FILED

Dec 07, 2010

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	)	

PUBLIC NUISANCE MEMORANDUM

The Department of Environmental Quality, Land Quality Division (Division), by and through the Office of the Attorney General, pursuant to the Environmental Quality Council's (EQC) December 1, 2010, Order of Schedule, hereby submits its memorandum on the law of public nuisance in Wyoming.

PUBLIC NUISANCE

The law of public nuisance in Wyoming as it pertains to sand and gravel mines is not well developed. The Wyoming legislature has identified a number of activities that it has determined to be public nuisances.[1] Sand and gravel mines are not included in the list of recognized public nuisances, but the legislature's list is not exhaustive. Therefore, it is necessary to look to the common law for further direction on what may constitute a public nuisance.

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[1] " Public Nuisance" is defined under WYO. STAT. ANN § 6-6-209. This definition, however, only addresses structures used as a "house of ill-fame" or for the purposes of prostitution, gambling, or the manufacture of liquor or controlled substances. Other statutes also address specific activities that can be deemed "public nuisances." *See also* WYO. STAT. ANN. § 11-31-301 (stray animals); § 24-10-102 (unauthorized outdoor advertising); § 31-5-406 (unauthorized traffic signs); § 33-16-409 (unauthorized crematoriums); § 33-19-102 (junkyards); § 35-9-111 (fire hazards); § 35-11-303 (storage of explosives); § 31-5-406 (unauthorized traffic signs); § 16-11-102 (shooting sports).

There is no definition of a "public nuisance" under Wyoming case law. Wyoming has defined a "nuisance" as "a class of wrongs, which arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to the right of another." *Lore v. Town of Douglas,* 355 P.2d 367, 370 (Wyo. 1960). Public nuisance is, however, defined by the Restatements of Torts as "an unreasonable interference with a right common to the general public." Restatements (Second) of Torts § 821B (1979). The Restatements go on to state:

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> > (a) Whether the conduct involves a significant interference with a public health, the public safety, the public peace, the public comfort or the public convenience, or,
> > (b) whether the conduct is proscribed by statute, ordinance or administrative regulation, or
> > (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

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

The focus of any inquiry into what may constitute a public nuisance must first focus on what public right is being infringed upon. It is important to point out that injury to a number of 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. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of

> the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance.

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

This point is illustrated very well in the case of *County of York v. Tracy,* 558 N.W.2d 815 (Neb. 1996), in which a land owner alleged that a neighboring refuse and recycling business was a public nuisance. The plaintiffs argued that waste blowing over from the business and concerns over loss in value of neighboring properties made the business a public nuisance. *Id.* at 824. The Court of Appeals for Nebraska disagreed and stated that refuse blowing onto the neighbor's property may provide for a private nuisance, but not a public nuisance. *Id.* Additionally, the court stated that mere depreciation of property values was not a public nuisance. *Id.* The court held that the business "cannot be found to constitute a public nuisance absent evidence or proof that the environment has been adversely impacted or that the public, as opposed to the immediate neighborhood, was in some way damaged." *Id.*

If a public right is identified that is being interfered with, the next step is to determine whether that interference is unreasonable. In the case of *Schork v. Epperson*, 287 P.2d 467 (Wyo. 1955), the Wyoming Supreme Court addressed the reasonableness of the construction a large wooden fence between two neighboring property owners in the context of a private nuisance claim. In that case, the court focused on the utility of the actor's conduct in relation to the gravity of the harm and determined that an actor's conduct would be reasonable if "the utility of the actor's conduct outweighs the gravity of

the harm." *Id.* at 471. The court noted "[n]o doubt everyone has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another." *Id.* at 472. In the case of a public nuisance, the conduct must be weighed against the gravity of the harm to the public right.

In conclusion, a public nuisance is "an unreasonable interference with a right common to the general public." Restatements (Second) of Torts § 821B (1979). In order for the EQC to find that the gravel mine is a public nuisance it must determine that a common right available to the general public will be interfered with unreasonably by the applicant's proposed operation. This requires the EQC to balance the utility of the applicant's conduct against the harm to the public right. If the harm to the public right outweighs the utility to the applicant, the proposed operation may be unreasonable and may constitute a public nuisance.

DATED, this 7th day of December, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Public Nuisance Memorandum was served by electronic mail, this 7th day of December 2010, to the following:

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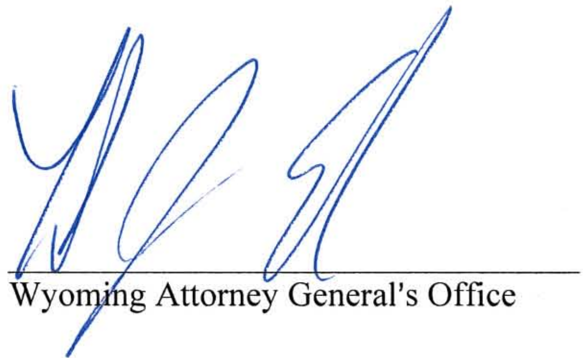

Wyoming Attorney General's Office