

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

DEC 20 2010

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE OBJECTION)
TO THE SMALL MINE PERMIT OF)
McMURRAY READY MIX CO.)
TFN 5 3/143)

Docket No. 10-4803

BOULDER RESIDENTS' CLOSING ARGUMENT

By and through their attorney Mark D. Sullivan, objectors Dave and Sandra Goodwin, Harv and Denise Hastings, Debra White, David Payne, Randy Simpson, and Kelly Garside (the "Boulder Residents") respectfully submit this memorandum as their closing argument summarizing their opposition to the small mine permit application filed by McMurray Ready Mix Company ("McMurry").

The Facts

The following material facts were established by the testimony and evidence presented at the EQC hearing.¹

Volume of Truck Traffic Generated By the McMurry Mine

- Over 300 Truck Trips a Day.
- A truck passing the Boulder Residents' homes every two minutes.
- Mine to operate seven days a week with no restrictions on hours.

¹ Please note that as of the date this closing memorandum was due, no transcript of the proceedings before the EQC was available. Therefore, pinpoint citations to testimony are not possible. The recitation of facts in evidence set forth herein is based on counsel's notes and review of the audio recording of the hearing.

- Trucks start as early as 5:15 in the Morning
- Each truck generates incredible noise and vibration, audible from two miles away.

Character of the Neighborhood Without the Mine

- Rural, agricultural and residential area.
- Very quiet.
- Abundant Wildlife
- Mine accessed via narrow, unpaved County Roads 133 and 113, and State Highway 353.
- Area public lands, including BLM lands, used by both Boulder Residents and the Public for recreation, including hunting, fishing, camping, biking, and horseback riding.

Sage Grouse Protection

- Mine Located in Sage Grouse Core Area.
- Abundant sage grouse without the mine hauling activity; far less to none with such activity.
- Goodwin Lek 1.9 miles or less from the Mine's on-site haul road.
- Goodwin and Speedway Leks within one-half mile of County Roads used by Trucks.
- Incompatibility with Executive Order 2010-4 and Stipulations for Development in Sage-Grouse Core Area:

Mine activity causes decline in sage grouse population in the area.

Active lek within 1.9 miles of haul road.

No habitat assessment performed.

No disturbance analysis performed for leks within 4.0 miles.

No on-the-ground confirmation of existing disturbances.

Reclamation plan inconsistent with re-establishing sage grouse habitat.

No monitoring plan in place.

Public Safety

- Turning movements from Highway 353 into the mine are hazardous, requiring trucks to cross into the oncoming lane of traffic and even the opposite shoulder.
- Trucks regularly occupy the center of the narrow county roads, and have forced drivers off the road.
- It is unsafe to bike, walk or ride a horse on or near the county roads due to the volume and nature of the truck traffic.
- Impact is so severe, Boulder residents afraid to even use roads when hauling activity present.

Alternative Route – Mathis Lane

- Owned and Controlled by Sublette County.
- Shorter distance to U.S. 191 and McMurry's Market.
- Farther from active sage grouse leks.
- No occupied homes along its path.
- Would eliminate dangerous truck turning movements from Highway 353 into mine.
- Would require work to upgrade.

McMurry's History of Violations

- Pattern of noncompliance: at least six NOV's issued to McMurry in 8 years for a variety of violations of DEQ permits.
- Violations of County Conditional Use Permit for this Mine.

ARGUMENT

Introduction

The McMurray Mine, presently operated as an "exempt" 10 acre limited mining operation, is a public nuisance and a threat to public safety. The mine produces in excess of 300 truck trips per day. The trucks, bearing an average load of 23 tons, pass the Boulder Residents' homes as early as 5:15 a.m., rattling their homes and waking them from their sleep. The noise and vibrations then continue, unabated, all day long, with trucks passing every 2-3 minutes, sometimes until after dark.

The truck traffic prevents the Boulder Residents from walking, biking or riding ATVs along the road, or even crossing the road on horseback to reach and use adjacent BLM lands. The traffic has reduced the public's use of area public lands for hunting, fishing, camping and recreation. As the Boulder Residents' testified, the McMurry Mine has destroyed the Boulder Residents' quality of life and is a public nuisance.

The proposed permit would make this intolerable situation even worse. While the current operation is restricted to "daylight hours," McMurry now proposes no restrictions on their hours of operation. They seek the ability to operate 24 hours a day, seven days a week. Ron McMurry, president of the applicant, acknowledged these impacts but stated that McMurry has and would consider no restrictions on its operations such as restrictions on the volume of aggregate they sell per day, or their hours of operation.

Furthermore, the operation of the mine poses a daily threat to public health and safety. The trucks pose a serious safety problem upon entry to and exit from the mine. When approaching from the North on State Highway 353, the trucks must and do cross the road into the oncoming lane of traffic, and even onto the opposite shoulder, before making the tight right-hand turn into the mine entry. The trucks furthermore consume the narrow county and state roads that lead to the mine, regularly driving in the middle of the narrow road and frequently forcing drivers off the road, or onto the shoulder. The truck traffic prevents bicycle, pedestrian, horse, or ATV use of the roads.

None of these impacts that create the public nuisance were even considered by the DEQ in its evaluation of the permit application. DEQ staff did not weigh the off-site impacts or whether they created a public nuisance. The DEQ's Tanya King testified that, in her view, DEQ does not have the authority to address such impacts, and did not weigh them in reviewing and recommending approval of the permit.

The operation of the McMurry Mine is furthermore inconsistent with Wyoming and Federal public policy concerning the preservation and conservation of greater sage grouse. The permit application does not comply with the Governor's Executive Order 2010-4, concerning the preservation of sage grouse, for the following reasons: the operation is within 1.9 miles of an active sage grouse lek; the applicant has not properly quantified suitable habitat in the potentially affected area nor performed a habitat assessment; the reclamation plan makes no effort to restore sage grouse habitat; and McMurry has no monitoring plan in place. Furthermore, when the mine is in operation, as testified by the Boulder Residents, sage grouse abandon the area en mass, only returning when the noise and truck traffic has ceased. The mine will adversely affect this core sage grouse area, and should be denied for that reason as well.

Finally, the permit should be denied because McMurry has habitually, and in reckless disregard of DEQ terms and conditions, violated its mining permits for its operations across the state. That is true of its operation of the Boulder Mine, and its other operations around the State of Wyoming. The permit should therefore be denied under W.S. § 35-11-406(o).

POINT I

THE McMURRY OPERATION IS A PUBLIC NUISANCE BY ANY DEFINITION

The parties have submitted memoranda of law on what constitutes a “public nuisance” under W.S. § 35-11-406(m)(vii), and the Boulder Residents respectfully refer the Council members to those memoranda. All parties have agreed that there is no clear definition of “public nuisance” under Wyoming statutes, or Wyoming case law. Instead, all parties have looked to the decisions of other states, and the Restatement (Second) of Torts for guidance.

As one might expect, the conclusion McMurry reaches regarding the definition of “public nuisance” is more constrained than that advanced by the Boulder Residents, drawing a distinction between private and public nuisance that would preclude the EQC from even considering the impact on the Boulder Residents’ use and enjoyment of their own property. McMurry stridently argues that to find a “public nuisance” one must identify “some interference with a public right.” McMurry Memo of Law at 4. Quoting the Restatement (Second) of Torts, 821B. After the testimony presented by the Boulder Residents, finding “some interference with a public right” should not be difficult. Thus, even under McMurry’s own narrow standard, the McMurry Mine is a public nuisance.

A. The McMurry Mine Unreasonably Interferes with the Exercise of Public Rights

The evidence has shown that the McMurry Mine unreasonably interferes with **public safety** and the **exercise of public rights** in the following ways:

- As Kelly Garside testified, trucks making a right turn entering the mine from State Road 353 must cross over the oncoming traffic lane, onto the opposite shoulder, in order to navigate the tight turn into the mine's one-lane haul road. This movement poses a serious risk to public safety.
- During mine operations, when hauling activity is being conducted, Mr. Garside and his wife do not use State Road 353, or County Road 113 and are thus captive in their own homes, out of fear for their own safety. They have a right to use the road, as any other member of the public does.
- Sandra Goodwin testified that on County Road 133, trucks often use the middle of the road, forcing other drivers onto the shoulder. This fact was also confirmed by Randy Simpson's Testimony, and is demonstrated in the video that was admitted into evidence, Boulder Residents' Exhibit 1, which shows trucks repeatedly consuming the road by driving down the middle of the road.
- Sandra Goodwin and Dave Goodwin testified that they are unable to access adjacent Bureau of Land Management public land used for horseback riding and other recreational activities such as looking for arrowheads or wildlife, because of the excessive truck traffic and noise.
- Dave Goodwin testified that, absent the mining operation, County Roads 133 and 113 are used by long-distance bikers. However, when the trucks are hauling, bikers prudently avoid this area due to the noise and safety concerns.

- Dave Goodwin testified that the public's use of County Roads 133 and 113 and area BLM lands is "all but curtailed if not completely wiped out" by the truck traffic.
- Dave Goodwin testified that as a result, since the McMurry Mine began operation, there are fewer hunters using the area public lands, and fewer people camping on the adjacent BLM lands.
- Denise Hastings testified that she and her husband, and their guests, are now unable to travel along the shoulder and sides of County Road 133, on public lands, either on an ATV, on horseback, or on a bicycle. The Hastings had previously enjoyed performing a public service, and a little outdoor time together, riding their ATV and clearing debris and litter from the sides of the road. The truck traffic and noise make such activities both unsafe and unpleasant, and has prevented the Hastings from exercising their right, as members of the public, to use the road.
- Randy Simpson testified that he and his wife have great difficulty entering County Road 133 from their own driveway due to the volume of truck traffic. Mr. Simpson also has had several near-miss incidents with trucks, wherein he was run off the road by trucks driving down the center of the narrow road.
- Mr. Simpson also testified that his wife cannot walk on the road when the trucks are running due to the dust, debris and safety concerns, and was forced to acquire a treadmill in order to get exercise.

Apart from objections to the relevance of the above testimony, which objections were overruled, none of the above-outline impacts on the exercise of public rights were in any way challenged or

contradicted by McMurry. McMurry acknowledges that the mine generates 300 or more truck trips a day, and acknowledges that those trucks begin to arrive at 5:15 in the morning. This unreasonable imposition has prevented the Boulder Residents, and other members of the public, from exercising their rights, as members of the public, to use State Highway 353, County Roads 133 and 113, and to use adjacent BLM public lands for permissible public purposes. It is therefore a classic example of a public nuisance, even by McMurry's own definition.

B. The Mine Unreasonably Interferes With the Rights of an Entire Neighborhood

Other definitions of "public nuisance," from other jurisdictions, interpret a public nuisance more broadly, and include the unreasonable imposition on the private rights of an entire neighborhood or area. A New Mexico decision cited by McMurry states: "A public nuisance affects a considerable number of people or an entire community or neighborhood." See McMurry Memo at 4 citing Padilla v. Lawrence, 101 N.M. 556, 562, 685 P.2d 964. (Ct. App. 1984). Similarly, Colorado and New York courts have found that noise from a firing range, or a stock car race track, have been found to be public nuisances, although such activities affected only the neighboring land owners' use of their own properties. See Davis v. Izaak Walton League, 717 P.2d 984 (Co. 1985); New York v. Waterloo Stock Car Raceway, Inc., 96 Misc.2d 350 (NY 1978).

Here, there can be little doubt that the noise and dust generated by truck traffic from the McMurry Mine has adversely affected the entire neighborhood and interfered with the public peace. While the Council cautioned the Boulder Residents against presenting cumulative or redundant testimony, and the Boulder Residents attempted to be concise in presenting their concerns, it was the testimony of all of the area residents that their lives have been severely disrupted by the mine operations. The Boulder Residents simply ask the members of the Council

to watch Boulder Residents' Exhibit 1 (a six minute video), and consider whether the noise generated by those trucks passing through the Boulder neighborhood 300 times a day, 7 days a week, is an unreasonable interference with the public peace in this otherwise tranquil area.

POINT II

THE DEQ DID NOT EVEN CONSIDER WHETHER THE IMPACTS GENERATED BY TRUCK TRAFFIC CREATE A PUBLIC NUISANCE

The DEQ's witness, Tanya King, who reviewed the McMurry permit application and determined its completeness, testified that she believed that the permit met all of the requirements of the Environmental Quality Act. Ms King further testified that in her view there were no grounds for denying the permit. However, Ms. King also testified that the DEQ's consideration of the noise impacts associated with the mine was limited to the activities in the pit itself. Truck noise on area roads, she testified, is "not in our area." Ms. King testified that while she "would like to give consideration" to truck noise, "I don't have any control over it." Ms. King continued: "I believe that the land quality division does not have authority to regulate noise from trucks."

This position is directly contradicted by the DEQ's own memorandum of law in opposition to McMurry's motion in limine. In that memorandum, the DEQ correctly stated:

The statutory directive requires the Council to consider aspects of the operation that are outside of the permit area and outside of the Council's jurisdiction. If it were limited to hearing evidence in the permit area boundary, there would be no ability to consider whether the operation will be a public nuisance, because the public is not likely to be inside the permit area. Consequently, the Council is authorized to hear evidence of truck traffic as it pertains to the claims of a public nuisance.

DEQ Memorandum dated December 9, 2010 at 2. Thus, although the DEQ has argued to this Council it has the authority to do so (and it clearly does), the DEQ gave no consideration to the

noise and other impacts generated by truck traffic emanating from the mine when it weighed whether the mine would constitute a public nuisance. To now issue the permit, without any such review, would be arbitrary and capricious.

POINT III

THE OPERATION IS IN VIOLATION OF PUBLIC POLICY PERTAINING TO THE PROTECTION OF SAGE GROUSE

The permit may be denied if it is determined that “any part of the proposed operation, reclamation program, or the proposed future use is contrary to the law or policy of this state, or the United States.” W.S. § 35-11-406(m)(iii). Here, the proposed operation, and its reclamation plan, are inconsistent with the expressed policy of the State of Wyoming relating to the need to protect greater sage grouse, a species of critical concern to the state. The permit should be denied because the applicant has not complied with Executive Order 2010-4. The mine is now having a detrimental impact on a sage grouse core area, and if permitted, will continue to adversely affect greater sage grouse.

A. It is the Public Policy of the State of Wyoming to Protect Sage Grouse Through the Implementation of Executive Order 2010-4

Mary Flanderka, Program Supervisor for Habitat Protection at the Wyoming Game & Fish Department testified at the hearing. Ms. Flanderka confirmed that it is the public policy of the state of Wyoming to protect greater sage grouse. As Ms. Flanderka testified, in order to carry out that policy, the State has adopted a “regulatory mechanism” – Executive Order 2010-4 (“EO 2010-4”). See Boulder Residents Exhibit 17.

EO 2010-4 establishes a permitting process requiring detailed habitat study and evaluation that must be performed before any activity may be permitted in a core sage grouse

area. It also establishes certain stipulations for development that must be met. In particular, EO-2010-4 sets a surface disturbance limitation of 5% of suitable sage grouse habitat per an average of 640 acres. Whether a particular project meets that surface disturbance limitation is evaluated through a Project Impact Analysis Area (“PIAA”) analysis. Where, as here, a private development is at issue, it is the applicant’s burden to demonstrate that its project meets the requirements of EO 2010-4. McMurry has not done so here.

B. EO 2010-4 Was Not Met Here

The DEQ, as Mrs. King testified, relied on the Wyoming Game and Fish Department to determine whether the application met the requirements of Executive Order 2010-4. McMurry appears to have had a limited role in that evaluation. However, Ms. Flanderka, the Game and Fish Habitat Program Supervisor, confirmed in her testimony that the following requirements set forth in Executive Order 2010-4 were not met:

1. No Habitat Assessment was performed and thus there was no assessment of suitable habitat, sage grouse use of such habitat, priority restoration areas, areas of invasive species, and no assessment of whether other assurances were in place such as easements, habitat contracts or the like.
2. No Disturbance Analysis was performed for the individual leks which fall within the PIAA.
3. Game and Fish did not evaluate whether the Mine’s reclamation plan would be consistent with EO-2010, which it is not.
4. No monitoring plan has been established.

Tanya King also testified that at least one lek, the Goodwin Lek, was likely to be within 1.9 miles of a haul road, in violation of EO-2010’s Stipulation #4. She did not know for certain, because no assessment has been performed of the size and perimeter of that Lek.

C. The Lack of a Habitat Assessment Likely Skews the Permissible Disturbance Area

Mary Flanderka, as well as Ms. King, both confirmed that no habitat assessment was performed here. However, they each asserted that where no habitat assessment is performed, the assumption is that all of the PIAA area is suitable habitat, suggesting that this is the more conservative approach. It is not.

The problem with this assumption (which is nowhere found in the Executive Order) is that it skews the results of the “Maximum Disturbance Process” and results in a less conservative, less protective evaluation. As stated above, within the sage grouse core area, no more than 5% of suitable sage grouse habitat per 640 acres may be disturbed. EO 2010-4, General Stipulation 1. Here, the Game and Fish Department’s disturbance analysis showed that the project would not exceed that number. However, the Game and Fish Department assumed that the entire PIAA is suitable habitat, apart from areas that its representatives knew were not suitable such as existing roads and existing gravel mines. No habitat assessment was performed of the area to determine what habitat may be suitable, and what may not.

Thus, the denominator of the equation used to determine the maximum allowable disturbance was likely larger than it might have been had a habitat analysis been performed because it included the all lands within the PIAA perimeter, not necessarily suitable habitat. As a result, the allowable disturbance area was likely larger than it should have been. Had a habitat analysis been performed, the applicant may well have identified large areas unsuitable for sage grouse due to poor sage brush coverage, sage brush eradication, or other features. If the permit application had been properly evaluated consistent with EO 2010-4, its proposed operation may well have exceeded the 5% cap on disturbance of suitable habitat. We do not know, because the assessment was not performed.

The McMurry mine permit is therefore inconsistent with the clearly stated Wyoming public policy aimed at protecting the sage grouse, and preventing an endangered species act listing. The permit should be denied for this reason.

POINT IV

McMURRY HAS DEMONSTRATED A PATTERN OF WILFULL VIOLATIONS OF ITS DEQ PERMITS

W.S. § 35-11-406(o) states that a permit may be denied where the applicant “controls or has controlled mining operations with a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable harm to the environment as to indicate reckless, knowing or intentional conduct.” The Boulder Residents have demonstrated that McMurry and its related entities have violated the terms of their DEQ permits no less than six times in the past eight years. Six notices of violation issued to McMurry are Boulder Residents’ Exhibits 31-36. The violations include failing to obtain LQD approval before commencing operations (BR Ex. 31); repeated violations for improper management of topsoil, which violations were not corrected in a timely fashion (BR. 31, 32, 33); failure to obtain landowner consent (BR 32); failure to control sediment resulting in discharge to waterways (BR33); failure to control air emissions (BR 34); failure to control fugitive dust (BR34, 35), and mining in excess of 10 acre limitations (the East Fork Ranch Pit) (BR 36).

In addition, McMurry has violated the terms of its County-issued conditional use permit. It has done so by exceeding the permissible hours of operation, by exceeding the 10 acre limit, and by failing to control fugitive dust. The County has taken no action to address those concerns. McMurry has thus demonstrated a pattern of willful violations as to indicate a reckless

disregard of the requirements of its permits. It should not be granted another mining permit to operate in the State of Wyoming.

POINT V

MCMURRY HAS STEADFASTLY REFUSED A COMPROMISE THAT WOULD MITIGATE OR ELIMINATE THE PUBLIC NUISANCE

There is a reasonable compromise that would eliminate the public nuisance and bring the application into compliance with Wyoming law and policy. The Boulder Residents repeatedly attempted to sit down with McMurry, Sublette County, and the landowner, and work out such a compromise, long before taking their objections to the permit to the EQC. See Boulder Residents Exhibits 21 and 23. Their attempts have been rebuffed at every turn.

With the cooperation of Sublette County (which can be reasonably anticipated considering the landowner is one of three County Commissioners), the applicant could improve Mathis Lane, an existing county road, and make it the dedicated truck route to the mine. See Boulder Residents' Exhibit 3. Using Mathis Lane would avoid any impact on area residences because there are no occupied dwellings along its path. It would also shorten the distance both to U.S. 191 and to the applicant's primary customer base (drilling operations and road construction in the Jonah field), as Ron McMurry testified. It would also eliminate the need for trucks to make the dangerous right hand turn from Highway 353, into the mine, which requires trucks to cross into oncoming traffic, and onto the opposite shoulder. Finally, it would take the truck traffic farther from active sage grouse leks in the area and greatly reduce if not eliminate the impact of the mine on the Goodwin Lek and the Speedway Lek.

McMurry has refused to consider this option, no doubt because of its cost. Similarly, the County has thus far declined to exercise its authority to improve the road and require trucks to

use it. If the EQC exercises its authority to turn down this permit on the basis that it creates a public nuisance, McMurry is likely to seriously pursue Mathis Lane, and work with the County to upgrade Mathis Lane and make it the dedicated truck route. To do so is well within the power of the County, and the purse of McMurry. With that condition in place, McMurry can return to the DEQ for a permit and will face no opposition from the Boulder Residents.

The EQC could furthermore impose more stringent hours of operation requirements, and limit the number of truck trips to the mine per day, thereby reducing the extraordinary and intolerable impact that traffic is having on the Boulder Residents. Although McMurry would not even consider such restrictions, and offered none in its permit application, the EQC may impose them to reduce the public nuisance caused by the mine's operation.

CONCLUSION

The McMurry permit should be denied. The mine is a public nuisance, poses a threat to public health and safety, and would violate public policy. For all of the reasons set forth above, and in consideration of the evidence presented at the contested case hearing, the Boulder Residents ask the Council to turn down this permit and thus restore their quality of life.

Respectfully Submitted,

DATED: December 20, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of December, 2010, the foregoing Closing Argument Memorandum, was served, by e-mail, on counsel for the parties, and the EQC, at the following addresses:

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