BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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'S MEMORANDUM REGARDING LAW OF NUISANCE

McMurry Ready Mix Company (McMurry), by and through its attorneys, Hageman and Brighton, P.C., and pursuant to the Scheduling Order issued by the Environmental Quality Council, hereby submits this Memorandum to establish that its permitting, management and operations at the Eastfork Ranch Pit do not and cannot constitute a public nuisance.

I. THE LAW OF NUISANCE

A. "Public Nuisance: vs. "Private Nuisance"

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). The court's discussion about public and private nuisances in *New Mexico v. General Electric Company*, 335 F.Supp.2d 1185, 1235-1237 (D. N.M. 2004) is worth quoting here:

> Defendants submit that the State of New Mexico follows the *Restatement (Second) of Torts* in defining the tort cause of action for public nuisance. *See, e.g., State ex rel. Smith v. Riley,* 123 N.M. 453, 454, 942 P.2d 721, 722 (App.1997); Restatement (Second) of Torts §§ 821B-821C (1979). Generally, public nuisance claims are brought to abate an activity which adversely affects the public health, safety or welfare, or 'an unreasonable interference with a right common to the general public.' *State of New Mexico ex rel. State ex rel. Village of Los Ranchos De Albuquerque v. City of Albuquerque,* 119 N.M. 150, 163, 889 P.2d 185, 198 (1994) (quoting *Restatement (Second) of Torts* § 821B(1)).
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> FN 110. According to *Riley,* 123 N.M. at 454, 942 P.2d at 722:
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> > Public nuisance has its roots in English common law. It came to mean an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 90, at 643 (5th ed.1984) (citation omitted). It was a crime. *Id.* at 645. Currently, New Mexico and all other states have criminal statutes barring public nuisance. *Id.* at 645-46. These statutes are commonly construed to encompass the common law prohibitions. *Id.* at 646. (Internal quotation marks omitted).
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> This public right is one common to-belonging to-'all members of the general public.' *Id.* § 821B cmt. g. 'It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large.' *Id.* (Citation omitted).
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> Analysis begins with the questions of interest and injury because nuisance 'has

reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion.' William L. Prosser, *Handbook of the Law of Torts* § 87, at 573 (4th ed.1971).

Common law public nuisance covered a wide range of conduct which interfered with the interests of the community at large: 'interests that were recognized as rights of the general public entitled to protection.' Restatement (Second) of Torts § 821B cmt. b (1979). A public nuisance included 'interference with the public health, ... with the public safety, ... with the public morals, ... with the public peace, ... with the public comfort, ... with the public convenience, ... and with a wide variety of other miscellaneous public rights of a similar kind.' *Id.* This common law concept is carried into New Mexico law. See § 30-8-1; *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque,* 119 N.M. 150, 163, 889 P.2d 185, 198 (1994) (A 'public right is one common to-belonging to-"all members of the general public."' (quoting Restatement, supra, § 821B cmt. g)). A public nuisance affects 'a considerable number of people or an entire community or neighborhood.' *Padilla v. Lawrence,* 101 N.M. 556, 562, 685 P.2d 964, 970 (Ct.App.1984).

Riley, 123 N.M. at 454, 942 P.2d at 722. The *Riley* court elaborated on the required breadth of the interest affected by a true 'public nuisance,' quoting the *Restatement:*

> 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.... 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.

Id., 123 N.M. at 455, 942 P.2d at 723 (quoting *Restatement (Second) of Torts* § 821B cmt. g, at 92).

See also Louderback v. Orkin Exterminating Company, Inc. 26 F.Supp.2d 1298, 1309-1310

(D.C. Kan. 1998); *State of New Mexico v. Smith*, 942 P.2d 721 (App. N.M. 1997).

The Wyoming Supreme Court's discussion of "nuisance" in *Bowers Welding and Hotshot, Inc.,, v. Bromley*, 699 P.2d 299, 306 (Wyo. 1985) (and its predecessor, *Lore v. Town of Douglas*, 355 P.2d 367 (Wyo. 1960)) was directed to analyzing a "private nuisance" when it defined the same 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." (citations and internal quotations omitted). This "class of wrongs" is simply not at issue here.

Importantly, it is apparent from the objectors' comments in opposition to McMurry's permit (as well as their anticipated presentation at the EQC hearing on Friday, December 10th), that their complaints are founded on a "private nuisance" theory of liability. The Environmental Quality Act (specifically Wyo.Stat. § 35-11-406), however, is directed towards public nuisances, not those types of activities that are not properly defined as such. *See* Subsections (b)(xiii) and (m)(vii).

II. THE PUBLIC POLICY OF THE STATE OF WYOMING IS EXPRESSED IN THE ENVIRONMENTAL QUALITY ACT - INCLUDING THE PERMITTING REQUIREMENTS

A. Public Policy Defined

According to the Wyoming Supreme Court: "In 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). Establishing public policy "is the business of the legislature." *Adoption of MM v. SLM and LKM*, 652 P.2d 974, 978 (Wyo. 1982). A statute cannot "by definition be contrary to public policy – it is public policy." *Id.*

"Generally the expressions upon public policy speak with reference to the law of any particular state as embodied in its constitution, statutes, and decisions of the courts. However, expressions thereupon are oftentimes enlarged to include the administrative practices of the state's officers as part of its public policy." *Dairyland County Mutual Insurance Company v. Wallgren*, 477 S.W.2d 341, 342 (Tex. App. 1972).

"Administrative rules and regulations have the force and effect of law, and an administrative agency must follow its own rules and regulations or face reversal of its action." *Northfork Citizens for Responsible Development v. Board of County Commissioners of Park County*, 228 P.3d 838, 848 (Wyo. 2010) (citations and internal quotations omitted). "In assessing whether an agency has abided by its rules and regulations, we defer to the agency's construction of those rules and regulations, unless that construction is clearly erroneous or inconsistent with the plain meaning." *Id. See also, Johnson v. City of Laramie*, 187 P.3d 355, 357 (Wyo. 2008).

B. Compliance with the Environmental Quality Act

The policy and purpose of the Environmental Quality Act is described in Wyo.Stat. § 35-11-102: "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 describes the permitting process that must be followed in order to ensure that 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 Department of Environmental Quality (DEQ), including the Land Quality Division (LQD"), "[t]o determine the degrees of air, water or land pollution throughout the state. ..." The Act allows the permitting of surface mining operations pursuant to the provisions of Wyo.Stat. § 35-11-406. The Act does not 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 Legislature has instead laid out the permitting process and responsibilities, and then stated – as a matter of public policy – that if a permittee meets the Act's requirements, a permit "shall be granted." Wyo.Stat. § 35-11-406(m).

To determine the Legislature's intent behind the Act, well-established rules of statutory construction must be used to determine the policy and purpose of the Act. "[A]ll statutes relating to the same subject or having the same general purpose must be considered

and construed in harmony." *Hoke v. Motel 6 Jackson*, 131 P.3d 369, 373 (Wyo. 2006). Statutory interpretation is done in accordance with Legislative intent and the inquiry applies the ordinary and obvious meaning of the words according to their arrangement and connection. *Id.* When a statute is sufficiently clear and unambiguous effect is given to the plain and ordinary meaning of the words and the court does not resort to the rules of statutory construction. *Id.*

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 shows that the Legislature contemplated that it is in the public's best interest to allow the responsible development of the State's natural resources balanced with protecting the environment and the public.

The language in the Act as set forth above is clear and unambiguous. When drafting the Act, the Legislature recognized that permitting and allowing surface mining operations are in the public interest, subject to the requirements of the Act. Wyo.Stat. § 35-11-401(a). Wyo. Stat. § 35-11-102 provides a clear Legislative policy statement – a recognition that the development and use of the State's natural resources is in the best interest of the public. As such, the Legislature did not include any language in the Act prohibiting mining operations in Wyoming as a public nuisance. Had the Legislature intended to prohibit mining as a public nuisance, it could have done so. It did not. Such a prohibition would have been easy

to include in the legislation and such prohibitions are not without precedent in other states. *See e.g. Mt. Bd. Of Nat. Res. & Conservation v. Mt. Power Co.*, 536 P.2d 758, 760 (Mont. 1975) (discussing language in statute specifically exempting facilities under construction or in operation as of a date certain from permitting process). Rather than prohibiting mining as a public nuisance, the Legislature set forth conditions under which mining operations could be permitted and operated. To repeat, so long as McMurry – or any other permittee – follows that process, the mining permit "shall be granted." Wyo.Stat. § 35-11-406(m).

The relevant portions of the Act show that the Legislature intended to allow mining operations so long as the operation's impact to the environment and public is minimized. The Legislature then laid out the road-map to be followed in order to meet that goal. At no point did the Legislature choose to prohibit mining altogether as a public nuisance. The Legislature instead adopted a permitting process, whereby the agency created for the purpose of evaluating the environmental impact of a particular activity (the DEQ) would have the authority to impose and enforce the State's environmental regulations in such a way as to balance the types of competing interests that are evident here. A plain reading of the relevant law leads to the conclusion that the Legislature determined that it is in the public's best interest to allow the permitting of mining operations that meet the requirements set forth in Wyo.Stat. § 35-11-406.

It is an applicant's compliance with the permitting process as described in Wyoming's statutory scheme that ensures that a mining operation cannot be considered a "public

nuisance." In fact, Wyo.Stat. § 35-11-406(b)(xiii) specifically requires that an applicant adopt procedures to avoid constituting a public nuisance before a permit may be considered "complete" and subject to being acted upon:

> [t]he 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 be consistent with the objectives and purposes of the act and the rules and regulations promulgated. The mining plan and reclamation plan shall include the following:
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> (xiii) 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.[1]

If no such procedures are identified a permit must be denied. Conversely, so long as the mining plan and reclamation plan include a description of such "procedures," the application is deemed to be "complete" under the Act and the 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." *Id.* at Subsection (m). McMurry has met that burden, and the DEQ has concluded that McMurry's Application meets these statutory permitting requirements. It is therefore not legally possible for McMurry's proposed operations to be

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[1] It is important to remember that several of the objectors do not own lands that are "adjacent to" McMurry's Eastfork Ranch Pit. According to Wyo.Stat. § 35-11-103(e)(vii), "'[a]djacent lands' means all lands within one-half mile of the proposed permit area." Most of the objectors' property lies more than one-half mile away.

considered a "public nuisance" under the Act.

The definitions found in Wyo.Stat. § 35-11-103 further confirm the foregoing interpretation, the purpose of the Act, and the Legislative intent to allow mining operations to proceed pursuant to our permitting process:

> (xi) "Mining permit" means **certification by the director** that the affected land described may be mined for minerals by a licensed operator **in compliance with an approved mining plan and reclamation plan.** No mining may be commenced or conducted on land for which there is not in effect a valid mining permit. A mining permit shall remain valid and in force from the date of its issuance until the termination of all mining and reclamation operations, except as otherwise provided in this act;
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> (xiii) 'A license to mine for minerals' means **the certification from the administrator** that the licensee has **the right to conduct mining operations** on the subject lands **in compliance with this act**; for which a valid permit exists; that he has deposited a bond conditioned on his faithful fulfillment of the requirements thereof; and **that upon investigation the administrator has determined that the licensed mining operation is within the purposes of this act**. . . . (Emphasis added).

This analysis and conclusion was fully endorsed by the Wyoming Supreme in *People v. Platte Pipe Line Company*, 649 P.2d 208, 211-213 (Wyo. 1982). Specifically:

> **The permitting system**, included in the Act, was designed to provide the state with the flexibility necessary to deal with certain economic realities. The legislature knew that business and industry, essential to the state's economic health, had to be maintained. And though it is an unfortunate statement on our modern age, technology is currently such that pollution can and does result from some commerce. **So the legislature adopted the permit scheme for businesses normally discharging wastes, under which the businesses would be authorized in advance to continue polluting the state's waters so long as the pollution remained within certain acceptable limits.**

> Clearly, however, there are some types of pollution which are unacceptable in any amount and thus under the Act it may be determined by the appropriate agencies **that no permit would be made available.**
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> **Clearly it is more consistent with the Act's stated purpose to bar the discharge of all pollution and exempt only those pollution sources for which a permit has been obtained in advance and upon a showing that the discharge would leave water quality within acceptable limits. Since that is what the statutory language taken literally says, and since such a reading would produce results harmonious with the Act's objective, we so read the Act.**
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> The statutory language in question states "No person * * * shall : (i) Cause, threaten or allow the discharge of any pollution * * *; (ii) Alter the physical, chemical * * * or bacteriological properties of any waters of the state." The clear import of this language is that if a person alters the waters' quality **without a permit**, he then has violated the statute, regardless of fault. We do not see how that can be disputed. (Emphasis added).

The Supreme Court's conclusion as quoted above is likewise confirmed by the explanation included in the Restatement (Second) of Torts, § 821B, comment f: "Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability." Further:

> **In addition, if there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations**. Thus, at one time courts frequently engaged in 'judicial zoning,' or the determination of whether a particular land use was unsuitable to a locality and therefore unreasonable. Now that most cities have complete sets of zoning regulations and agencies to plan and administer them, the courts have shown an inclination to leave the problem of the appropriate location of certain types of activities, as distinguished from the way in which they are carried on, to the administrative agencies. The variety and complexity of a problem and of the interests involved and the feeling that the particular decision should be a part of an overall plan prepared with a knowledge of matters not presented to the court

> and of interests not represented before it, may also promote judicial restraint and a readiness to leave the question to an administrative agency if there is one capable of handling it appropriately. (Emphasis added).

The Environmental Quality Act and related DEQ Rules and Regulations are obviously the type of "comprehensive set of legislative or administrative regulations" as described in the Restatement comment quoted above. The DEQ's finding that McMurry's Application is in compliance with them further confirms that its operation of the Eastfork Ranch Pit cannot be considered a public nuisance.

III. SUBLETTE COUNTY HAS ESTABLISHED THAT GRAVEL MINING OPERATIONS ARE AN APPROPRIATE LAND USE IN THE AREA IN QUESTION

As per the Sublette County "Zoning and Development Regulations Resolutions" (Zoning Regulations), gravel pit operations are an authorized land use in those areas that have been designated as an "Agricultural District" (A-1). The area in question, including the lands occupied by the objectors, is zoned as an Agricultural District. Gravel pits are not allowed in Residential or Rural Residential Districts. McMurry has complied with the County requirements in terms of permitting and operating the Eastfork Ranch Pit.

Sublette County's Zoning Regulations further confirm that McMurry's proposed Eastfork Ranch Pit operations as reflected in its Permit Application cannot be considered a "public nuisance."

IV. CONCLUSION

McMurry's proposed Eastfork Ranch Pit operations do not constitute a public

nuisance. The public policy of the State of Wyoming is embodied in its statutes, including the Environmental Quality Act. That public policy provides that the right to develop and pursue gravel mining operations will not only be allowed, but will be protected so long as the applicant follows the proper permitting procedure. The existence of such an operation cannot be considered a "public nuisance" for the simple reason that our Legislature and Sublette County have concluded – as a matter of public policy – that it is not.

Dated this 6th day of December, 2010

McMURRY READY MIX

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6TH day of December, 2010, a true and correct copy of the foregoing **McMURRY READY MIX COMPANY'S MEMORANDUM REGARDING LAW OF NUISANCE**, was served upon the following:

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