BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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' MEMORANDUM OF LAW REGARDING THE DEFINITION OF A PUBLIC NUISANCE

Objectors Dave and Sandra Goodwin, Harv and Denise Hastings, Debbra White, David Payne, Randy Simpson, and Kelly Garside (the "Boulder Residents") respectfully submit this memorandum of law on the question of what constitutes a "public nuisance" pursuant to Wyoming Statute § 35-11-406(m)(vii).

INTRODUCTION

Wyoming Statute § 35-11-406 gives the Department of Environmental Quality the authority to deny a small mine permit for a variety of reasons, including if it finds that that "the proposed operation constitutes a public nuisance or endangers the public health and safety." W.S. § 35-11-406(m)(vii). At the upcoming contested case hearing, the Boulder Residents and other objecting parties will show that the proposed McMurray Ready Mix mine, currently operating under a 10-acre limited mining operation exemption, constitutes a public nuisance and endangers public health and safety. The extraordinary volume of heavy truck traffic generated by the mine, and the resulting noise, vibration and safety issues that traffic causes, have shattered the peace in

the residential neighborhood surrounding the mine and pose a daily threat to the health, safety and happiness of area residents. The DEQ (and the Environmental Quality Council) have the authority to protect the Boulder Residents from this nuisance by denying the requested permit.

ARGUMENT

POINT I

PUBLIC NUISANCE IS NOT DEFINED BY THE ENVIRONMENTAL QUALITY ACT, DEQ REGULATIONS, OR ANY OTHER STATUTE

Neither the Environmental Quality Act, nor the regulations promulgated by the Department of Environmental Quality thereunder define "public nuisance" in the context of mining activities.[1] Therefore, it is appropriate to look to common law as a source for the definition of "public nuisance." See Nimmo v. State of Wyoming, 603 P.2d 386 (Wyo.1976) ("the common law is constantly invoked for the purpose of definition and elucidation").

POINT II

THE COMMON LAW DEFINITION OF "PUBLIC NUISANCE" INCLUDES EXCESSIVE AND UNREASONABLE NOISE

The Wyoming Supreme Court has not specifically addressed the definition of "public nuisance," either under W.S. § 35-11-406(m)(vii), or otherwise. Nonetheless, the Court has found that certain activities, operations or structures constitute a public nuisance. Examples include constructing a dam six feet too high and thus interfering with a railroad right-of-way,

[1] A variety of Wyoming statutes establish that specified unauthorized or nonconforming activities constitute a public nuisance due to their noxious or offensive nature. These include, among other things, unauthorized public assembly (W.S. 35-15-111), unauthorized storage of explosives (W.S. 35-10-303), maintaining a structure that is a fire hazard (W.S. 35-9-111), and maintaining an unauthorized nonconforming junkyard (W.S. 33-19-102).

Big Horn Power Co. v. State of Wyoming, 148 P. 1110 (Wyo. 1915); the unauthorized enclosure of public lands, thus taking them out of the public domain, Ketchum v. Davis, 13 P. 15 (Wyo. 1887); and blocking a roadway, Cottman v. Lochner, 278 P. 71 (Wyo. 1929). In contrast, a popcorn stand was found not to constitute a public nuisance. Knight v. City of Riverton, 259 P.2d 748 (Wyo. 1953).

The Restatement of Torts, Second (1979), frequently cited by the Wyoming Supreme Court in a wide variety of contexts (although never for the definition of "public nuisance"), defines "public nuisance" as follows:

> § 821B Public Nuisance
>
> **(1) A public nuisance is an unreasonable interference with a right common to the general public.**
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Comment b to the Restatement put this definition in context, stating:

> At common law public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large -- interests that were recognized as rights of the general public entitled to protection. Thus public nuisances included interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes; with the public safety, as in the case of the storage of explosives in the midst of a

> city or the shooting of fireworks in the public streets; with the public morals, as in the case of houses of prostitution or indecent exhibitions; **with the public peace, as by loud and disturbing noises**; with the public comfort, as in the case of widely disseminated bad odors, dust and smoke; with the public convenience, as by the obstruction of a public highway or a navigable stream; and with a wide variety of other miscellaneous public rights of a similar kind. In each of these instances the interference with the public right was so unreasonable that it was held to constitute a criminal offense. For the same reason it also constituted a tort. Many states no longer recognize common law crimes, treating the criminal and the traditional basis for determining what is a public nuisance may still be applicable.

Comment b, Restatement Second of Torts, § 831B (1979) (emphasis added). In its memoranda dated December 6, 2010, McMurry cites this very same comment b from the Restatement. McMurry states that the comment "identifies the following types of activities as being 'public nuisances'" and then lists some of the types of activities noted above by the comment. However, McMurry conspicuously fails to mention that according to the comment, "loud and disturbing noises" constitute a public nuisance. McMurry Memorandum at 2.

Consistent with the Restatement's definition and commentary, numerous court decisions from a variety of jurisdictions have found that excessive and unreasonable noise constitutes a public nuisance. See e.g., Davis v. Izaak Walton League, 717 P.2d 984 (Colorado 1985) (noise from firing range found to be a public nuisance affecting neighboring residents); State of New York v. Waterloo Stock Car Raceway, Inc., 96 Misc. 2d 350; 409 N.Y.S.2d 40 (New York, 1978)(noise from stock car racing one night per week is a public nuisance); Ganim v. Smith & Wesson Corp., 258 Conn 313, 369, 780 A.2d 98 (Conn. 2001) (stating that "Typical examples of public nuisances" include noise pollution); Howard Opera House Assocs. v. Urban Outfitters, Inc. 2002 U.S.Dist LEXIS 26257 (D.Vt. 2002)(excessive music from retail store constituted public nuisance).

Furthermore, many municipal ordinances that prohibit excessive noise define such noise as a public nuisance, and have been upheld as a valid exercise of the police power. See e.g., McClure v. Beisenbach, 2008 U.S. Dist. LEXIS 77425 (2008) (upholding a San Antonio, Texas ordinance that stated that "excessive noise is a hazard to the health and well being of the citizens of the City of San Antonio, and should be more effectively abated as a public health hazard and public nuisance."); Sharkeys, Inc., v. City of Waukesha, 265 F.Supp. 2nd 984 (E.D. Wisc. 2003) (upholding noise ordinance aimed at curtailing public nuisance); Chicago National League Ball Club, Inc. v. Thompson, 483 N.E.2d 1245 (Ill. 1985)(upholding ordinance prohibiting "noise which creates a public nuisance."). Indeed, Sublette County's own zoning ordinance includes a provision governing noise. See Chapter III, Section 14.

While it has never defined "public nuisance," the Wyoming Supreme Court has defined "nuisance" as "[a] class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to the right of another." Hein v. Lee, 549 P.2d 286, 291 (Wyo. 1976) citing Lore v. Town of Douglas, 355 P.2d 367, 370 (1960). In Hillmer v. McConnell Brothers, 414 P.2d 972 (Wyo. 1966), the Court equated "public nuisance" with "nuisance." The Court first stated that "it is the proper function of the legislature to define those breaches of public policy which are to be considered public nuisances..." and then went on to state that the City of Laramie ordinance at issue did so, when it declared that certain noxious operations "constitute a nuisance." 414 P.2d at 974. On this point, again the Restatement Second of Torts provides guidance. Comment e to Section 821B explains that courts often equated "nuisance" with "public nuisance" and applied the same test. The comment explains:

> e. Unreasonable interference. The common law criminal offence of public nuisance involved an interference with a right common to the general public.

> Little more than this in the way of a standard for determining what kinds of interferences constitute the crime of public nuisance was to be found in the cases. But as the tort action came into the picture, the use of the single word "nuisance" to describe both the public and the private nuisance, led to the application in public nuisance cases, both criminal and civil, of an analysis substantially similar to that employed for the tort action for private nuisance."

Restatement, Second, Torts, Section 821B, comment e.

Consistent with this comment, in Wyoming the Supreme Court has simply used the word "nuisance" rather than "public nuisance." See e.g., Bowers Welding and Hotshot, Inc. v. Bromley, 699 P.2d 299, 306 (Wyo. 1985). In Bowers, a group of plaintiffs complained that the Defendant's neighboring commercial operation, which was located in a quiet, rural residential neighborhood, and which generated noise from heavy truck traffic, was a nuisance. Both the trial court and the Wyoming Supreme Court agreed, and the operation was enjoined.[2]

Therefore, public nuisance, as contemplated by W.S. § 35-11-406(m)(vii), should be viewed as any unreasonable interference with the public health, the public safety, the public peace, the public comfort or the public convenience. The McMurray Mine is just such a public nuisance. The noise and dust created by the mine's operation, including the tremendous truck traffic it generates, severely disrupt the public peace and comfort in the area of the mine and along the roads leading to U.S. 191. The truck traffic generated by the mine is a menace to anyone utilizing County Road 133 and the Muddy Speedway. The mine poses a significant and unreasonable interference with public health, public safety, public peace, public comfort and the public convenience and is therefore a nuisance – both public and private.

[2] McMurray too cites Bowers, and in doing so, claims that it was "directed to analyzing 'private nuisance'" This is a fiction. The Bowers decision does not use the term "private nuisance." See Bowers, 699 P.2d 299.

POINT III

THE DEQ HAS THE AUTHORITY TO DENY THE PERMIT FOR OFF-SITE PUBLIC NUISANCE AND SAFETY HAZARDS GENERATED BY THE MINE

The DEQ can be expected to argue, as it has in the past, that DEQ has no authority consider off-site impacts relating to a mine permit, even where that permit will create a public nuisance or endanger public health or safety. This view is based on an erroneous reading of the Environmental Quality Act, and is an abdication of the DEQ's responsibility to protect the public. The Boulder Residents ask the EQC to properly read the DEQ's enabling statute, and find that the DEQ has all the authority it needs to deny this permit.

As stated above, Wyoming Statute § 35-11-406 gives the DEQ the authority to deny a small mine permit for a variety of reasons, including if it finds that that "the proposed operation constitutes a public nuisance or endangers the public health and safety." W.S. § 35-11-406(m)(vii). "Operation" is very broadly defined by the statute, and includes:

> "...**all** of the **activities, equipment**, premises, facilities, structures, roads, rights-of-way, waste and refuse areas...storage and processing areas, and shipping areas **used in the process** of excavating **or removing overburden and minerals from the affected land.**"

W.S. § 35-11-103(e) (emphasis added). In turn, "affected land" is defined to include all of the land affected by the mining activity, including the mined area itself, as well as on-site haul roads and stockpiles. W.S. § 36-11-103(e)(xvi). Therefore, "operation" includes the "all" of the equipment used in removing minerals from a mine. Trucks used to remove gravel and sand from the McMurray Mine therefore fall within the meaning of "operation" under the statute, and their contribution to the public nuisance and impact on public health and safety cannot be ignored. Those trucks, by virtue of their frequency and size, and the fact that the primary haul routes are

narrow dirt roads, create a public nuisance and are a hazard to public health and safety and the permit should be denied.

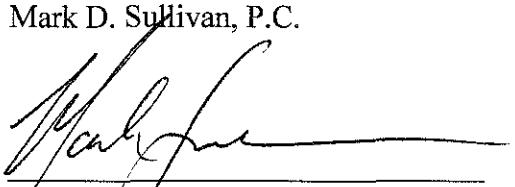
CONCLUSION

Excessive and unreasonable noise that unreasonably disrupts the public peace is commonly considered a classic example of a public nuisance. The DEQ has the authority to, and should be directed to, deny the McMurray Mine permit because it will create such a public nuisance.

Respectfully Submitted,

DATED: December 7, 2010.

Mark D. Sullivan, P.C.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of December, 2010, the foregoing Memorandum, was served, by e-mail, on counsel for the parties, and the EQC, at the following addresses:

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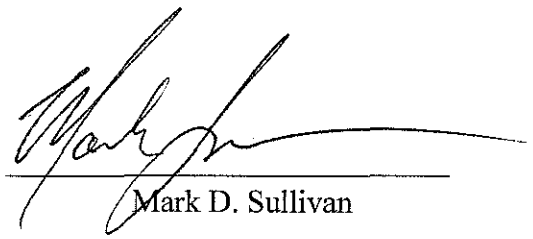

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