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' CLOSING REPLY

By and through their attorney Mark D. Sullivan, 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 as their reply closing argument in further opposition to the small mine permit application filed by McMurry Ready Mix Company ("McMurry").

INTRODUCTION

McMurry's closing argument misstates the law and the evidence before the EQC. It also badly distorts the Boulder Residents' arguments, ascribing to the Boulder Residents exaggerated claims that they have not made. McMurry's closing is an affront to the rule of law (by claiming that an executive order does not apply to McMurry), to the permitting discretion of the DEQ and the EQC (by asserting that the DEQ "shall" issue the permit); and, perhaps most of all, to the Boulder Residents' right to participate in this proceeding and oppose the issuance of a permit (by repeatedly stating that the Boulder Residents should be "ashamed" for fighting to preserve their

quality of life). The Boulder Residents respectfully ask the EQC to weigh the evidence, exercise its authority under the law, and deny the permit for the reasons set forth below.

POINT I

McMURRY'S CLOSING FAILS TO ADDRESS THE MERITS OF THE BOULDER RESIDENTS' ARGMENTS AND INSTEAD CASTS ASPERSIONS AND MISCHARACTERIZATIONS

McMurry's closing argument avoids the merits of the Boulder Residents' objections. Instead, McMurry relies on hollow recitations of statutory language they claim strips the EQC of discretion, and mischaracterizations of the evidence the Boulder Residents' have presented in opposition to the permit.[1] This is a rather transparent effort to distract the EQC from the real issues of this contested case: the DEQ's inadequate review of the public nuisance, the threat the mine poses to public safety, and the fact that issuing the permit would be contrary to public

[1] As just one example, McMurry's closing argument states that the "load out" data from the mine "shows that the objectors' claims that there will be over 300 tucks per day every day for the next eighty (80) years is a distortion of reality, contradicted by the facts, and designed to convince this Council to make a decision on emotion rather than the law." McMurry Closing Argument at 13. The Boulder Residents made no such claims. On the contrary, the Boulder Residents' comment letter on the permit application, which prompted this contested case hearing, stated as follows:

> The LQD permit application does not give an estimate of the number of trucks that may leave the site daily, monthly or annually. In fact, there is no discussion of the timing or intensity of the hauling activity whatsoever. However, McMurray proposes an annual production rate of 300,000 tons of aggregate, and its air quality permit application anticipates an average of 15,790 hauls annually (this estimate is found in the air quality permit application, which suggests that trucks will have an average load capacity of 19 tons). Round trip, that's a truck passing by the Boulder Residents' homes approximately 31,580 times during the roughly six month (June to November) period that aggregate sales are typically conducted. Assuming the mine is closed on Sunday (which the permit application does NOT commit to), that is roughly 200 heavy trucks every day. Assuming hauling proceeds for ten hours a day, that's one truck, roughly, every 3 minutes.

policy of the State of Wyoming relating to the protection of sage grouse. The Boulder Residents have not attempted to "spin" the evidence, as McMurry claims. The Boulder Residents' objections and presentation of their evidence has been measured and reasoned. The Boulder Residents respectfully request that the EQC weigh that evidence and the law, and deny this permit.

POINT II

THE DEQ FAILED TO CONSIDER THE PUBLIC NUISANCE AND PUBLIC SAFETY IMPACTS OF THE MINE

A. The DEQ Did Not Weigh the Off-Site Public Nuisance the Mine Generates

The statute requires the DEQ to consider whether the mine will create a public nuisance, and deny the permit if that is the case. W.S. § 35-11-406(m)(vii). McMurry acknowledges that it was the responsibility of the DEQ's permit administrator, Tanya King, "to ensure that (the permit application) met each of the requirements of the Act before it could be considered for approval." McMurry Closing at 9-10. That is unquestionably true. Yet, in her testimony, Ms. King conceded that her review of the permit did not consider off-site impacts such as truck noise, stating: "I believe the land quality division does not have authority to regulate noise from trucks." As stated by the DEQ in its memorandum of law, the DEQ does have such authority. DEQ Memorandum dated December 9, 2010 at 2.

The Boulder Residents have pointed this inconsistency out in their initial closing memorandum. Yet, in their responses, neither the DEQ nor McMurry even address this shortcoming. To now approve the mine, with this glaring omission in the DEQ's review, would be arbitrary and capricious and contrary to law.

B. The Boulder Residents Demonstrated that the Mine Interferes With the Public's Exercise of Public Rights

The Boulder Residents have shown that the mine is a public nuisance by any definition, including the narrow definition put forward by McMurry. The mine interferes with the Boulder Residents' exercise of public rights including their right to use area roads for walking, biking, horseback riding and driving. It also interferes with the public's access to and lawful use of adjacent public lands by discouraging the Boulder Residents, their guests, and other members of the public from using those lands for horseback riding, rock and artifact hunting, and camping. McMurry characterizes these real-world impacts on public rights as mere "bootstrapping" and claims the Boulder Residents have not introduced any testimony from members of the public to support their claims. The Boulder Residents are not only area homeowners, but members of the public as well, and they have shown that the mine unreasonably interferes with their exercise of rights that they share with the public at large. Thus, the mine and its associated truck traffic constitute a public nuisance, even by McMurry's cramped definition.

C. The Mine Is An Unreasonable Imposition on the Public Peace of an Entire Neighborhood

Furthermore, the Boulder Residents have shown that the noise and truck traffic associated with the mine are an unreasonable imposition on the entire area or neighborhood, and for that reason as well constitute a public nuisance. One after another, the Boulder Residents succinctly testified regarding the impact that the mine and associated truck traffic have had on the public peace and their ability to enjoy their properties. Again, in their closing memoranda McMurry and the DEQ simply ignore the support marshaled by the Boulder Residents for this argument. The Boulder Residents have cited New Mexico, Colorado and New York precedent on this point showing that an unreasonable interference with the private rights of an entire neighborhood of

landowners constitutes a public nuisance. Neither McMurry nor the DEQ have even attempted to counter that authority. Again, the mine is a public nuisance, no matter what definition one uses. The permit should be denied.

POINT III

THE MINE IS A THREAT TO PUBLIC SAFETY

Kelly Garside, a Boulder Resident, testified concerning the dangerous truck turning movement necessary for trucks to enter the mine when approaching on State Highway 353. Trucks making a right turn into the mine have to cross over the oncoming lane of traffic, and even onto the opposite shoulder, to then make a wide turn into the narrow mine entrance. Mr. Garside introduced photos of the narrow entry to the mine, and described the turning movements. The turning movements, repeated dozens, if not hundreds of times a day, are a serious threat to public safety. As if hoping the EQC will simply ignore this problem as well, neither the DEQ nor McMurry address this public safety concern in any way in their closing arguments.

The permit may be denied if "the proposed operation constitutes a public nuisance or endangers the public health and safety." W.S. § 35-11-406(m)(vii). This turning movement, necessary for the proposed mine's operation (unless Mathis Lane were improved and used), endangers public safety. Neither the DEQ, nor McMurry have put forward any evidence that suggests the turning movement is safe, or that it can be made safe, and neither has addressed this problem in its closing arguments. For this reason as well, the EQC should deny the permit.

The Boulder Residents have furthermore demonstrated, using video and their own testimony, that the trucks regularly consume the road, driving down the center of County Roads 113 and 133. Trucks have forced the Boulder Residents off of the road when driving. They

prevent the Boulder Residents and others from riding a horse or an ATV, biking, or walking on county roads, all permitted lawful activities in a public right-of-way. These safety concerns are not something that would be cured by additional policing, or posting signs as the DEQ suggests. The trucks are a hazard by virtue of the character of the roads they travel, (narrow dirt country roads), their frequency (at times in excess of 300 trips a day), and their size (23 tons on average). The County has refused to restrict the use of County roads and cannot be expected to do so to protect the Boulder Residents, particularly in light of the fact that the property on which the mine sits is owned by a County Commissioner who then leases it to McMurry. The Boulder Residents' only hope is that the EQC will address this issue by denying the permit. If McMurry is committed to this project, it will then work with Sublette County to improve and utilize Mathis Lane, which would not require the dangerous turning movement, and is furthermore shorter, farther from active Sage Grouse leks, and does not pass any occupied dwellings.

POINT IV

MCMURRY'S PERMIT APPLICATION IS CONTRARY TO PUBLIC POLICY CONCERNING THE PROTECTION OF GREATER SAGE GROUSE

A. EO 2010-4 Applies to McMurry's Mine Permit Application

Practically acknowledging that it has failed to meet the requirements of EO 2010-4, McMurry attempts to argue that EO 2010-4 does not apply to them because their permit application was filed before EO 2010-4 was issued. McMurry cites no law to support this position, and therefore the Boulder Residents will not dwell long on this point. However, the DEQ does not agree, and has argued that EO 2010-4 applies to McMurry's permit application. On this point, the DEQ is certainly correct.

In Wyoming (and most other states), an applicant for a particular use of land acquires no vested right unless a permit has been issued, and construction commenced. *See e.g., Snake River Venture v. Board of County Comm'rs*, 616 P.2d 744 (Wyo. 1980) (developer had no vested right in a building permit where he had not commenced construction, and was thus subject to intervening zoning change). McMurry has not been issued a permit, and thus has no vested right to rely on the provisions of the now-superseded prior Executive Order. EO 2010-4 sets the public policy of the State of Wyoming with respect to the preservation of greater sage grouse and it applies to McMurry's application.

B. McMurry Has Failed to Demonstrate That the Mine Will Not Cause a Decline In Sage Grouse

The DEQ has now conceded that McMurry has not met the requirements of Executive Order 2010-4. However, the DEQ asks the EQC to issue the permit anyway, conditioning it on a future review of the mine's impact on Greater Sage-Grouse. Placing the cart before the horse in this manner would be both contrary to law, and contrary to public policy. McMurry has failed to meet the requirements of EO 2010-4 and therefore the permit should be denied as contrary to public policy.

First, the DEQ concedes that no disturbance analysis has been performed for the individual leks within the Project Impact Analysis Area or ("PIAA"), and no monitoring plan is in place, both of which are required by EO 2010-4. To cure these problems, the DEQ recommends issuance of the permit, and after-the-fact compliance by McMurry. However, EO 2010-4 states: "New development or land uses within Core Populations Areas should be authorized or conducted only when it can be demonstrated that the activity will not cause declines in Greater Sage-Grouse populations." Here, without performing the required

disturbance analysis, and by failing to prepare a monitoring plan, McMurry has not demonstrated that its activities will not cause a decline in Greater Sage-Grouse populations in a core area, and the permit should not issue.

Second, the applicant is required to conduct a habitat assessment to determine suitable and unsuitable habitat in the area. EO 2010-4 describes the habitat assessment as follows:

> 3. Habitat Assessment: A habitat assessment will be conducted to create a baseline survey indentifying:
>
> a. Suitable and unsuitable habitat within the PIAA
>
> b.Sage-grouse use of suitable habitat (seasonal, densities, etc.)
>
> c.Priority restoration areas (which could reduce 5% cap)
>
> i. Areas where plug and abandon activities will eliminate disturbance
> ii. Areas where old reclamation has not produced suitable habitat
>
> d. Areas of invasive species
>
> e. Other assurance in place (CCAA, easements, habitat contracts, etc.)

EO 2010-4 at B-2. That information is then used to determine whether the proposed activity will exceed the 5% cap on "existing and allowable suitable habitat disturbance" set forth in EO 2010-4.

No habitat assessment was performed for this project, as McMurry and the DEQ concede. Instead of performing a habitat assessment, the Wyoming Game and Fish simply assumed that all habitat within the PIAA was suitable, and now the DEQ and Game & Fish have claimed that this was the more conservative approach.

First, this assumption is not provided for anywhere in EO 2010-4. On the contrary, EO 2010-4 states that a habitat assessment "will be conducted." EO 2010-4 at B-2. Second, this

assumption is not more conservative. By assuming that all habitat is suitable, without actual verification, the DEQ and WG&F have likely overstated the amount of suitable habitat – the denominator in the equation for determining the allowable disturbance. EO 2010-4 describes the calculation to be performed as follows:

> 4. Determination of existing and allowable suitable habitat disturbance: **Acres of disturbance within suitable habitat divided by the total suitable habitat within the PIAA times 100 equals the percent of disturbed suitable habitat within the PIAA.** Subtracting the percentage of existing disturbed suitable habitat from 5% equals new allowable suitable habitat disturbance until plant regeneration or reclamation reduces areas of disturbed habitat within the PIAA.

EO 2010-4 at B-2 (emphasis added).

By assuming all of the PIAA is suitable habitat, the equation is skewed, allowing more area to be disturbed. Using the actual numbers produced by Wyoming Game and Fish, rather than fictional numbers used by the DEQ in its closing memorandum, illustrates this point. According to the Game & Fish analysis, contained in a June 8, 2010 memorandum, the entire PIAA was determined to be 67,236 acres. See Wyoming Game and Fish Memorandum dated June 8, 2010 (included in the agency correspondence attached to McMurry's permit application). As Game and Fish's Mary Flanderka testified, that entire area was assumed to be suitable habitat because no habitat assessment was performed. Using that as its "analysis area," Game and Fish concluded that the 5% threshold for permissible disturbance would be 3,362 acres (.05 x 67,236). Because the existing and proposed disturbance totaled only 2,595 acres, it was determined by Game and Fish that the proposed mine did not violate the 5% threshold.

Had a habitat assessment been performed, it may well have determined that a portion, perhaps even a substantial portion, of the PIAA constitutes unsuitable habitat for one reason or another. For example, large areas may not provide adequate sage brush cover (5% or greater

sagebrush canopy cover is required). Furthermore, as testified by Mary Flanderka, there are large swaths of land within the PIAA that are used for alfalfa and hay production by area landowners, which areas were assumed to provide suitable sage grouse habitat. In her testimony, Ms. Flanderka asserted that such alfalfa and hay fields are considered suitable habitat. However, a close examination of EO 2010-4 shows that only areas of alfalfa and other "forbs" "within 60 meters of sagebrush habitat with 10% or greater canopy cover" are considered suitable. See EO 2010-4 at B-9. We cannot know what portion, if any, of the alfalfa and hay fields within the PIAA meet these criteria because no habitat assessment was performed. One thing is certain, though, not all of the existing haying and alfalfa operations are suitable habitat, and their inclusion in the calculation skewed the results.

Finally, the DEQ's Tanya King acknowledged during her testimony that the Goodwin Lek may well be within 1.9 miles of the project's haul roads. She could not say, because the perimeter of that lek had not been determined. Again, this is a violation of the general stipulations of EO 2010-4. See EO 2010-4 at B-4.

McMurry has failed to perform the analysis required by EO 2010-4 and has thus failed to show that the permit will not cause a decline in Greater Sage-Grouse in the area. McMurry conducted no habitat assessment, no disturbance analysis for individual leks, and has no monitoring plan. These failings have statewide impacts. As Wyoming Game & Fish's Mary Flanderka testified, EO 2010-4 is Wyoming's regulatory response to the potential Endangered Species Act ("ESA") listing of Greater Sage Grouse. If the Greater Sage-Grouse is listed on the ESA, the impact to Wyoming's energy economy is incalculable. If Wyoming cannot demonstrate a commitment to protecting this bird, ESA listing is all the more likely. The permit should therefore be denied and contrary to the public policy of the state.

POINT V

McMURRY HAS DEMONSTRATED A PATTERN OF WILLFUL VIOLATIONS OF ITS PERMITS

Continuing its callous disregard for the concerns of the Boulder Residents, McMurry now argues that they should be "ashamed" for asserting that McMurry has demonstrated a pattern of willful violations of the Environmental Quality Act. McMurry fulminates that the Boulder Residents have "misrepresented" the terms of the Act by failing to point out that a hearing and findings by the Director or the EQC are required before a permit may be denied for this reason. Again, McMurry's arguments are more noise than substance.

A hearing *was* held in this matter. Prior to and during that hearing the Boulder Residents presented substantial evidence demonstrating that McMurry is a repeat offender. Six notices of violation have been issued to McMurry by the DEQ in eight years. Those NOVs cover a wide variety of violations that have resulted in irreparable air and water pollution, and the loss of topsoil. Those NOVs were introduced into evidence at the hearing in this matter. See BR 31-36. In addition, McMurry has violated the terms of its Sublette-County issued conditional use permit for this particular mine by exceeding the hours of operation (even after promising not to do so), by exceeding the 10 acre limitation, and by failing to control dust.

McMurry had ample notice that the Boulder Residents would make these arguments and introduce evidence of its pattern of willful violations at the hearing. Other than objecting to the introduction of that evidence, McMurry made no attempt to contradict that evidence, or explain why such a pattern of violations does not warrant denial of its permit. In their closing memorandum, McMurry still has not addressed that question. The Boulder Residents respectfully request that the ECQ make findings that McMurry has demonstrated a pattern of

willful violations of its permits, which violations have resulted in irreparable harm to the environment, and which demonstrate knowing conduct that warrants denial of this permit.

CONCLUSION

For all of the reasons set forth above, the Boulder Residents respectfully request that the permit be denied.

Respectfully Submitted,

DATED: January 12, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of January, 2011, the foregoing Closing Reply, was served, by e-mail, on counsel for the parties, and the EQC, at the following addresses:

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