

BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

FILED

DEC 09 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

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**BOULDER RESIDENTS' MEMORANDUM OF LAW IN OPPOSITION TO McMURRAY  
READY MIX COMPANY'S *MOTION IN LIMINE***

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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 of law in opposition to the *motion in limine* filed by McMurray Ready Mix Company ("McMurry").

**INTRODUCTION**

McMurry, by all appearances, wishes to eviscerate the powers of the Wyoming Department of Environmental Quality and the Environmental Quality Council. Perhaps that should not be too surprising from a recidivist that has been repeatedly cited for violating the terms of its DEQ permits. First, employing remarkable "heads I win, tails you lose" reasoning, McMurry argued that the DEQ has no authority to find that the McMurry mine is a public nuisance and deny the permit. Now, McMurry seeks to preclude even the introduction of evidence of the public nuisance their operation has created, or measures that would mitigate or eliminate that nuisance. The EQC should deny McMurry's motion.

## ARGUMENT

### POINT I

#### **THE BOULDER RESIDENTS MUST BE PERMITTED AN OPPORTUNITY TO DEMONSTRATE THAT THE MCMURRY OPERATION CREATES A PUBLIC NUISANCE**

The Boulder Residents are asking the EQC to deny the McMurry permit because, among other things, the mine and its associated truck traffic (among other things) create a public nuisance and pose a danger to public health and safety. The EQC has the clear authority to do so under Wyoming Statute § 35-11-406(m)(vii); See e.g., Findings of Fact and Conclusions of Law and Order in Matter of Objections to the Small Mining Permit Application of Harris Trucking and Construction Co., TFN 3 5/15, Docket No. 2703-95. To demonstrate that such a nuisance exists, the Boulder Residents must be permitted to introduce evidence relating to the mine-generated truck traffic on State Highway 353 and County Road 133,<sup>1</sup> and how that traffic affects and endangers the Boulder Residents and other members of the public that may wish to use the road and adjacent public lands. Therefore, McMurry's motion, which states "any evidence regarding McMurry's use of the State Highways and County Roads should be excluded as being irrelevant," should be denied.

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<sup>1</sup> Demonstrating utter disregard for the Boulder Residents' concerns, McMurry's Motion states that "The Eastfork Ranch Pit is accessed by use of Highway 353 (a paved state Highway), which then intersects with County Road 113 (a gravel County Road)." This is not accurate. Highway 353 intersects with County Road 133, which is the road that the Boulder Residents live on and where the bulk of the nuisance is felt.

## POINT II

### THE EQC HAS THE AUTHORITY TO IMPOSE CONDITIONS ON THE McMURRY MINE PERMIT TO ELIMINATE THE PUBLIC NUISANCE

The Environmental Quality Act empowers the EQC to “Order that any permit, license, certification or variance be granted, denied, suspended, revoked or modified.” W.S. § 35-11-112(c)(ii). The EQC, therefore, may modify a completed permit and mine plan by incorporating such terms in the permit as may be necessary to meet the requirements of the Act. In particular, the EQC has the authority to impose terms that eliminate or reduce impacts from mine operations that create a public nuisance.

Here, the Boulder Residents are advocating that an alternative, county-controlled road, Mathis Lane, be the designated truck route to the McMurry Mine. There are no occupied dwellings along that road. It is a shorter distance to U.S. 191, and it is farther from occupied sage grouse leks.

The County has the authority to make Mathis Lane the designated truck route, and any necessary improvements and maintenance can and should be paid for by McMurry. Such actions are well within the power of the County and the purse of McMurry. Doing so would mitigate both the public nuisance, and the impact on sage grouse leks that are very close to County Roads 133 and 113, the current route predominantly used by trucks accessing the mine.

The Boulder Residents are not asking the EQC to make Mathis Lane the designated truck route or to prohibit truck traffic on County Roads 113 and 133. On the contrary, the Boulder Residents accept that such authority rests with the County. However, the EQC does control whether or not the permit should issue in light of the public nuisance it creates, and has the



power to modify the permit to reduce or eliminate that nuisance. If McMurry cannot work out an arrangement with the County relating to improving Mathis lane, which seems unlikely in light of the fact that the landowner is a Sublette County Commissioner, the mine should not be permitted to continue the public nuisance, and the permit should be denied.

### **POINT III**

#### **DUST AND AIR QUALITY IMPACTS ARE A COMPONENT OF THE PUBLIC NUISANCE**

Dust and fumes emitted by both mine operation and the truck traffic (in excess of 15,000 trips a year), are components of the public nuisance. Controlling such a public nuisance is within the power of the DEQ and EQC. Thus, evidence pertaining to such dust and fumes should be heard by the EQC. This position is shared by the DEQ.

### **POINT IV**

#### **McMURRY'S HISTORY OF VIOLATIONS IS RELEVANT**

Lastly, McMurry seeks to preclude introduction of evidence relating to its past permit violations, both at the East Fork Ranch Mine, and at its other operations around the state. The Environmental Quality Act empowers the EQC to deny a permit where an applicant has demonstrated a pattern of willful violations. The law states:

No permit shall be issued to an applicant after a finding by the director or the council, after opportunity for a hearing, that the applicant or operator specified in the application 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.

W.S. § 35-11-405(o). McMurry Ready Mix, Co, and a related entity believed to be under the same ownership and control (Rissler & McMurry Company) have received from the DEQ no fewer than seven Notices of Violation at their mining operations around the State in just eight years, including one violation at the East Fork Ranch mine. The Boulder Residents should be permitted to introduce evidence of such violations in order to show that the permit should not be issued under W.S. § 35-11-405(o). The motion should therefore be denied.

### CONCLUSION

For the reasons set forth above, McMurry Ready Mix Co.'s motion in limine should be denied in its entirety and the Boulder Residents should be permitted to make their case.

Respectfully Submitted,

DATED: December 9, 2010.

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**CERTIFICATE OF SERVICE**

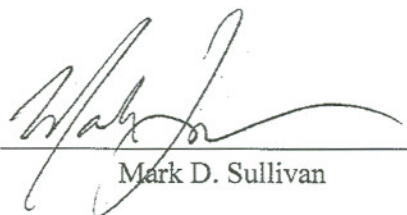
I HEREBY CERTIFY that on the 9<sup>th</sup> day of December, 2010, the foregoing Memorandum, was served, by e-mail, on counsel for the parties, and the EQC, at the following addresses:

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