BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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Jim 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	))))	**Docket No. 10-4803**

McMURRY READY MIX COMPANY CLOSING ARGUMENT

INTRODUCTION

McMurry Ready Mix Company ("McMurry") filed its Mine Permit Application for the Eastfork Ranch Pit (TFN 5 3/143) with the Wyoming Department of Environmental Quality ("DEQ") Land Quality Division ("LQD") in October, 2009. The proposed operation that is the subject of McMurry's Permit Application is located in a rural area east of Boulder, Wyoming (Sublette County) and represents an expansion of an existing sand and gravel mining activity that has been conducted since early 2008 pursuant to a "ten-acre ET" (as per Wyo.Stat. § 35-11-401(e)(vi)).

During the year-long period following submission of its Permit Application, McMurry worked with the DEQ/LQD to ensure that such Application met the requirements of the Wyoming Environmental Quality Act (Wyo.Stat. §§ 35-11-101 *et seq.*) ("Act"). More specifically here, McMurry directed its efforts toward meeting each and every requirement of Article 4 of the Act – those provisions addressed to land quality issues and considerations.

In wending its way through that process, McMurry also worked with those State and Federal agencies that are tasked with addressing related fish and wildlife issues. Such agencies included the Wyoming Game and Fish Department ("WGFD") and the United States Fish and Wildlife Service ("USFWS").

On September 22, 2010, McMurry was notified by the DEQ/LQD that its Permit Application was "technically complete" pursuant to State law and ready for public notice. Four (4) sets of comments were received from nine (9) Sublette County landowners (referred to below as the "objectors"), only one of whom (Eastfork Limited Partnership) owns lands that are "adjacent" to McMurry's current and proposed gravel operations as that term is defined in Wyo.Stat. § 35-11-103(e)(vii).

Based upon the objections received, and pursuant to Wyo.STat. § 35-11-406(k), the Environmental Quality Council ("EQC") scheduled the matter for a contested case hearing. That hearing was held on December 10, 2010 in Rock Springs, Wyoming, during which the LQD, the objectors, and McMurry were all given an opportunity to call witnesses and submit evidence.

The testimony and documentary evidence presented during the EQC hearing established the following: (1) that McMurry's Permit Application complies with the Environmental Quality Act; (2) that McMurry's Permit Application meets each of the requirements of Wyo.Stat. § 35-11-406; (3) that none of the reasons for denial as set forth in Wyo.Stat. § 35-11-406(m) apply to the McMurry's proposed Eastfork Ranch operations; (4) that McMurry's Permit Application complies with Executive Order 2010-4 for "Greater

Sage-Grouse Core Area Protection" ("2010 SG Executive Order") (despite the fact that such Executive Order did not exist at the time that the Permit Application was filed); (5) that the objectors' testimonial and documentary evidence is inadequate under Wyoming law to support denial of McMurry's Permit Application; and (6) that McMurry's Permit Application must be granted as mandated by Wyo.Stat. § 35-11-406(m) and the applicable Agency Rules and Regulations.

LEGAL FRAMEWORK

The Wyoming Legislature adopted Wyo.Stat. § 35-11-406 as the mechanism for providing the legal and technical framework that an applicant must conform to when submitting a mining permit application to the DEQ/LQD. This framework identifies the specific information that an applicant must produce, describes each of the issues that must be addressed, and provides a detailed road map that must be followed by anyone who seeks a permit to conduct mining operation in our State. Perhaps as importantly, Section 406 provides a checklist for the DEQ/LQD to follow to ensure that every permit application that is received is complete; meets the same standards; provides the same level of detail, scope and nature of information; addresses the relevant environmental issues within the LQD's jurisdiction; and conforms to State law. Section 406 is not only lengthy as statutory provisions go, but lays out the State's public policy regarding the circumstances under which mining operations will be administratively permitted and operated in Wyoming.

As explained in McMurry's "Nuisance" Memorandum to the Council, the Wyoming Supreme Court has rightfully held that "[i]n delineating public policy, the key is found in our

identifying and giving force and effect to that public policy of the State of Wyoming announced through applicable statutes or controlling precedent." *Commercial Union Insurance Company v. Stamper*, 732 P.2d 534, 536 (Wyo. 1987). It is for the Legislature to establish public policy (*Adoption of MM v. SLM and LKM*, 652 P.2d 974, 978 (Wyo. 1982)), and it is through our statutory scheme that such public policy is announced. Those statutory and legislative absolutes apply with equal force to the Environmental Quality Act, including those provisions that are before the Council in the current proceedings.

The Wyoming Legislature has described the purpose of the Act in Wyo.Stat. § 35-11-102 as follows: "Whereas pollution of the air, water and land of this state will imperil public health and welfare, [and] create public of private nuisance . . . it is hereby declared to be 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;. to plan the development, use**, reclamation, preservation and enhancement **of the air, land and water resources of the state**. ..." (Emphasis added). Thus, by its very terms, the Act does not prohibit the development or use of the air, land and water of the State – it instead lays out through the permitting process the manner in which such development and use is properly planned and managed. This fact is further set forth in Wyo.Stat. § 35-11-110(a)(iv), which tasks the Administrators of the individual Division of the DEQ, including the LQD, with determining "the degrees of air, water or land pollution throughout the state. ..."

The Legislature has not chosen to prohibit either the generation of pollution in the use and development of the State's natural resources, or condition permitting on the complete

absence of impacts to surrounding landowners. The Act recognizes and provides for the responsible development of the State's natural resources while contemporaneously setting procedures and limits for the protection of the environment and the public's health, safety and welfare.

The Act allows the permitting of surface mining operations pursuant to the provisions of Wyo.Stat. § 35-11-406. The specific provisions of that section are well known to this Council and will not be repeated here. Those detailed permitting requirements must be met before a permit may be granted and before operations may begin. They describe the DEQ/LQD's responsibilities for carrying out the purpose of the act in terms of reviewing and evaluating each application before it. The Legislature has gone so far as to mandate the issuance of a permit if the applicant meets the requirements set forth:

> 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 or more [specifically identified] reasons. (Emphasis added).

Wyo.Stat. § 35-11-406(m).

As for those specifically identified reasons for which a permit may be denied, the only one at issue here is whether McMurry's proposed operation "constitutes a public nuisance or endangers the public health and safety." Subsection 406(m)(vii). Stated conversely, none of the other "reasons for denial" were at issue in the contested case hearing and they are not at issue before the Council. In other words, there is no question of fact or law as to whether McMurry's permit application meets the requirements of the Subsection 406, with the only

question being whether the objectors were able to meet their burden of establishing that McMurry's operation would constitute a public nuisance. As is discussed in greater detail below, the objectors have not met that burden and the permit – as per the public policy of this State – "shall" be granted.

EVIDENCE PRESENTED

The testimony and exhibits are before the Council and speak for themselves. McMurry has every confidence that the Council is schooled in and capable of reviewing the evidence that was presented, comparing it to the Act and requirements summarized above (and described in detail in Wyo.Stat. § 35-11-406), and reaching the appropriate conclusion.

In addition to the evidence presented during the contested case hearing, the parties were also requested to submit a "nuisance" Memoranda describing the legal and factual underpinnings for such claims. While it is not necessary to reiterate all of the information set forth in McMurry's nuisance Memorandum, there are few points that are worth emphasizing in light of the theories put forth by the objectors. The following excerpt is taken from McMurry's Memorandum, and frames the issue here:

> There are two types of nuisance: a "private nuisance" or a "public nuisance." *See* Restatement (Second) of Torts, § 821A. "Any harm to a person or property that does not fall within either of the two stated categories is not a nuisance. . . ." *Id.* Comment a.
>
> According to Section 821B of the Restatement (Second) of Torts:
>
> (1) A public nuisance is an unreasonable interference with a right common

to the general public.

(2) 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 the 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.

Comment b to § 821B identifies the following types of activities as being "public nuisances" (i.e., those that interfere "with the interests of the community at large – interests that were recognized as rights of the general public entitled to protection"): keeping diseased animals; maintenance of a pond breeding malarial mosquitos; storage of explosives in the midst of a city; shooting of fireworks in the public streets; houses of prostitution; widely disseminated bad odors, dust and smoke; and obstruction of a public highway.

It does not appear that the Wyoming Supreme Court has specifically defined a "public nuisance," although other courts have done so in conformance with the Restatement sections quoted above. According to the Court in *Hoery v. United States*, 64 P.3d 214, 218 fn 5, "[a] private nuisance is distinguishable from a public nuisance. A private nuisance is a tort against

land and the plaintiff's actions must always be founded upon his interest in the land. **A public or common nuisance covers the invasion of public rights, that is, rights common to all members of the public**." (Citing Restatement (Second) of Torts §§ 821B, 821D). (Emphasis added).

McMurry Memorandum at 1-2.

McMurry respectfully requests that Council members to review the parties' Memoranda, as they provide significant insight and information regarding the law of "nuisance," including the differences between those that are considered "private" and those that may be defined as "public." The Memoranda submitted by the parties – including those submitted by the objectors – make clear that McMurry's operations cannot be considered a "public nuisance" as that term of art is defined, and that the objectors' efforts to show otherwise simply come up short.

Again, McMurry does not believe that it is necessary to reiterate all of the evidence and testimony that was presented during the hearing. It is even more inappropriate to follow the objectors' lead and to attempt to rewrite what occurred during the course of the hearing, or to attempt to "spin" what such evidence and testimony is supposed to mean to the Council. McMurry will instead briefly summarize the information that was presented only as necessary to respond to the objectors' efforts at distortion, or their efforts to ignore the actual record before the Council.

1. DEQ/LQD Witnesses

   a. Tanya King – LQD Staff

Ms. King's primary responsibility with regard to the McMurry Permit Application was to ensure that it met each of the requirements of the Act before it could be considered for approval. She has no personal stake in the outcome of this action, other than to ensure that McMurry's Permit Application met each of the LQD requirements for permitting and operating a sand and gravel mine. It was Ms. King's responsibility to identify any deficiencies in McMurry's Application, and to either demand additional information, analysis, and safeguards, or to recommend denial. Upon concluding that the Application was complete – and that it thereby satisfied each of the categories and requirements set forth in Section 406 – she was also statutorily required to do just the opposition, which would be to recommend approval.

Ms. King (along with other State agency personnel) worked with McMurry throughout the one-year period from the fall of 2009 until the fall of 2010 to address any LQD concerns or issues and to ensure that the Permit Application met the 406 requirements before it could be declared "complete" as that term is defined by State law. By finding that the McMurry Permit Application was "complete," the LQD personnel was not simply noting that there was certain information filled out in a standardized form. They were concluding that the Permit Application met each and every requirement of Section 406, including providing a Mine Plan and a Reclamation Plan.

Ms. King (and the other DEQ personnel involved) has a special expertise in reviewing LQD permit applications, and her conclusions and testimony are entitled to the deference that such expertise warrants. Ms. King testified that McMurry's Permit Application met each of

the requirements of the Act, most specifically Wyo.Stat. § 35-11-406 (actually referring to McMurry's Reclamation Plan as "excellent"). While the objectors do not like Ms. King's testimony, they presented no evidence to undermine or counter the information she provided. The objectors did not present any testimony or evidence from anyone with an expertise in permitting to call into question the LQD's findings (as presented through Ms. King).

b. Mary Flanderka – WGFD Staff

Ms. Flanderka testified on behalf of the WGFD, and addressed the 2010 SG Executive Order, as well as McMurry's compliance with it. Ms. Flanderka described the WGFD's review of the Permit Application, and their efforts to work with McMurry to address sage grouse issues. She also addressed the United States Fish and Wildlife Service's involvement with the current Permit Application. Again, while the objectors did not like Ms. Flanderka's testimony, they did not present any legitimate evidence or challenges to contradict what she said or to undermine her conclusions.

It must also be kept in mind that the 2010 SG Executive Order was not adopted until after McMurry had submitted its Permit Application for Review. Thus, while such Executive Order does not apply to the Application pending before the Council, McMurry went above and beyond what was legally required, and worked with the WGFD to address sage grouse issues. McMurry encourages the Council to review the correspondence and other documentation related to wildlife issues (all of which are part of the Permit Application (DEQ Exhibit A)), including the materials related to sage grouse. Such documentation includes the Sage Grouse Stipulation that was in effect at the time McMurry filed its

Application, and thus controls its operations.

2. Objectors' Exhibits and Witnesses and Arguments

a. Boulder Residents

i. **McMurry's Existing and Proposed Operations Do Not Constitute a Public Nuisance or Endanger the Public Health and Safety**

The most important aspect of the objectors' testimony and exhibits relates to their confirmation that McMurry's existing and proposed operations do not constitute a "public nuisance or endanger[] the public heath and safety" pursuant to Wyo.Stat. § 35-11-406(m)(vii). It takes nothing more than the most rudimentary review of their testimony and exhibits to recognize that their claims are not directed to the "public" impacts of McMurry's operations, but whether such operations impact them individually. While they have attempted to bootstrap the impacts on them into a larger "societal" or "public" impact, the fact remains that their criticism of McMurry's operations is directed to the manner in which it affects them – and only them.

The objectors failed to call any "public" witnesses or representatives to testify regarding how McMurry's proposed operations constitute a public nuisance. They presented no evidence regarding how McMurry's operations constitute an "unreasonable interference with a right common to the general public." They failed to prove that McMurry's operations "involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience." They failed to prove that McMurry's operations are "proscribed by statute, ordinance or administrative regulation." They failed

to prove that McMurry's operations "has a significant effect upon the public right." *See* Restatement (Second) of Torts, § 821A and related comments.

It is also important that the Council review the objectors' video (which they edited from approximately twenty-four (24) minutes down to six (6) minutes) showing gravel trucks traveling on the Sublette County road near their property. This video shows that the trucks are easily able to pass each other (without slowing), thereby establishing that the road is sufficiently wide, maintained, and groomed to handle the traffic. The video shows that there is minimal (if any) dust associated with the truck traffic. The video shows that the trucks are traveling at a reasonable rate of speed. The video shows that the noise level is neither excessive no different than what any of us experience on a daily basis, whether we live in town or in a more rural setting. The video shows that there is minimal "public" traffic in the area, and that the truck traffic cannot be considered a "public nuisance" as defined above. The video simply does not support the objectors' complaints.

The objectors have also attempted to claim that the gravel trucks' use of the County Road somehow endangers the public health or safety. The testimony elicited and the exhibits introduced, however, nullify that argument as well. None of these witnesses had any personal knowledge about any accidents caused by such truck traffic (although one of them saw some gravel along the road where a one-vehicle accident may have occurred). They presented no photographs or other documentary evidence showing such public safety concerns or problems. They admitted that folks were still able to park along the road while trucks were passing by. In fact, almost down to the last one, the Boulder Resident witnesses

testified that, prior to the start of McMurry's operations, there was little public traffic on these roads, and that they were generally used by only those few residents who live in the area. Such witnesses also testified that the County has substantially improved the County Road by widening it, grading it, maintaining it, putting magnesium chloride on it, etc. In other words, the objectors admit that the County has been pro-active in terms of addressing the very "public safety" concerns that they have raised.

McMurry does not have jurisdiction over use of the County Road. McMurry has requested its customers to obey all traffic laws, and requested Sublette County to post speed limit and "no jake-brake" signs along the County Road. (*See* Exhibit J).

Finally, Exhibit DD documents the load-out information associated with McMurry's historical operation at the Eastfork mine site. That load-out information shows that there is a natural fluctuation in McMurry's operations, that such activities are seasonal, and that they are dictated by the market and customer demands. Such evidence also shows that the objectors' claims that there will be over 300 trucks per day every day for the next eighty (80) years is a distortion of reality, contradicted by the facts, and designed to convince this Council to make a decision on emotion rather than the law.

ii. **The Council is Without Jurisdiction to Require McMurry to Construct a New Road**

Wyo.Stat. §§ 24-1-101, *et seq.*, address the establishment, construction, management, use, control, authority and jurisdiction over Wyoming's state highways and county roads. The Transportation Commission and Department of Transportation are tasked with

overseeing state highways. *See*, for example, Wyo.Stat. §§ 24-1-102, 24-1-103, 24-1-105, 24-1-106, and 24-1-128. Wyo.Stat. § 24-1-104 provides that "[a]ll county roads shall be under the supervision, management and control of the board of the county commissioners of the county wherein such roads are located, and no county road shall hereafter be established, altered or vacated in any county in this state, except by authority of the board of the county commissioners of the county wherein such road is located, except as otherwise provided by law."

Wyo.Stat. §§ 24-1-106 through 24-1-109 describe the circumstances under which a state highway may be restricted and/or closed. These statutory provisions allow for such restricted use and/or closure only when the Department of Transportation finds it "necessary" to do so "[f]or the protection of the public;" to protect the highway from damage during storms, or during construction, improvement or maintenance, or for a special event (such as an athletic event. Wyo.Stat. § 24-1-106. "No person shall post a notice purporting to restrict access over a public road unless the restriction has been approved by the governing body having jurisdiction of the road." Wyo.Stat. § 24-1-133(a). This prohibition applies equally to state highways and county roads.

The objectors are requesting the Council to not only prohibit McMurry and its customers from using State Highway 353 and County Road 113, but to affirmatively impose a permit condition requiring McMurry to construct an entirely different road, the use of which would be mandatory for any customer who purchases gravel. The Council, however, has no such authority or jurisdiction, a fact demonstrated not only by the application of

Chapter 1 of Title 24 of the Wyoming Statutes, but by operation of the Environmental Quality Act (specifically Wyo.Stat. § 35-11-406). In short, the Act does not allow the Council to condition a permit on an applicant's construction of their own private road, especially when there are public roads available in the vicinity.

The DEQ's Rules and Regulations confirm that the objectors' road complaints are not only invalid, but are not properly before the EQC. Chapter 1 does not include "roads" in the definition of "mine facilities." The definition for "permit area" does not include roads. A "public road" is defined as "any thoroughfare open to the public which has been and is being used for the public for passage of vehicles, and is maintained by public funds." An "exempted road" is defined as follows:

> [R]oads within the pit and those roads maintained by the county, State and Federal government, or those roads which are existing private roads except:
>
> (A) When the existing road requires extensive regrading and resurfacing in order to render the road usable; or
> (B) Upgrading of the road requires cuts, fills, and borrow areas.

Chapter 2 of the DEQ Rules and Regulations (identifying Permit Application requirements) excludes "exempted roads" from consideration:

> (b) in addition to the information required by W.S. § 35-11-406(b), each application for a mining permit shall contain:
>
> ***
>
> (iii) A plan whereby the operator will reclaim the affected lands to the proposed postmining land use in accordance with Chapter 3, Section 2(a) which shall include:
>
> ***
>
> (G) A classification and description, including maps and cross-sections, if appropriate, of all roads (except exempted roads), other transportation facilities, shipping areas, and rights-of-way to be built or utilized during the

operation. The classification shall designate the road as either a haul road, access road, or light-use road. (Emphasis added).

McMurry and its customers are as entitled to access and use State Highway 353 and County Road 113 as any other citizen of the State of Wyoming. *See Weaver v. Public Service Commission of Wyoming*, 40 Wyo. 426, 278 P. 542 (1929) (municipal highway regulations must be reasonable, operate with equality, and must have some tendency to accomplish object in view). The EQC does not have the authority to prevent McMurry or its customers from doing so.

iii. McMurry's Historical Compliance with the Environmental Quality Act

Wyo.Stat. § 35-11-406(m)(xvi) states that "[n]o permit shall be denied on the basis that the applicant has been in actual violation of the provisions of this act if the violation has been corrected or discontinued." Objectors have complained about McMurry's historical operation of the Eastfork Ranch Pit, arguing that the EQC must deny its Land Quality Permit Application for allegedly violating the Environmental Quality Act. Any such allegations, however, are irrelevant as a matter of law as per the above-quoted statutory provision. McMurry has no pending notices of violation, and remains in compliance with all provisions of the Act.

The Boulder Resident objectors, in their quest to stop McMurry's operations at all costs, have intentionally misrepresented the circumstances under which a permit application may be denied under subsection (o). Such misrepresentations have been made by omitting the most critical part of the very statutory provision that they rely upon as they urge the

Council to deny the Permit Application at hand. According to the objectors:

> W.S. § 35-11-406(o) states that a permit may be denied where the applicant 'controls or has controlled mining operations with a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable harm to the environment as to indicate reckless, knowing or intentional conduct.'

Boulder Residents' Closing Argument at 14. The objectors, however, have deleted the following preface that describes the only circumstances under which such an action may be taken: "No permit shall be issued to an applicant after a finding by the director or council, after opportunity for a hearing, that the applicant or operator controls or has controlled mining operations with a demonstrated pattern of willful violations. . . ." (Emphasis added). McMurry has never before been accused of controlling a mining operation with a demonstrated pattern of willful violations as described in the Statute. McMurry has never before been accused of causing irreparable harm to the environment. McMurry has never before been accused of engaging in the type of reckless, knowing or intentional conduct described above. Neither the Director nor the Council have ever held any hearing in which McMurry was accused of such conduct. Neither the Director nor the Council have found that McMurry has engaged in such behavior. *See* Ms. King's testimony regarding these matters.

The objectors misrepresentation speaks volumes, and they should be ashamed. They should be ashamed of attempting to mislead the Council as to the plain language, the intent, and the import of Section 406(o). They should be ashamed of accusing McMurry of such egregious conduct.

iv. **McMurry's Permit Application Adequately Addresses Sage Grouse**

Issues

As noted above, the 2010 SG Executive Order does not apply to McMurry's Permit Application. Without waiving that argument, and in light of the accusations being made by the objectors, McMurry finds it necessary to correct the misinformation that is being provided.

The objectors claim that the McMurry's proposed operations do not comply with the 2010 SG Executive Order concerning the preservation of sage grouse because it is within 1.9 miles of an active sage grouse lek. The objectors have failed to point out, however, that the Executive Order uses a 0.6-mile buffer to limit activity. No mining activity is proposed to take place within 0.6 miles of the lek. Additionally, the roads used within the mine provide facility access and maintenance, which are required to be constructed no closer than 0.6 miles from an occupied lek. They meet that restriction. The main roads used to transport the sand and gravel produced (State Highway 353 and the County Road) currently exist and, as such, are protected pursuant to the terms of the Executive Order itself.

The objectors claim that McMurry has not properly quantified suitable habitat in the potentially affected area nor performed a habitat assessment. In accordance with DEQ protocol, the vegetation is quantified within the Permit area, as well as within a half-mile buffer surrounding the Permit area, which information is presented in Appendix D8 of the Application. This quantification includes an estimate of absolute cover of Wyoming big sagebrush, which was determined to be 5 percent (*see* Table entitled Mixed Shrub Cover Data, Page D8-AC-1), which forms the basis for the definition of suitable sage-grouse

habitat. A habitat assessment (in reference to Item 3 under Permitting Process in the 2010 SG Executive Order, Attachment B), was conducted by the WGFD.

Objectors contend that the Reclamation Plan makes no effort to restore sage grouse habitat and that McMurry has no monitoring plan in place. That claim is untrue. Topsoil reclamation considers sage-grouse habitat restoration in Section RP-4.1 of the Reclamation Plan: *"Direct-haul is preferred because of the* ***commitment to annually reclaim sage-grouse habitat.***" (Emphasis added). The scheduling in reference to sage-grouse habitat restoration is cited in Section RP-4.2 of the Reclamation Plan: "Assuming the planned rate of production, topsoil replacement is anticipated during the latter part the first year of mining, which will **facilitate the first area of sage-grouse habitat reclamation**." A commitment to restore suitable sage-grouse habitat is specified in RP-5.2 of the Reclamation Plan, and is shown in Figure RP-1:

> The permanent seed mixture was chosen to establish postmining land use preferred by the landowner to support agricultural use, as well as the **restoration of suitable sage-grouse habitat**. The relative simplicity of the vegetation distribution will yield revegetation that focuses on pasture re-establishment in selected portions of the affected area. An upland, sagebrush/grass seed mixture is also included to re-establish native vegetation that will be beneficial to wildlife, especially sage-grouse. An upland seed mix containing at least 0.3 pounds of Wyoming big sage brush per acre will be applied to 50 percent of the affected area, and will include the reclaimed highwalls, any upland affected areas surrounding the highwall perimeter, and a portion of the perimeter on the pit bottom (Figure RP-1).

Scheduling in reference to sage-grouse habitat restoration is also cited in Paragraph 1 of Section RP-8 of the Reclamation Plan: "*Reclamation units are a logical progression of reclamation that will maximize reclamation efficiency, provide sufficient room for continuing*

mining operations, and ***allow continuing restoration of sage-grouse habitat****. Reclamation within each unit will begin as soon as practical after mining within each block is completed in order to* ***maintain acreage for sage-grouse habitat restoration*** *as well as ongoing mining operations*." (Emphasis added). In addition, a commitment for rolling reclamation to protect sage-grouse habitat is specified in Paragraph 6 of Section MP-1.5.3: "*Because Eastfork Ranch Pit is located within the South Pass Sage Grouse Core Area, mining restrictions will be implemented to* ***protect sage-grouse***."

The objectors also claim that the sage grouse abandon the area when McMurry is operating its gravel pit, only returning when the noise and truck traffic has ceased. They have produced no actual evidence of that claim. Conversely, McMurry mine personnel have witnessed sage-grouse within the disturbed area of the LMO, as mentioned in Paragraph 7 of Section MP-1.5.3.

Objectors claim that there was no Habitat Assessment performed and thus no assessment of suitable habitat was completed concerning sage grouse use of such habitat, priority restoration areas, areas of invasive species, and no assessment of whether other assurances were in place such as easements, habitat contracts or the like. They further claim that no Disturbance Analysis was performed for the individual leks which fall within the PIAA. Those claims are untrue. A Habitat Assessment and a Disturbance Analysis were conducted that combined known field conditions, GIS analysis and aerial photography, all of which are viable means to conduct these analyses.

McMurry does not waive any defenses regarding the applicability of the Executive

Order by providing the foregoing information. It is being supplied to further demonstrate the manner in which McMurry has pro-actively addressed all wildlife issues, including those involving the sage grouse.

b. East Fork Limited Partnership

i. Challenges to Sublette County's Zoning and Development Regulations Resolutions and County Compliance

The Sublette County Zoning and Development Regulations Resolutions ("Zoning Regulations") were admitted as Exhibit N. Again, McMurry is confident that the members of the Council are capable of reading and understanding their relevance to the issues at hand. Objector East Fork Limited Partnership ("East Fork") insists upon arguing that such Regulations require McMurry to obtain a County permit to expand its Eastfork Ranch mining operations from a 10-acre ET to a regular mine. Eastfork is wrong in that regard, and its arguments to the contrary should be seen for what they are – an effort to convince this Council of something that is not true in an effort to convince it to deny a permit that should be granted.

Chapter 2, Section 3 of the Zoning Regulations identifies the "authorized uses" for each zoning district. Gravel mining operations are an authorized land use in those areas that have been designated as an "Agricultural District" (A-1). *See* Zoning Regulations. The geographic area in question, including the lands within McMurry's proposed operations and the lands owned by the objectors, is zoned as an Agricultural District. Gravel pits are not allowed in Residential or Rural Residential Districts. The objectors do not live in

"Residential" or "Rural Residential" Districts. The evidence shows that McMurry has complied with the County requirements in terms of permitting and operating the Eastfork Ranch Pit.

Sublette County defers to the regime and protocol developed by the Wyoming Legislature and the DEQ for the permitting of regular mining operations. That approach makes sense for several reasons. First, the Wyoming Legislature has preempted the area and developed a statutory scheme through which it has conferred jurisdiction for addressing these matters to the DEQ/LQD. In short, the County has no jurisdiction over mining operations. Second, the land quality requirements for obtaining a mining permit are detailed, comprehensive, and all-encompassing. The County has chosen not to develop its own set of redundant rules and regulations to cover the same topic. Finally, the DEQ/LQD has the expertise for evaluating compliance with State law in terms of mining operations. The County does not.

Eastfork also appears to be complaining that Sublette County has failed to enforce its own Zoning Regulations's with regard to McMurry's operations. This Council, however, does not have jurisdiction over the County or such an issue. This is simply not the appropriate forum for the objectors to complain about whether the County is complying with its own Zoning Regulations.

ii. Moving of Ditches

The ditches in question cross the Bousman property. The East Fork representative testified that he was not aware of any written easement or other document requiring that these

ditches to remain in any particular defined location. Regardless, McMurry made clear in its Permit Application that it does not intend to interrupt or negatively impact the conveyance of irrigation water to East Fork's irrigated lands. As testified to by Mr. Stresky, the relocation of the Banes No. 1 has been engineered to be stable with respect to slope, and the new ditch has been designed to convey all of the water adjudicated to the water right holder. East Fork did not present any evidence contrary to Mr. Stresky's testimony.

McMurry's Mine Plan was developed based on the fact that the Hittle Ditch has long been abandoned and not intended for future use. The State Engineer records seem to confirm this conclusion.

Considering East Fork's objection to moving the Banes No. 1 and the Hittle Ditch, McMurry is committed to relocating the Banes No. 1 ditch to accommodate conveyance across the permit area and into the Hittle Ditch. McMurry will also re-evaluate a conveyance on th southern portion of the permit area that will be engineered in order to achieve the twin goals of conveyance and stability, as well as to make it possible to use the Hittle Ditch. McMurry commits to working with East Fork regarding this proposal and, if such proposal is acceptable, the Permit Application will be revised accordingly.

3. McMurry's Permit Application, Witnesses and Evidence

a. Ron McMurry – President of McMurry Ready Mix

Ron McMurry testified on behalf of McMurry. He described the historical operations at the Eastfork Ranch mine, and described the manner in which the expanded operations would be conducted. He described compliance with State law, and the Company's LQD

Permit Application. He described the efforts that McMurry has made to be a good neighbor. He also described the realities of operating a sand and gravel operation, and his obligations to his customers. He also explained that gravel mining operations must, by necessity, take place where the gravel is located, and what he looks for when evaluating whether to pursue mining operations in a particular area. He explained that one of the attractive aspects of the Eastfork Ranch operation is that it is located in a rural area with few surrounding or close neighbors.

b. Steve Stresky – Aqua Terra Associates, Inc.

Steve Stresky is a Senior Hydrogeologist with Aqua Terra Consultants. Mr. Stresky prepared McMurry's Permit Application and was tasked with working with the DEQ/LQD, WGFD and the Fish and Wildlife Service (as well as the other relevant agencies) to ensure that McMurry's Application complied with all State laws and requirements. Mr. Stresky, who was designated as an expert on permitting under the Act during the December 10th EQC hearing, testified regarding his activities in relation to the pending Application. He testified that McMurry's Permit Application does in fact comply with the Act, as well as with the applicable sage grouse requirements in existence at the time that it was filed.

The objectors presented no evidence to counter Mr. Stresky's testimony, and in fact chose not to cross-examine him.

CONCLUSION

The Wyoming Legislature has concluded that it is in the public's best interest to allow for the responsible development of the State's natural resources, a finding that applies with

special force to the extraction and production of gravel – the most foundational of resources that makes up not only the infrastructure for modern society, but is absolutely critical to our economic prosperity. Gravel is the resource that paves our roads, makes up our foundations, and is necessary for the extraction of our natural resources.

McMurry provides a service and a product to the State of Wyoming and its citizens. McMurry operates and runs a business within a heavily-regulated industry. McMurry hires employees and consultants to implement its compliance obligations, to prepare permit applications, to run its various operations, and to manage its resources, all in compliance with local, State, and Federal law.

McMurry's job is to mine for gravel, prepare it for sale, load out trucks (sometimes its own and sometimes those of customers), and to put the product to use. McMurry provides a service and a product that is absolutely critical to the financial well-being of this State. McMurry must do its mining where the product is located.

The current Eastfork Ranch location is as close to perfect as almost any gravel mining operation in the State. It is remote, there are few surrounding neighbors, there is an abundance of gravel, and there are adequate access and haul roads. McMurry has been operating in this location for almost three (3) years, with the intensity of those operations fluctuating based on the demand, the economy, and the season. Considering its reclamation requirements, McMurry does not anticipate that its operations going forward will vary much from what has taken place in the past.

McMurry's Permit Application meets all of the requirements of the Environmental

Quality Act. McMurry's operations do not constitute a public nuisance or endanger the public health and safety. McMurry's Application provides the necessary and required protections for the sage grouse.

McMurry respectfully requests that its Application be granted, and that any objections be overruled.

Respectfully Submitted this 6th day of January, 2011.

McMURRY READY MIX

/s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of January, 2011, a true and correct copy of the foregoing **McMURRY READY MIX COMPANY'S CLOSING ARGUMENT**, was served upon the following:

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/s/
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