

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**FILED**

DEC 20 2010

Tim Ruby, Executive Secretary  
Environmental Quality Council

IN THE MATTER OF THE OBJECTION )  
TO THE SMALL MINE PERMIT OF )  
McMURRY READY MIX CO. )  
TFN 5 3/143 )  
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)  
)

Docket No. 10-4803

**EAST FORK LIMITED PARTNERSHIP'S**  
**CLOSING ARGUMENT**

COMES NOW East Fork Limited Partnership ("East Fork"), by and through its attorneys, and, pursuant the Environmental Quality Council's ("Council") Order of Schedule, dated December, 13, 2010, submits the following closing argument:

**INTRODUCTION**

**I. BACKGROUND**

On March 19, 2008, Sublette County, Wyoming ("Sublette County") issued McMurry Ready Mix Co. ("McMurry") a Zoning and Development Permit. It was a "Conditional Use to allow a gravel pit for extraction, crushing, screening, and storage of gravel on 10 acres with 6 conditions stated on back of permit[.]" The permit was issued "By order of: Board of County Commissioners, Sublette County, Wyoming." The 10 acres covered by the County Conditional Use Permit are T31N, R106W, Sec. 6, SE4,SE4 ("Ten Acre Mine").

East Fork opposed the Ten Acre Mine and the grant of the County Conditional Use Permit in 2008. East Fork relied on the Sublette County Zoning and Development Regulations Resolutions (“Sublette County Zoning Resolutions”) to contest the grant of the County Conditional Use Permit for the Ten Acre Mine in 2008, and East Fork planned to contest the anticipated expansion of the Ten Acre Mine at the county level. East Fork believed McMurry would be required to comply with county zoning law if it wanted to expand its operation from a ten acre mine to a larger mine.

Unknown to East Fork, McMurry would receive a pass from Sublette County. McMurry’s pass allows it the freedom to expand from a Ten Acre Mine, with a permit subject to 5 year renewals controlled at the county level, to a 353 acre mine with a planned duration of over 80 years, controlled at the state level. All without complying with the Sublette County Zoning Resolutions relied on by East Fork.

Apparently, Sublette County allows gravel pits in the Agricultural district by Conditional Use only—except if you want a huge pit, like 353 acres, then you have a use by right. This is an untenable position.

## **II. ISSUE**

The Council is charged with determining whether or not McMurry’s Application is complete and compliant with state and federal law and, if so, whether or not the DEQ may issue McMurry a permit to mine.

## DISCUSSION

### I. RULE

#### a. BURDEN OF PROOF

“In determining which party bears the burden of proof, we consider the applicable substantive statutes. When the statutes do not assign the burden of proof, the proponent of the order has both the initial burden of production and the ultimate burden of persuasion in a contested case hearing.” *JM v. Department of Family Services*, 922 P.2d 219, 222 (Wyo. 1996). “In general, an agency is the proponent of its orders, while an applicant for benefits or for a license is the proponent in eligibility determinations.” *JM v. Department of Family Services*, 922 P.2d 219, 221(Wyo. 1996); *See also Three Sons, LLC v. Wyoming Occupational Health and Safety Com'n*, 2007 WY 93, ¶14, 160 P.3d 58 (Wyo. 2007). The burdened party “has both the initial burden of production and the ultimate burden of persuasion in a contested case hearing . . . [.]” *Three Sons, LLC v. Wyoming Occupational Health and Safety Com'n*, 2007 WY 93, ¶18, 160 P.3d 58 (Wyo. 2007).

Wyoming Statute §35-11-406(m) suggests who is the burdened party for this proceeding. Subsection (m) provides that “[t]he requested permit . . . shall be granted if the applicant demonstrates that the application complies with the requirements of this act and all applicable federal and state laws.” W.S. §35-11-406(m).



**b. McMURRY'S NONCOMPLIANCE WITH WYOMING LAW**

Wyoming Statute §18-5-204, provides:

No person shall locate erect, construct, reconstruct, enlarge, change, maintain or use any land in violation of a resolution or amendment adopted by any board of county commissioners under W.S. 18-5-202(c). Each day's continuation of such violation is a separate offense.

The Sublette County Zoning Resolutions contain similar language at Chapter IV,

Section 1. There, it is stated:

All proposed land development and use, construction, and site improvements **including the enlargement of existing uses** and structures shall conform to the applicable development standards prescribed in Chapter II hereof.

All proposed land development and use, construction and site improvements, **including the enlargement of existing uses** and structures shall be subject to review as prescribed in this chapter, and shall be authorized only upon the granting of a zoning and development permit. The following uses and activities shall be exempt:

- a. Accessory buildings and structures which are not used for human occupancy and have less than 900 square feet of floor space.
- b. Ranch buildings, except commercial feedlots which shall be required to obtain a permit.

Sublette County Zoning Resolutions, Chapter IV, Section 1 (emphasis supplied).

The Sublette County Zoning Resolutions also require an application for any non-exempt use be filed with the zoning administrator. Sublette County Zoning Resolutions, Chapter IV, Section 2. The Sublette County Zoning Resolutions allow a gravel pit like the McMurry pit only by conditional use. Sublette County Zoning Resolutions, Chapter II,

Section 3(b)(5)(m)-(o). Cement and concrete manufacturing is allowed either in the Heavy Industrial District or by conditional use in the Agriculture district. Sublette County Zoning Resolutions, Chapter II, Section 3(b)(5)(o), (m)(4). A cement and concrete manufacturing plant is not an accessory use of a gravel pit. Swift v. Sublette County Bd. of County Com'rs, 40 P.3d 1235 (Wyo. 2002) (a concrete batch plant is not an associated extraction activity in connection with a gravel pit operation).

A county may all together prohibit a gravel mine pursuant to its zoning authority. River Springs Ltd. Liability Co. v. Board of County Com'rs of County of Teton, 899 P.2d 1329, 1336-37 (Wyo. 1995). Neighboring property values are a consideration available at the zoning level. Laughter v. Board of County Com'rs for Sweetwater County, 2005 WY 54, ¶52, 110 P.3d 875, 891 (Wyo. 2005). No such consideration is available here.

**c. PUBLIC NUISANCE**

A public nuisance is one which affects an indefinite number of people, or all the residents of a particular locality, or all people coming within the extent of its range or operation, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Blacks Law Dictionary, Fifth Edition, p. 961 (West, 1979). Maintaining a public nuisance is by act, or by failure to perform a legal duty, intentionally causing or permitting a condition to exist which injures or endangers the public health, safety or welfare. Echave v. City of Grand Junction, 118 Colo. 165, 193 P.2d. 277 (1948).

1985 Wyo. Op. Att'y Gen. 10, p.1-2 (1985) (emphasis added).

“As a general rule, a public nuisance gives no right of action to any individual, but must be abated by a proceeding instituted in the name of the state, or at the suit of some

proper officer or body as its authorized representative.” Knight v. City of Riverton, 71 Wyo. 459, 470, 259 P.2d 748, 751 (1953) (citing 39 Am.Jur. 378, § 124). Wyoming Statute §35-11-406(m) provides:

The requested permit, other than a surface coal mining permit, shall be granted if the applicant demonstrates that the application complies with the requirements of this act and all applicable federal and state laws. The director shall not deny a permit except for one (1) or more of the following reasons:

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(iii) Any part of the proposed operation, reclamation program, or the proposed future use is contrary to the law or policy of this state, or the United States;

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(vii) The proposed operation constitutes a public nuisance or endangers the public health and safety[.]

W.S. §35-11-406(m)(iii),(vii) (emphasis added). The Wyoming Supreme Court recognized that the interference with public travel on a public highway is a public nuisance. Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 83 P. 364, 371 (1905).

## **II. ANALYSIS**

### **a. BURDEN OF PROOF**

The statutory command of W.S. §35-11-406(m) should be read to place the burden of proof on McMurry. Section 35-11-406 (m) requires McMurry to demonstrate that its application meets all requirements of the Wyoming Environmental Quality act and that McMurry has complied with all applicable state laws. The word “demonstrate” means:



McMurry has requested a permit to mine. Without the permit, McMurry is without the authority to conduct the operation it proposes. The permit is, therefore, a benefit. Both the substantive statute, W.S. §35-11-406(m) and relevant case law, JM, 922 P.2d at 221 and Three Sons, LLC, 2007 WY at ¶14, place the burden on McMurry.

**b. McMURRY’S NONCOMPLIANCE WITH WYOMING LAW**

Wyoming law requires McMurry to obtain a use permit in compliance with Sublette County law before it may use its property. W.S. §18-5-204. McMurry first obtained a conditional use permit for its Ten Acre Mine. No application was made, however, to Sublette County for to change the use of the remaining 343.3 acres from agricultural use to the use of a gravel pit. Like the state statute, the Sublette County Zoning Resolutions require that the McMurry gravel pit be subject to review and “authorized only upon the granting of a zoning and development permit.” Chapter IV, Section 1. It must be noted that Chapter IV, Section 1 specifically lists only two exemptions to this criteria. First, certain accessory buildings and structures and, second, ranch buildings. A gravel pit is not excepted from the requirement of obtaining a zoning and development permit. McMurry’s application violates Wyoming Statute §18-5-204 and Chapter IV, Section 1 of the Sublette County Zoning Resolutions.

East Fork is justified in relying on the protections afforded by the state zoning law and, specifically, the Sublette County Zoning Resolutions. Both require that a permit be obtained prior to any use of the property as a gravel pit.

Additionally, McMurry was requested to obtain permission to move the Banes No. 1 ditch. East Fork is the owner of the Banes No. 1 ditch. East Fork was never consulted regarding relocating the Banes No. 1 ditch. East Fork has relied on the consistency and high utility of the ditch for over fifty years. The Banes No. 1 ditch has existed in its present location for over 100 years.

Additionally, the Hittle Enlargement of the Jorgensen Ditch (“Hittle Ditch”) belongs to East Fork. McMurry claims the Hittle Ditch has been abandoned. Ken Routh testified that East Fork still uses a portion of the Hittle Ditch and that East Fork may use the entire Hittle Ditch next year. McMurry claims the Hittle Ditch was abandoned and the point of diversion of its water right moved. These are two completely distinct concepts. The ownership of a ditch and the corresponding easement is not lost because a water right is abandoned. Further, a water right is not lost by nonuse until an appropriate action is taken either by the state or a private party. Nonuse alone does not work a forfeit of a water right. There is **nothing** in McMurry’s application that addresses the use of the Hittle Ditch and there is no plan to accommodate East Fork’s use of the Hittle Ditch during, and after, the life of the gravel pit.



**c. PUBLIC NUISANCE**

Kelly Garside testified, and the Bolder Residents' exhibits clearly show, that there is no turn lane for the approach to McMurry's gravel pit. Further, Ron McMurry testified that he knew there was no turn lane but had washed his hands of the dangers created. Further, it was undisputed that the residents in the area use the public road less now because of the huge increase in traffic. There was also evidence that an indefinite number of travelers now avoid using the Muddy Speedway. Last, it was undisputed that the increase in traffic that created these issues was personally observed to be coming only from McMurry's gravel pit.

This Council is authorized by statute to prevent this McMurry's proposed use if it constitutes a public nuisance. Under Wyoming Statute §35-11-406(m)(vii) requires the Council to examine and determine whether or not McMurry's gravel pit constitutes a public nuisance or endangers the public health and safety. The evidence is undisputed that traffic to and from the McMurry gravel pit endangers the public safety. The semi trucks that haul the gravel cannot make the turn into the mine without crossing into the oncoming traffic. That is undisputed. Ron McMurry basically acknowledged the fact.

By statutory mandate, this Council has been authorized by the State of Wyoming to determine whether or not McMurry's use creates a public nuisance or endangers the public health and safety. Knight, 71 Wyo. at 470. McMurry is currently creating a danger to the public by the operation of its gravel pit without an appropriate approach from the highway.

Approval of the permit would double the acreage of gravel that may be mined at any one time.

### **CONCLUSION**

The clear mandate of both state statute and the Sublette County Zoning Resolutions requires McMurry to get a permit to conduct its operations requested by the permit. McMurry's mining plan will deprive East Fork of its water rights that have been established and used for over 100 years. McMurry has yet to contact East Fork regarding its Banes No. 1 ditch or Hittle Ditch. The issue was avoided by telling the DEQ that Mr. Bousman, the surface owner of the proposed gravel pit consented to moving the ditches. Mr. Bousman has no property interest in those ditches. He has no consent to give.

The danger to the general public is great. Over 300 semi trucks turn into or out of the McMurry pit every day. Those trucks must cross into oncoming traffic to make the turn. It is a clear and present danger to the general public.

Last, McMurry has the burden of proof in this matter. It is evident by both statute and case law. McMurry has failed to meet its burden.

The permit should be denied.

DATED this 20<sup>th</sup> day of December, 2010.

EAST FORK LIMITED PARTNERSHIP,  
Objector.

By: \_\_\_\_\_/s/\_\_\_\_\_  
Jon Aimone, 6-4433

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**CERTIFICATE OF SERVICE**

I certify that, on December 9, 2010, I served a true and correct copy of the foregoing by electronic mail, to the following:

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\_\_\_\_\_/s/\_\_\_\_\_  
Jon Aimone