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JAN 06 2010 JK

Jim Ruby, Executive Secretary  
Environmental Quality Council

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 )

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**DEQ'S CLOSING ARGUMENT**

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The Department of Environmental Quality, Land Quality Division (DEQ/LQD), through the Office of the Attorney General, hereby submits its Closing Arguments in the appeal of McMurry Ready Mix Co.'s (McMurry) small mine permit application TFN 5 3/143.

**I. INTRODUCTION**

McMurry filed small mine permit application TFN 5 3/143 with DEQ/LQD in December of 2009 in order to expand its current mining operation located in Sublette County, Wyoming. DEQ/LQD reviewed the application, found it to be complete and required McMurry to provide notice to the public of DEQ/LQD's determination and decision to issue the permit. After notification that McMurry's application was complete, several interested parties timely filed objections to the permit with the DEQ/LQD. A contested case hearing was held on the permit application before the Environmental Quality Council (Council) pursuant to WYO. STAT. ANN. § 35-11-406(k) on December 10, 2010, in Rock Springs, Wyoming.<sup>1</sup> At the hearing, the objecting parties, the Boulder

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<sup>1</sup> Please note that no transcript was available at the time of DEQ's Closing Argument. Facts in evidence are based on the audio recording of the hearing.

Residents and East Fork Limited Partnership (East Fork), alleged four primary issues and three, in DEQ/LQD's view, secondary issues. The primary issues were whether the mine expansion would create a public nuisance, violate the Governor's Executive Order on Sage Grouse 2010-4 (Executive Order), violate local zoning regulations, and impair established water rights. The secondary issues were whether previous violations by McMurry were willful, whether an alternate route was required, and which party had the burden of proof.

DEQ/LQD acknowledges that the evidence presented at the hearing revealed that the proposed permit stipulations, which arose from consultations between DEQ/LQD and the Wyoming Game and Fish Department (WGFD), failed to include three stipulations required by the Executive Order. However, DEQ/LQD and the Council have the authority to modify the permit prior to its issuance to remedy these issues. The remaining issues raised by the objecting parties failed to show that any grounds will exist that would allow the Director to deny the permit pursuant to the provisions of WYO. STAT. ANN. § 35-11-406(m). Therefore, it is the Council should issue findings of fact and conclusions of law directing DEQ impose additional conditions on the permit and grant the mine expansion permit to McMurry. WYO. STAT. ANN. § 35-11-406(m) & (p).

## **II. THE MINE EXPANSION WILL NOT CONSTITUTE A PUBLIC NUISANCE**

One of the primary issues in this case is whether the expansion of the mine will create a public nuisance. The objecting parties presented testimony that their lives have been impacted by the mine due to the amount of truck traffic coming from the mine.

Interference with the use and enjoyment of one's land, however, does not necessarily constitute a public nuisance.

It is agreed that the Restatement (Second) of Torts provides guidance as to what constitutes a public nuisance. *See* Boulder Residents Closing Arguments p. 6. Public nuisance is defined by the Restatements (Second) of Torts as "an unreasonable interference with a right common to the general public." Restatements (Second) of Torts § 821B (1979).

It is also important to point out that injury to multiple individuals does not constitute a public nuisance. The comments to the Restatements (Second) of Torts state:

Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.

Restatements (Second) of Torts § 821B cmt. g (1979).

In this case, the objecting parties claim that the McMurry operation will interfere with "public safety and the exercise of public rights." *See* Boulder Objectors' Closing arguments p. 7. To support these claims, the objecting parties testified that the road is inadequate for trucks to turn into the mine, the trucks often exceed the speed limit and drive down the center of the road. These are matters of traffic law enforcement, however, and should be presented to the Sublette County Board of County Commissioners or the Sublette County Sheriff not the Council. DEQ/LQD and the Council do not have authority to prohibit anyone from using a public roadway or regulate the speed or manner

in which vehicles use county roads. This is an area that the legislature has clearly reserved for the counties. "All county roads shall be under the supervision, management and control of the board of county commissioners of the county wherein such roads are located." WYO. STAT. ANN. § 24-1-104. It was established at the hearing that Sublette County has enacted a 35 mph speed limit and also prohibited jake brakes. These measures should address the Boulder Residents' concerns about speeding trucks and noise from jake brakes. If trucks violate these restrictions, that would be an issue for the Sheriff's Department, not the Council.

Additionally, the objecting parties claim that the trucks' use of the road prevents them from accessing public lands in the area. However, upon further questioning, they admitted that this is not true. The objecting parties are not prohibited from accessing the public lands. Sandra Goodwin testified that she was unable to access Bureau of Land Management (BLM) land due to the truck traffic on the county road, but then admitted on cross examination that she was not actually physically prohibited from accessing the BLM lands. The availability of access to public lands has not and would not be diminished if the permit is granted.

The objecting parties also claim that they are no longer able to use the county road for walking or biking due to the truck traffic. It is important to remember that this is a county road open to multiple forms of traffic, not a bike or jogging path. When making the decision to walk or ride a bike on a county road, one cannot have an expectation of privacy. It is a public road, and one must expect others to also take advantage of it. The objecting parties cannot be heard to complain that others are lawfully using a public road.

The real issue in this case is whether the mine unreasonably interferes “with a right common to the general public.” Restatements (Second) of Torts § 821B (1979). The Boulder Residents can still use the county road and can still access public lands. The objecting parties have not established that any public right will be unreasonably interfered with by the expansion of the mine. Sandra Goodwin claimed that she does not stay in her house when the trucks are running due to the noise and vibrations. These claims, however, are individualized claims which may qualify as a private nuisance but are not a right common to the public. The public does not have the right to the peaceful enjoyment of the Goodwin residence. At most, the objecting parties have claimed a private nuisance which the Council does not have jurisdiction to abate.

Finally, while it is clear that the objecting parties are displeased with the way that their local government has handled the increased traffic from the mine, this displeasure can not prevent DEQ/LQD from granting the permit so long as the activities comply with WYO. STAT. ANN. § 35-11-406(m). The objecting parties should be voicing their concerns to law enforcement and local government, rather than the Council. While DEQ/LQD is authorized by the Environmental Quality Act to consider whether activities rise to the level of a public nuisance, it is not authorized to enforce traffic laws and local noise ordinances. For the reasons stated above, the mine expansion does not unreasonably interfere with a right common to the public and the permit should be granted by the Council.

### **III. THE MINE EXPANSION PERMIT CAN MEET THE GOVERNOR'S EXECUTIVE ORDER ON SAGE GROUSE WITH MINOR MODIFICATIONS**

The next issue raised by the objecting parties is whether the mine expansion permit will comply with the Governor's Executive Order on Sage Grouse 2010-4. DEQ/LQD concedes that some elements of the Executive Order were not complied with through the initial WGFD consultations, which occurred prior to issuance of the Executive Order. At that time, it was difficult to completely anticipate the contents of the Executive Order. These missing elements can be addressed by applying permit conditions when DEQ/LQD approves the permit. These conditions would require McMurry to work with WGFD to address the remaining issues, and to revise the DEQ/LQD permit to incorporate any changes that result from the consultation. The permit should not be denied in its entirety since these conditions will ensure timely compliance with the Executive Order. The Council and DEQ/LQD have the authority to modify permits prior to issuance without denying the entire permit. *See* WYO. STAT. ANN. §§ 35-11-112(c)(ii) and 35-11-109(a)(xiii). Therefore, any omission can be remedied by DEQ/LQD and the Council prior to the issuance of the permit and will not result in the loss of a permit by the applicant.

The Executive Order directs state and federal agencies to "maintain and enhance Greater Sage-Grouse habitats and populations in a manner consistent with [the] Executive Order." *See* Executive Order at 3. To accomplish this goal, the Executive Order requires new development within core areas be "conducted only when it can be demonstrated that the activity will not cause declines in Greater Sage-Grouse

populations.” *Id.* at 2. The Executive Order goes on to state that development which meets the stipulations of Attachment B to the Executive Order is deemed not to cause declines. *Id.* The Executive Order exempts certain activities from its requirements. The exemptions include “[a]reas already disturbed or approved for development prior to Executive Order 2008-02.” *Id.* at B-5. The McMurry mine expansion was not approved prior to the development of the Executive Order and therefore, is subject to the requirements of the Executive Order. Tanya King testified to this fact at the hearing when she stated that DEQ/LQD determines the Executive Order to be a law or policy of the state and described the consultation process with WGFD. Therefore, it is clear that the Executive Order is applicable in this case.

Three issues were raised during the hearing that should be included as conditions to the permit. The first involved the noise limitations during breeding season which was raised by Ms. Mary Flanderka of the WGFD during her testimony. Ms. Flanderka testified that time limit stipulations on quarry activity and hauling (March 1-May 15, 6PM to 8AM) would protect lekking activity from noise disturbance. This would limit new noise levels to 10 dB above ambient noise (existing activity included) at the perimeter of the lek during the breeding season. Therefore, in accordance with Stipulation 6 of Attachment B of the Executive Order, DEQ/LQD proposes to condition the permit as follows: “McMurry shall consult with the WGFD regarding timing stipulations, and submit a revision incorporating any permit changes prior to February 15, 2011.” The condition addresses the time limit stipulations in the Executive Order and the deadline ensures any timing restrictions will be in place before the next lekking season.

The second issue involves the absence of a monitoring plan in the permit. DEQ/LQD concedes that the Executive Order requires monitoring plans as a part of its general stipulations in Attachment B. This issue should also be addressed prior to the issuance of the permit. Accordingly, DEQ/LQD proposes to condition the permit as follows: “McMurry shall consult with WGFD to develop a monitoring plan, and submit a revision incorporating the monitoring plan into the approved permit.”

Additionally, the Boulder Residents pointed out that disturbance analyses for the individual leks were not conducted. As stated in the Executive Order, “[d]isturbance will be analyzed for the [Project Impact Analysis Area (PIAA)] as a whole and for each individual affected lek within the PIAA.” *See* Executive Order at B-2. Disturbance analysis was conducted for the entire PIAA area, however, it was not conducted for the individual affected leks. Compliance with this provision in the Executive Order can be achieved by conditioning the permit as follows: “McMurry shall consult with the WGFD to perform a disturbance analysis for the individual affected leks, and provide the results to the DEQ/LQD.”

Boulder Residents also take issue with the fact that a habitat assessment was not conducted for the PIAA. However, as described at the hearing, the fact that a habitat assessment was not conducted resulted in a more conservative analysis for the PIAA. The habitat assessment is conducted to create a “baseline survey” of the PIAA area and to determine what habitat is suitable and what is unsuitable. *See* Executive Order at B-2. This is important because “[u]nsuitable habitat occurring within the project area will not be included in the disturbance cap calculation.” *See* Executive Order at B-1. As Ms.



Flanderka explained at the hearing, the assumption that all area inside of the PIAA area is suitable is more conservative than the performance of a habitat assessment. Additionally, there was no evidence submitted to show that a habitat assessment would have resulted in any different result. If a habitat assessment is conducted and land is determined to be unsuitable, it is not included in the 5% Disturbance Analysis. It is not only excluded from the numerator but also the denominator of the analysis. For example, consider a PIAA area of 1000 acres and a disturbance of 20 acres. If it was assumed that all area was suitable, the 5% disturbance calculation would be 20 acres of disturbance divided by 1000 acres in the PIAA area, multiplied by 100 to result in a 2% disturbance within the PIAA area. Compare this to a situation where a habitat assessment was conducted in that same area and 10 acres were determined to be unsuitable, 10 acres would be excluded from the analysis. The resulting disturbance calculation would be 10 acres divided by 990 acres in the PIAA area, multiplied by 100 to have a disturbance of approximately 1%. Given the fact that the cap is 5%, it is clear that the disturbance calculation resulting from the assumption that all land is suitable (2%) is closer to the 5% threshold and a more conservative approach.

Finally, the Boulder Residents' argue that the McMurry operation does not comply with the Executive Order because haul roads will fall within 1.9 miles of the Goodwin lek. This is not the case. DEQ Exhibit B shows that the Goodwin lek is outside of the 1.9 mile boundary. Furthermore, it was established by Tanya King that the haul roads were in existence in 2009 and would be exempt from analysis pursuant to the Executive Order as an existing use.

In conclusion, DEQ/LQD acknowledges that additional conditions need to be included in the permit. These omissions were the result of a change in policy in the middle of a permit review and DEQ/LQD's reliance on WGFD in the permit review process. These omissions, however, can be easily resolved. DEQ/LQD's intention is to include the above mentioned conditions in the permit to address these issues. The Council should not deny the entire permit when the Council and the DEQ/LQD have the authority to remedy these deficiencies prior to its issuance. Therefore, DEQ/LQD asks the Council to grant the permit subject to the above referenced conditions.

#### **IV. THE OBJECTING PARTIES PRESENTED NO EVIDENCE OF WILLFUL ACTIONS BY MCMURRY**

The Boulder Residents failed to provide any evidence that would suggest that the Notices of Violation (NOV) issued to McMurry were "willful violations of such nature and duration with such resulting irreparable harm to the environment as to indicate reckless, knowing, or intentional conduct." WYO. STAT. ANN. § 35-11-406(o). The Boulder Residents' Exhibits 31 through 36 show that McMurry has had NOVs prior to this hearing. However, there is no evidence to suggest that these violations were reckless, knowing, or intentional. It was also established that McMurry did not have any outstanding NOVs and all past violations had been corrected. There is no evidence in the record that suggests the violations were anything more than accidental. Therefore, the Council should reject the Boulder Residents' allegation of willful violations.

## **V. AN ALTERNATE ROUTE IS NOT A FACTOR OF CONSIDERATION**

The Boulder Residents also argue that McMurry has refused to agree to use Mathis Lane for its truck traffic. This is simply not a factor that DEQ can consider when reviewing permit applications and an area completely outside of DEQ's authority. WYO. STAT. ANN. § 35-11-406(m) contains the factors that DEQ may consider when rejecting permit applications. Use of a particular route is not required by the statute. Furthermore, as mentioned above, the management and operation of county roads is an area that the legislature has clearly reserved for the counties. DEQ/LQD is not in a position to advocate that a county construct and operate additional roads. As such, this argument is an inappropriate and should be rejected by the Council.

## **VI. THE MINE EXPANSION COMPLIES WITH COUNTY ZONING REGULATIONS**

East Fork argues that the operation will not comply with local zoning regulations. DEQ/LQD relies on the applicant and the local zoning authority to provide evidence that all necessary zoning regulations are met. Assurances have been provided by Sublette County that the operation will comply with local zoning regulations in correspondence from the Planning and Zoning Department. Based on this letter, which is included in DEQ Exhibit A under County Approval, DEQ was satisfied that the zoning regulations would be met. DEQ defers to the local zoning authority on the interpretation and applicability of zoning regulations within the zoning authority's jurisdiction. As such, DEQ believes that the McMurry operation will comply with all zoning requirements of Sublette County.

Additionally, East Fork's arguments about interpretation of zoning regulations should be directed at Sublette County rather than the Council. Proceedings before this Council are not the proper forum to attack county zoning determinations. If East Fork believes Sublette County's interpretation its zoning regulations is incorrect, East Fork should challenge this interpretation in Sublette County.

#### **VII. THE BANES NO 1 DITCH WILL NOT BE IMPACTED BY THE MINE EXPANSION**

East Fork also argues that its water rights will be impacted by the approval of the McMurry operation. This is not the case. Tanya King testified that the approval of the McMurry operation will not impact the Banes No. 1 Ditch. The application in front of DEQ/LQD only allows McMurry to mine for the next 20 years. In the 20 year plan, there will be no impact or modification to the Banes No. 1 Ditch. Figures MP-1 and MP-2 in DEQ Exhibit A support this conclusion. Figure MP-1 shows the Banes No. 1 Ditch and states "[t]o remain through 20-Year Mining Sequence." Figure MP-2 shows that the 20 year mining plan will not impact the Banes No. 1 Ditch. The applicant is required to follow the approved mine plan, and any deviation from that plan requires a permit revision approved by DEQ/LQD. DEQ/LQD has not authorized the movement of the Banes No. 1 Ditch and it will not be impacted unless a permit revision is submitted and all necessary requirements are met.

East Fork also argues that it is the owner of the Hittle Enlargement of the Jorgensen Ditch. As Tanya King testified to at the hearing, discussions between DEQ/LQD and the Wyoming State Engineers Office revealed that it was the State

Engineer's opinion that this ditch has been abandoned. DEQ/LQD relies on the State Engineer for information on water rights and ditch information. While, Mr. Routh testified that he still uses a portion of the Hittle Ditch, he did not submit any evidence that he has a valid water right in the Hittle Ditch. Use of a ditch does not necessarily demonstrate a legal right to such use.

Therefore, East Fork's argument should be rejected because the Banas No. 1 Ditch will not be impacted by the approval of the mine expansion and East Fork failed to present evidence that the Hittle Ditch has not been abandoned.

### **VIII. BURDEN IS ON THE OBJECTING PARTIES**

East Fork raises one final argument relating to the burden of proof. East Fork contends that WYO. STAT. ANN. § 35-11-406(m), assigns the burden to McMurry to prove that it satisfies the provisions of the statute. East Fork misinterprets this provision. As noted by Councilman Boal at the hearing, "the entity contesting the agency action has the burden." The Wyoming Supreme Court has clearly stated that the burden of proving arbitrary administrative action is on the complainant, and this burden includes not only the clear presentation of the question, but also placement of evidence in the record to sustain the complainant's position. *Knight v. Environmental Quality Council*, 805 P.2d 268, 273 (Wyo. 1991).

The applicant has already shown to the satisfaction of DEQ/LQD that the permit complies with the requirements of WYO. STAT. ANN. § 35-11-406(m). Otherwise, DEQ/LQD would not have authorized public notice of the permit and proposed to issue the permit. It is now up to the objecting parties to show that DEQ/LQD's proposed

issuance is not appropriate. *See 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. (“Objectors failed to meet the burden of showing any reason why the permit should not be issued in this case.”) Therefore, the objecting parties bear the burden of putting forth evidence that DEQ’s decision to issue the permit is not in accordance with WYO. STAT. ANN. § 35-11-406(m).

Even if East Fork’s argument were correct, however, McMurry did establish all the elements of WYO. STAT. ANN. § 35-11-406(m) during its cross examination of Tanya King. Therefore, while it was not necessary because the objecting parties bear the burden to show that DEQ/LQD’s proposed action of issuing the permit was inappropriate, McMurry established that the necessary elements were met and at the very least shifted the burden to the objecting parties to prove otherwise.

## **IX. CONCLUSION**


The evidence presented to the Council at the hearing demonstrated that the McMurry’s small mine permit application TFN 5 3/143 should be granted. It was established at the hearing that the Boulder Residents can access public lands and use the county roads and no public right will be infringed. It was established that the local zoning regulations were met. It was established that no valid water rights would be impacted. DEQ/LQD acknowledges that the permit requires minor modification to ensure compliance with the Executive Order, but these modifications can be made without denying the permit in its entirety. Therefore, subject to the imposition of the

three conditions required by the Executive Order, the requirements of WYO. STAT. ANN. § 35-11-406(m) are met and the McMurry mine expansion permit should be granted.

WHEREFORE, for all the reasons set forth above, DEQ/LQD requests that the McMurry permit be approved subject to the imposition of the following conditions as they relate to compliance with the Executive Order:

1. McMurry shall consult with the WGFD regarding timing stipulations, and submit a revision incorporating any permit changes prior to February 15, 2011.
2. McMurry shall consult with WGFD to develop a monitoring plan, and submit a revision incorporating the monitoring plan into the approved permit.
3. McMurry shall consult with the WGFD to perform a disturbance analysis for the individual affected leks, and provide the results to the DEQ/LQD.

DATED, this 6<sup>th</sup> day of January, 2011.



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**CERTIFICATE OF SERVICE**

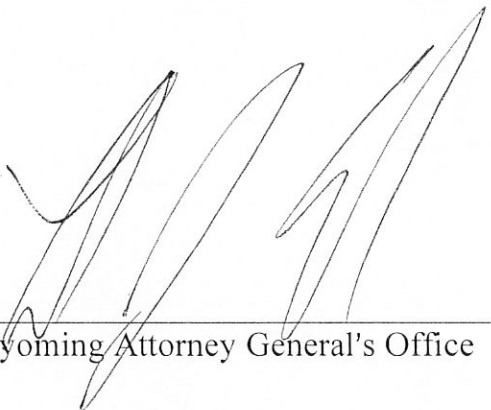
The undersigned hereby certifies that a true and correct copy of the DEQ's Closing Argument was served by electronic mail, this 6<sup>th</sup> day of January 2010, to the following:

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