

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

FILED

MAR 10 2011

Jim Ruby, Executive Secretary
Environmental Quality Council

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

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. Testifying on behalf of the Objectors were Kelly Garside, Sandra Goodwin, Dave Goodwin, Denise Hastings, Randy Simpson and Kenneth Routh. Testifying on behalf of the Department of Environmental Quality were Tanya King and Mary Flanderka. Testifying on behalf of McMurry Ready Mix were Ron McMurry and Steve Stresky.

4. Jurisdiction is proper for the Council to hear this contested case pursuant to WYO.

STAT. ANN. §§ 35-11-406(k) and 35-11-112(a)(iv).

5. The Council held its bimonthly meeting on January 13 and 14th in Cheyenne WY. On the agenda for the meeting was the discussion and vote on the case at bar. Present and participating in the discussion and vote were Dennis Boal, Cathy Guschewsky, David Searle, Tom Coverdale, John Morris, Tim Flitner and Dr. Fred Ogden.

I. FINDINGS OF FACT

6. 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.*

7. The Boulder Residents and East Fork filed timely objections to the proposed issuance of the McMurry Permit. The Boulder Residents alleged that the McMurry Permit will constitute a public nuisance or endanger the public health and safety; 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.*

8. 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.*

9. 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.*

10. 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.*

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

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

13. The petitioners and the general public have been impacted by the truck traffic traveling to and from the McMurry mine. *Dec. 10, 2010 Tr. 181:15-18, 193:11-21.*

14. The preponderance of the testimony demonstrated that the truck traffic associated with this permit will result in trucks travelling on this road in the amount of two trucks per minute or 300 trucks per day. *Dec. 10, 2010 Tr. 44:24-25 and 45:1-8, 160: 5-10, 19; 19-21, Boulder Residents Ex. 1.*

15. Mr. McMurry testified that there would be upwards of 300 truck loads per day. *Dec. 10, 2010 Tr 314: 1-4.*

16. 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.*

17. Randy Simpson testified that in the past he has had two close encounters with truck traffic travelling in the middle of the road. In one instance he drove into the ditch to avoid an accident with a truck on County Road 133. Mr. Simpson also testified that his wife is unable to walk along the road because of the gravel being picked up and thrown by the trucks. *Dec. 10, 2010 Tr., 255:17-23, 256: 5-8.*

18. Denise Hastings testified that she and her husband do not ride their ATV on County Road 133 when trucks are traveling on the road because the trucks don't slow down and the gravel is sprayed everywhere. *Dec. 10, 2010 Tr. 248:23, 249:3-9.*

19. Mr. Garside testified that every vehicle he owns had cracked windows and the truck he was driving the day of the hearing had 18 cracks. *Dec. 10, 2010 Tr. 172: 11-17*

20. Ms. Hastings also testified that the noise from the trucks would disrupt the peace of the neighborhood in the early hours of the day and awaken her and any guests present in her house. *Dec. 10, 2010 Tr. 246: 13-18, 250: 1-11*

21. 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.*

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

23. 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.*

24. 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.*

25. 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.*

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

27. When McMurry first submitted its permit application to DEQ, the Executive

Order had not been issued. *Dec. 10, 2010 Tr. 119:1-3.*

28. On August 18, 2010, Governor Freudenthal signed Executive Order 2010-4. .

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

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

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

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

33. 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.*

34. 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.*

35. 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.*

36. 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.*

37. The entrance to the McMurry mine from Highway 353 is narrow and unsuitable

for the intended purpose of allowing long trucks to enter and exit Highway 353 without the trucks turning into opposite lane in order to make the turn into the McMurry mine resulting in daily violations of the rules of the road as adopted by the Wyoming Legislature and creating a traffic hazard that endangers the public health and safety. *Dec. 10, 2010 Tr. 163:8-17, 164: 17-25, 165; 15-25, 166;1-10, 173;20-25, 255; 6-23, 324; 6-11.*

38. 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.*

39. 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.*

40. 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. 316; 2-8, 335:1-25.*

41. The evidence was uncontroverted that there is Bureau of Land Management public land located within two and one-half miles from the mine and is located along Highway 353. That prior to the enlargement of the mine the public visited the land for recreational and hunting opportunities on a regular basis. That since the enlargement of the mine the traffic has substantially interfered with the public’s use of these lands and caused a substantial decrease in the use of these public lands by the public. *Dec. 10, 2010 TR. 186; 22-25, 187; 1-25, 188; 1-7, 195; 7-24, 217; 4-16, 229;1-25, 230; 1-4, 237; 3-21, 250; 9-16,*

II. CONCLUSIONS OF LAW

42. To the extent any of the above findings of fact include conclusions of law, they are hereby incorporated as such..

42. The EQC has jurisdiction over the subject matter and the parties to this proceeding.

43. All notice requirements for the hearing have been met pursuant to the Act, the applicable rules of practice and procedure and non-coal rules and regulations.

44. McMurry's application is complete within the meaning of WYO. STAT. ANN. § 35-11-406(m), with the exception of the manner in which it addresses manner in which McMurry will control its traffic volume, the turning of its trucks into the mine from public roads and its hours of operation so as to avoid constituting a public nuisance or endangering the public health and safety within the meaning of WYO. STAT. ANN. § 35-11-406(m)(vii) .

45, WYO. STAT. ANN. § 35-11-406(m) requires that a permit be granted if the applicant demonstrates that the application complies with the requirements of the Act and all applicable state and federal laws. With the exception of the factors listed in Conclusion of Law 44, above, the applicant and DEQ otherwise met the requirements of WYO. STAT. ANN. § 35-11-406(m).

46. 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.*

47. 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).

48. A permit can be denied if at least one of the enumerated criteria in WYO. STAT. ANN. § 35-11-406(m) exist. The evidence demonstrates that one of these criteria exist in this case. WYO. STAT. ANN. § 35-11-406(m)(vii).

49. 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.”

50. 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.

51. 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.

52. 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.

53. Properly issued executive orders are part of the laws and policy of the State of Wyoming and therefore authorized activities must satisfy the requirements of executive orders.

54. Executive Order 2010-4 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.*

55. Executive Order 2010-4 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.*

56. 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.*

57. DEQ and WGF followed the requirements of the Executive Order and a proper consultation was conducted. *Jan. 13, 2011 Tr. 21:13-22.* However, the McMurry Permit, as proposed, does not meet the requirements of the Executive Order because it fails to include monitoring requirements for sage grouse, noise restrictions, and a disturbance analysis for individual leks within the PIAA.

58. The McMurry Permit, as issued, would comply with all applicable zoning requirements. *Dec. 10, 2010 Tr. 88:6-17.*

59. The Council acknowledges that it has no authority to control the speed of traffic on public roads or the manner in which a county constructs or maintains its roads. However, it does have jurisdiction to determine whether or not an operation may endanger the public health or safety if approved as proposed.. Including denial of the permit based upon the fact that the public roadway is not constructed to handle the amount and type of traffic created by the enterprise without endangering the public health or safety and/or that the means provided for gaining access to and from the public roadway is constructed in a manner that endangers the public health and safety. *Jan. 13, 2011 Tr. 6:10-16.*

60. Use of the entrance to the McMurry mine from Highway 353 as described in testimony given at the contested case hearing, endanger the public health and safety due to the significant 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 or when they exit the access road onto Highway 353. *Jan. 13, 2011 Tr. 6:1-6.*

61. DEQ, and the Council when it hears an objection to a permit, are also required to consider whether the operation will constitute a public nuisance. WYO. STAT. ANN. § 35-11-406(m)(vii). DEQ is also required to consider whether the operation will endanger public safety. WYO. STAT. ANN. § 35-11-406(m)(vii).

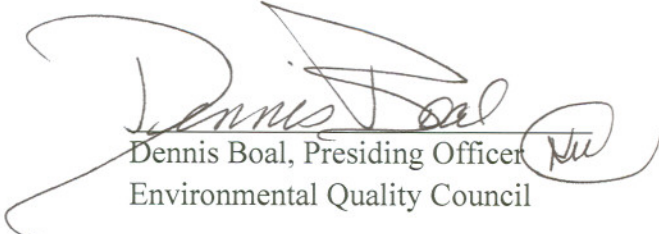
62. A public nuisance is an unreasonable interference with a right common to the general public. The public peace is a right that is common to the general public. Restatement (Second) of Torts § 821B (1979).

63. Operating the McMurry mine 24 hours a day, seven days a week, in accordance with Mr. McMurry's testimony at the contested case hearing would be an unreasonable interference with the public peace. *Dec. 10, 2010 Tr. 316; 2-8, 335:1-25.; Jan. 13, 2011 Tr. 13:2-18.*

III. ORDER

Therefore, the Council FINDS that the McMurry Permit is contrary to the laws and policies of the State and hereby ORDERS that the McMurry Permit be DENIED.

DATED this 10th day of March, 2011.


Dennis Boal, Presiding Officer
Environmental Quality Council

CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 10th day of March, 2011, I served a copy of the foregoing **Findings of Fact and Conclusions of Law** by electronic mail to the following:

Luke Esch
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne WY 82002
lesch@state.wy.us

Harriet Hageman
222 East 21st St.
Cheyenne, WY 82001
hhageman@hblawoffice.com

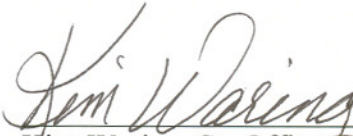
Kelly Garside
P.O. Box 281
Boulder WY 82923
kellygarside@hughes.net

Mark Sullivan
5237 HHR Ranch Road
Wilson, WY 83014
mark@mdslawoffice.com

Jon Aimone
205 C Street
Rock Springs WY 82901
jon@lemichlaw.com

and U.S. Mail pre-paid to the following:

Mr. Ron McMurry
McMurry Ready Mix Company
P.O. Box 2488
Casper, WY 82602



Kim Waring, Sr. Office Supp. Spec.
Environmental Quality Council
422 W. 25th, Rm. 1714
Herschler Bldg.
Cheyenne, WY 82002
Phone: 307-777-7170
FAX: 307-777-6134