

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

**IN THE MATTER OF THE OBJECTION)
TO THE SMALL MINE PERMIT OF) DOCKET NO. 10-4803
McMURRY READY MIX CO.,)
TFN 5 3/143)**

**WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. This matter came before the Environmental Quality Council (Council) as a contested case hearing pursuant to WYO. STAT. ANN. § 35-11-406(k) on the issuance of small mine permit TFN 5 3/143 to McMurry Ready Mix Company (McMurry). Council members present included Dennis M. Boal, presiding officer; Catherine Guschewsky; Dr. Fred Ogden, (via videoconference); John N. Morris (via teleconference); and Chairman Tim Flitner (via teleconference).

2. The Council held the contested case hearing on December 10, 2010, in Rock Springs, Wyoming at which the objectors to the permit, Dave and Sandra Goodwin, Harv and Denise Hastings, Debra White, David Payne, Randy Simpson, and Kelly Garside (collectively the Boulder Residents), were represented by Mark Sullivan; the East Fork Limited Partnership (East Fork) was represented by Jon Aimone; McMurry was represented by Harriet Hageman; and the Department of Environmental Quality, Land Quality Division (DEQ) was represented by Luke J. Esch.

3. Jurisdiction was proper for the Council for this contested case pursuant to WYO. STAT. ANN. §§ 35-11-406(k) and 35-11-112(a)(iv).

I. FINDINGS OF FACT

4. On September 22, 2010, DEQ authorized McMurry to issue a public notice that

its application for a small mine permit TFN 5 3/143 (McMurry Permit) was to be approved by DEQ pursuant to WYO. STAT. ANN. § 35-11-406. *Dec. 10, 2010 Tr. 32:9-13.*

5. The Boulder Residents and East Fork filed timely objections to the proposed issuance of the McMurry Permit. The Boulder Residents alleged that the truck traffic resulting from the McMurry Permit would result in a public nuisance; the McMurry Permit did not comply with the Governor's Executive Order 2010-4 on Greater Sage-Grouse (Executive Order); and McMurry should not receive a permit due to past alleged willful violations of DEQ rules and regulations pursuant to WYO. STAT. ANN. § 35-11-406(o). *See Boulder Residents List of Witnesses, Exhibits and List of Issues.*

6. East Fork alleged that the McMurry Permit did not comply with local zoning regulations and interfered with water rights. *See East Fork's Statement of Issues and List of Witnesses and Exhibits.*

7. The McMurry mine is a sand and gravel operation that has been in operation since February 15, 2008, as a limited mining operation. *Dec. 10, 2010 Tr. 30:21-25.*

8. The McMurry Permit authorizes the expansion of the limited mining operation beyond ten acres and allows it to expand over the next twenty years. *DEQ Exhibit A, MP-1.*

9. The McMurry mine is accessed by State Highway 353. *DEQ Exhibit A, Figure E-1.*

10. Trucks traveling to the McMurry mine also use County Road 133 to reach Highway 353. *Boulder Residents Exhibit 1.*

11. Many of the Boulder Residents live along County Road 133 and have been impacted by the truck traffic traveling to and from the McMurry mine. *Dec. 10, 2010 Tr. 181:15-18, 193:11-21.*

12. Sandra Goodwin testified that she does not let her grandchildren cross County Road 133 and will not cross on horseback when the McMurry mine is operating. *Dec. 10, 2010 Tr. 187:7-14, 187:23-188:1-3.*

13. Randy Simpson testified that in the past he drove into the ditch to avoid an accident with a truck on County Road 133. *Dec. 10, 2010 Tr. 255:17-23.*

14. Denise Hastings testified that she and her husband do not ride their ATV on County Road 133 when trucks are traveling on the road. *Dec. 10, 2010 Tr. 248:23-249:3.*

15. Kenneth Routh testified that he was concerned that his water rights on the Baner No. 1 Ditch and the Hittle Enlargement of the Jorgenson Ditch would be impacted by the expansion of the McMurry mine. *Dec. 10, 2010 Tr. 263:8-18.*

16. The Baner No. 1 Ditch will not be impacted by the approval of the McMurry Permit. *Dec. 10, 2010 Tr. 75:20-22.*

17. According to the State Engineers Office, the Hittle Enlargement of the Jorgenson Ditch has been abandoned for more than thirty years. No evidence was presented that showed Mr. Routh had an established right in the Hittle Enlargement of the Jorgenson Ditch. *Dec. 10, 2010 Tr. 83:14-25.*

18. The Sublette County Planning and Zoning Department determined that the McMurry mine did not require a conditional use permit because the County's regulations provide that the County may accept a permit issued by a state agency as evidence of compliance with all necessary regulations. *McMurry Exhibit K.*

19. Sublette County is responsible for the maintenance of County Road 133 and has imposed a thirty-five mile-per-hour speed limit and prohibited the use of jake brakes along County Road 133. *Dec. 10, 2010 Tr. 206:12-16, 37:12-15.*

20. McMurry submitted its application to expand the McMurry mine to DEQ in December of 2009. *DEQ Exhibit A*.

21. When McMurry first submitted its permit application to DEQ, the Executive Order had not been issued. *Dec. 10, 2010 Tr. 119:1-3*.

22. On August 18, 2010, Governor Freudenthal signed the Executive Order into law.

23. DEQ consulted with the Wyoming Game and Fish Department (WGF) on the Executive Order and incorporated its comments into the McMurry Permit. *Dec. 10, 2010 Tr. 47:14-16*.

24. DEQ relies on WGF to recommend permit conditions that comply with the Executive Order. *Dec. 10, 2010 Tr. 57:17-18*.

25. A Project Impact Analysis Area (PIAA) was conducted for the project as required by the Executive Order. *Dec. 10, 2010 Tr. 55:13-16*.

26. The PIAA was not conducted by McMurry, but rather by WGF. *Dec. 10, 2010 Tr. 50:8-13, 55:13-16*.

27. No habitat assessment was conducted by WGF for the PIAA; however, the WGF process manual states that if a habitat assessment is not conducted, WGF assumes all habitat within the PIAA is considered suitable for the PIAA. *Dec. 10, 2010 Tr. 133:9-12, 20-24*.

28. Assuming all habitat to be suitable for the purposes of the PIAA results in a more conservative result. *Dec. 10, 2010 Tr. 143:17-144:22*.

29. A disturbance analysis was conducted pursuant to the requirements of the Executive Order; however, no disturbance analysis was conducted by WGF for individual leks within the PIAA. *Dec. 10, 2010 Tr. 139:17-140:3*.

30. WGF did not require a monitoring plan on the McMurry Permit for the evaluation of impacts on sage grouse. *Dec. 10, 2010 Tr. 142:5-8.*

31. WGF did not impose any noise restrictions in the McMurry Permit or require McMurry to demonstrate that its operations will not exceed the ten decibels limit included in the Executive Order. *10, 2010 Tr. 126:15-20.*

32. The entrance to the McMurry mine from Highway 353 is narrow, thus requiring the trucks turning into the mine when traveling from the north to the south to enter the opposite lane in order to make the turn into the McMurry mine. *Dec. 10, 2010 Tr. 163:8-17.*

33. The McMurry Permit does not address the issues of trucks entering or accessing the McMurry mine or the volume of trucks using the local roadways. *DEQ Exhibit A.*

34. The McMurry Permit states that “[m]ining operations will normally be conducted during daylight hours on any day of the week.” *DEQ Exhibit A, MP-17.*

35. Ron McMurry testified that he interprets the hours of operation provision of the permit to mean that McMurry can operate outside of daylight hours so long as they do not do it more than fifty percent of the time. *Dec. 10, 2010 Tr. 335:1-25.*

II. CONCLUSIONS OF LAW

36. To the extent any of the above findings of fact include conclusions of law, they are incorporated.

37. The objecting parties bear the initial burden of presenting evidence showing that the proposed issuance of permits is improper. *In the Matter of the Objection to the Small Mine Permit of Croell Redi-Mix, Inc. TFN 5 6/072, EQC Docket No. 09-4806.*

38. Once the objecting parties meet their burden of presentation, the burden shifts to the applicant to show that the application complies with the requirements of the Environmental

Quality Act (Act). WYO. STAT. ANN. § 35-11-406(m).

39. The policy and purpose of the Act is expressly described in WYO. STAT. ANN. § 35-1-102 where it states that it is the “policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve and enhance the air, water and reclaim the land of Wyoming; [and] to plan the development, use, reclamation, preservation and enhancement of the air, land and water resources of the state.”

40. The extent to which the Act authorizes the establishment of mining operations within the state is governed by Article 4 of the Act. WYO. STAT. ANN. § 35-11-401.

41. WYO. STAT. ANN. § 35-11-406 establishes requirements for mine permit applications and the procedures under which DEQ reviews and approves or denies mining applications.

42. WYO. STAT. ANN. § 35-11-406(m) sets forth the bases upon which the director of DEQ may deny a permit application. Included in these criteria are: (1) whether any part of the proposed operation, reclamation program, or proposed future use would be contrary to the law or policy of Wyoming or the United States, and (2) whether the proposed operation would constitute a public nuisance or endanger public health or safety.

43. DEQ considers properly issued executive orders to be part of the laws and policy of the State of Wyoming and therefore authorized activities must satisfy the requirements of executive orders.

44. The Executive Order requires state agencies to review new development or land uses within core areas and authorize or conduct it only when it can be demonstrated that the activity will not cause declines in sage grouse populations. Development conducted consistent with the requirements of the Executive Order is deemed sufficient to demonstrate that the

activity will not cause declines in sage grouse populations. *Executive Order at 2.*

45. The Executive Order requires certain analyses to be conducted on the project to determine potential impacts on sage grouse, including the PIAA, a disturbance analysis, and a habitat assessment. The Executive Order also places general stipulations on projects in core areas, including limitations on surface disturbance, surface occupancy, seasonal use, and noise, in addition to monitoring requirements. *Executive Order at B-1 – B-6.*

46. However, existing land uses must be recognized and respected by state agencies and existing uses are exempt from compliance with the requirements of the Executive Order. *Executive Order at 2, Dec. 10, 2010 Tr. 125:6-9.*

47. The McMurry Permit does not meet the requirements of the Executive Order because it failed to include monitoring requirements for sage grouse, noise restrictions, and a disturbance analysis for individual leks within the PIAA.

48. With the exceptions identified above, DEQ and WGF adequately satisfied the requirements of the Executive Order and a proper consultation was conducted. *Jan. 13, 2011 Tr. 21:13-22.*

49. The McMurry Permit would comply with all required zoning requirements. *Dec. 10, 2010 Tr. 88:6-17.*

50. DEQ is also required to consider whether the operation will endanger public safety. WYO. STAT. ANN. § 35-11-406(m)(vii).

51. The Council acknowledges that it has no jurisdiction over traffic on public roads, however, it does have jurisdiction over haul roads for the mine. *Jan. 13, 2011 Tr. 6:10-16.*

52. The entrance to the McMurry mine from Highway 353 constitutes an issue of public safety due to the risk that an accident may occur when trucks enter into the opposite lane

to make the turn onto the access road to the McMurry mine. *Jan. 13, 2011 Tr. 6:1-6.*

53. DEQ is also required to consider whether the operation will constitute a public nuisance. WYO. STAT. ANN. § 35-11-406(m)(vii).

54. A public nuisance is an unreasonable interference with a right common to the general public. The public peace is a right that is common to the general public. Restatements (Second) of Torts § 821B (1979).

55. Operating the McMurry mine 24 hours a day seven days a week in accordance with Mr. McMurry's testimony would be an unreasonable interference with the public peace. *Jan. 13, 2011 Tr. 13:2-18.*

III. CONCLUSIONS

56. The Boulder Residents have shown that, as drafted, the McMurry Permit (1) does not meet the requirements of the Executive Order, (2) could constitute a threat to public safety due to the access road, and (3) may constitute a public nuisance if allowed to operate twenty-four hours a day, seven days a week. Therefore, the Council FINDS that the McMurry Permit is contrary to the laws and policies of the State and may constitute a public nuisance and endanger public health and safety and hereby ORDERS that the McMurry Permit be DENIED.

DATED this ____ day of February, 2011.

Dennis Boal, Presiding Officer
Environmental Quality Council