dimension, pattern, and profile without excessive aggradation or degradation;
 - viii. Demonstration that the placement of any unconsolidated imported material for the construction of riffle features will not be entrained and mobilized during normal high flows;
 - ix. Demonstration that discharges and associated construction activities will not result in adverse impacts to water quality or existing uses of the waterbody upstream and downstream of the project area;

The applicant claims that “[t]he stream channel will be reconstructed in the exact same location and with the same dimensions as the existing channel, at a higher elevation in order to match the adjacent topography and grading” but it is clear from the proposal that the steep slopes that characterize this drainage/ gully will be excavated and reshaped to allow for the safe passage of both skiers and snow grooming equipment. The Pre-construction Notification in Section 2.0 states that the stream “channel is steep, rocky, and narrow...” There cannot be any doubt that the combination of 446 cubic yards of fill material along with excavation will eliminate the steep, rocky and narrow” stream and replace it with terrain more suitable for intermediate skiers and snow grooming equipment. The changes to stream morphology likely to result from the fill activity dictate that answers to the above questions be provided.

Lack of identified Ecological Reference. The identification of an ecological reference is a critical requirement of NWP 27 that seems to have been omitted in the application. Activities authorized by NWP 27 must result in an aquatic habitat that resembles an “ecological reference,” consistent with the definition of that term in section F of the NWPs. According to the terms of NWP 27:

“To be authorized by this NWP, the aquatic habitat restoration, enhancement, or establishment activity must be planned, designed, and implemented so that it results in aquatic habitat that resembles an ecological reference. An ecological reference may be based on the characteristics of one or more intact aquatic habitats or riparian areas of the same type that exist in the region. An ecological reference may be based on a conceptual

model developed from regional ecological knowledge of the target aquatic habitat type or riparian area."

What is the ecological reference for this project? NWP 27 "requires that aquatic habitat restoration, enhancement, and establishment activities result in net increases in aquatic resource functions and services and resemble ecological references." See Decision Document, NWP 27 at 114.

Nutrient pollution not addressed. Fish Creek is listed in the DEQ's 305(b)/303(d) report as impaired for E.coli concentrations that exceed primary contact recreation standards. In addition, multiple lines of evidence indicate that Fish Creek suffers from nutrient impairment. This project and related future ski slope projects entail significant excavation and ground disturbance requiring intensive reclamation and erosion control measures. Any future agency authorizations related to these projects should restrict the use of chemical fertilizers to prevent the introduction of additional nutrients into the watershed.

Construction season. The application states that construction will begin in June or when conditions are dry. But what is not discussed is how the stream channel, which still may be flowing when upland conditions might otherwise permit construction activities, will be addressed. Will fill material be deposited on top of running water or into damp channels?

Revegetation. The application states that seed mixtures approved by the U.S. Forest Service will be used to reclaim disturbed areas. In addition, we suggest that native plants growing in the stream channel be removed and reused in an effort to replace to the extent possible aquatic plants currently found in the drainage.

Absence of Professional Engineer's certification. The engineer's proposed project drawings in Attachment D (Grading plan, Profile and Cross Sectional) lack an engineer's name and professional stamp. This information should be provided by the applicant.

The Proposed Dredge and Fill activity will cause impermissible channelization. As defined by the USACE, Stream channelization means "[t]he manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized jurisdictional stream remains a water of the United States." The alterations to the stream channel proposed by JHMR fall within the definition of channelization which are not allowed under NWP 27. ("Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., the conversion of a stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. **This NWP does not authorize stream channelization.** This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.") (Emphasis added).

See USACE Decision Document, NWP 27:
<https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/19807>

Conclusion

The DEQ's website explains that, "Under Section 401 of the federal Clean Water Act (CWA) and 40 CFR Part 121, any applicant for a federal license or permit to conduct an activity

that may result in a discharge of a pollutant into a water of the United States must obtain a 401 Water Quality Certification from the state certifying authority that ensures the discharge will comply with applicable provisions of the CWA and state surface water quality standards.”
<https://deq.wyoming.gov/water-quality/watershed-protection/cwa-section-401-turbidity-wetland/401-water-quality-certification/>

As discussed above, JHMR has failed to demonstrate that water quality in the unnamed tributary to Fish Creek will be protected and maintained as required by Chapter 1 and has requested coverage under a nationwide permit that clearly does not apply to the proposed discharge. Activities authorized under NWP 27 “must result in net increases in aquatic resource functions and services.” JHMR has not demonstrated how this project achieves that requirement. Allowing JHMR’s proposed discharge to occur under NWP 27 would not only make a mockery of that nationwide permit, it would erode public confidence in the administration of the entire nationwide permitting program. For these reasons, the DEQ must deny 401 certification.

Thank you for your attention and consideration of our comments. Please keep us apprised of any additional public comment opportunities on this and related JHMR ski hill projects, and agency decisions/actions regarding these matters.

Sincerely,



Kevin E. Regan
Law and Policy Advisor
Protect Our Water Jackson Hole

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