

**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 RESPONSE TO MCMURRY READY  
MIX COMPANY'S *MOTION IN LIMINE***

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The Department of Environmental Quality, Land Quality Division (DEQ/LQD), through the Office of the Attorney General, hereby submits its response to McMurry Ready Mix Company's (McMurry) *Motion in Limine*. DEQ/LQD agrees with McMurry's statements that the Environmental Quality Council (Council) does not have authority to prohibit use of the county roads by McMurry. DEQ/LQD also agrees that air quality issues, such as dust, are best left to the Air Quality Division (AQD) of DEQ. DEQ/LQD, however, does not agree that evidence submitted by objectors of truck traffic on county roads and dust issues is irrelevant and should be excluded. DEQ/LQD believes that evidence of this nature can be considered in the limited context of determining whether the proposed operation will constitute a public nuisance pursuant to WYO. STAT. ANN. § 35-11-406(m)(vii).

**I. THE COUNCIL DOES NOT HAVE JURISDICTION OVER COUNTY ROADS**

DEQ/LQD agrees with McMurry that the Council does not have authority to prohibit anyone from using a public roadway. However, it is clear from the Environmental Quality Act (EQA) that the legislature intended the Council to hear

evidence on any number of issues over which it has no jurisdiction in the course of determining whether the proposed operation will be a public nuisance or endanger public safety. For example, the EQA states, in part:

The [mine] application shall include a mining plan and reclamation plan dealing with the extent to which the mining operation will disturb or change the lands to be affected, the proposed future use or uses and the plan whereby the operator will reclaim the affected lands to the proposed future use or uses. ... The mining plan and reclamation plan shall include the following:

(xii) The procedures proposed to avoid constituting a public nuisance, endangering the public safety, human or animal life, property, wildlife and plant life in or adjacent to the permit area including a program of fencing all stockpiles, roadways, pits, and refuse or waste areas to protect the surface owner's ongoing operations

WYO. STAT. ANN. § 35-11-406(b). (emphasis added)

This statutory directive requires the Council to consider aspects of the operation that are outside of the permit area and outside of the Council's jurisdiction. If it were limited to hearing evidence in the permit area boundary, there would be no ability to consider whether the operation will be a public nuisance, because the public is not likely to be inside the permit area. Consequently, the Council is authorized to hear evidence of truck traffic as it pertains to the claims of a public nuisance.

## II. AIR QUALITY ISSUES CAN BE CONSIDERED BUT ONLY IN THE CONTEXT OF WHETHER THE OPERATION WILL MEET THE REGULATORY REQUIREMENTS

As discussed above, the legislature was clear that the Council may consider impacts of the proposed operation outside of the permit area to determine whether the operation will be a public nuisance. Air quality issues would likely be included in this

group. However, as mentioned in McMurry's *Motion in Limine*, the AQD has scheduled a public meeting to discuss the air quality issues associated with McMurry's Eastfork Pit on December, 20, 2010, and will determine whether to issue a separate permit to McMurry and on what conditions. It is also important to note that dust control measures are one of many provisions often included in AQD permits to address air quality issues at mines and would likely be included if McMurry's AQD permit is approved by AQD. *See Wyoming Air Quality Rules and Regulations, Chapter 6, Section 2(f), Fugitive Dust Control Measures.* Therefore, any evidence received by the Council regarding air quality issues should be viewed only in the context of whether the air quality issues are of such a nature that the operation will constitute a public nuisance.

### III. EVIDENCE OF PAST VIOLATIONS IS NOT RELEVANT TO COUNCIL'S DECISION

DEQ/LQD agrees with McMurry that evidence of past violations that have been corrected in regard to the permit appeal hearing should be excluded from the proceedings. WYO. STAT. ANN. § 35-11-406(m)(xvi) directs DEQ/LQD to disregard evidence of past violations by the applicant if the violation has been corrected when determining whether to grant a permit. However, evidence of prior violation does not demonstrate compliance or non-compliance with WYO. STAT. ANN. § 35-11-406, which is the only issue in this proceeding. Accordingly, DEQ/LQD supports the exclusion of evidence of past violations of the EQA which have been corrected.

WHEREFORE, DEQ request that McMurry's *Motion in Limine* be denied in part to prevent the introduction of evidence related to traffic and air quality impacts and

granted in part to exclude evidence of past violations by the applicant which have been corrected.

DATED, this 9<sup>th</sup> day of December, 2010.



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the DEQ's Response to McMurry's *Motion in Limine* was served by electronic mail, this 7<sup>th</sup> day of December 2010, to the following:

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