

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

FILED

FEB 24 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**

**McMURRY READY MIX COMPANY'S OBJECTION TO
PROPOSED "FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER" SUBMITTED BY THE BOULDER RESIDENTS**

The Boulder Resident Objectors (BR Objectors) have submitted their proposed "Findings of Fact, Conclusions of Law and Order" (BR Findings). The Environmental Quality Council ("EQC" or "Council") should reject that document out of hand for several reasons, including the following: It is better classified as a legal brief or closing argument than an accurate rendition of what occurred in the underlying public proceeding and hearings.

1. It contradicts the record before the Council.
2. It includes so-called "findings of fact" that are not supported by the evidence in the record.
3. It misstates the applicable legal framework.
4. It is argumentative.

5. It attempts to embroil the Council into deciding issues that are clearly outside of its jurisdiction.
6. It mis-characterizes the applicable burden of proof, and contradicts the decisions made by Hearing Officer Boal.
7. It lacks any citations to the testimony or documentary evidence in the record.
8. It is insufficient as a matter of law as per the Wyoming Supreme Court's instructions in *Billings v. Wyoming State Board of Outfitters and Professional Guides*, 837 P.2d 84 (Wyo. 1992).
9. It misrepresents the Council Members' findings and conclusions as expressed during their January 13, 2011 public hearing, and belies the tenor and substance of the discussions, the analysis, and the concerns that were voiced.
10. It is woefully deficient in substance and format.

The foregoing is not intended to be a complete list of the deficiencies or problems with the Objectors' Findings, but gives a flavoring for why such document is simply not acceptable.

The BR Objectors' Findings should be classified as what they are – an effort to re-argue issues that have already been decided by the Council (such as the burden of proof), an effort to “pad” the record to include “evidence” that was either not admitted or that is

not substantiated by the evidence (including, for example, their rendition of what the video (BR Exhibit 1) allegedly shows), and an effort to persuade the Council to issue a decision that most likely could not be defended on appeal. It is apparent from their submission that the BR Objectors were not satisfied with the Council's January 13th discussion, analysis and findings related to McMurry Ready Mix's ("MRM" or "McMurry") application and proposed operations, and that they are seeking to "fix" some of those perceived deficiencies. It is also apparent that the Objectors hope to use this process – submission of proposed findings of fact and conclusions of law – as a way to enlist the aid of the EQC to make it regulatorily and legally impossible for McMurry to ever obtain a land quality permit for the Eastfork Mine operations.

The Council members made clear during the January 13th hearing that they did not intend to forever bar McMurry from pursuing mining operations at the Eastfork Ranch location but, instead, that they expected MRM to supplement its land quality permit application to address the three (3) particular issues that were identified. Those three issues are: (1) protecting and preserving sage grouse, (2) hours of operation, and (3) protection of the public health and safety relating to the ingress and egress of MRM's access road.

MRM is submitting its own proposed Findings of Fact and Conclusions of Law, which document accurately reflects the testimony and evidence that was presented during the December 10th hearing, and comports with the Council's discussion and conclusions

as stated during the January 13th hearing. McMurry's proposed Findings and Conclusions provide the necessary citations to the record, and meet the following standard as adopted by the Wyoming Supreme Court's in *Billings v. Wyoming State Board of Outfitters and Professional Guides*, 837 P.2d 84 (Wyo. 1992):

Section 16-3-110 sets forth an agency's duty to support its action with sufficient factual findings:

A final decision or order adverse to a party in a contested case shall be in writing or dictated into the record. The final decision shall include findings of fact and conclusions of law separately stated. *Findings of fact if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.*

... In prior cases, we interpreted this statute as imposing the duty upon the agency to 'make findings of basic facts upon all of the material issues in the proceeding and upon which its ultimate findings of fact or conclusions are based.' *Pan American Petroleum Corporation v. Wyoming Oil and Gas Conservation Commission*, 446 P.2d 550, 555 (Wyo.1968). *See also Mekss v. Wyoming Girls' School*, 813 P.2d 185, 201 (Wyo.1991), *cert. denied*, 502 U.S. 1032, 112 S.Ct. 872, 116 L.Ed.2d 777 (1992). A lack of findings of basic fact on all material issues precludes any rational basis for judicial review because this Court cannot determine the basis upon which each ultimate fact or conclusion was reached. In short, we must know the why. *Geraud v. Schrader*, 531 P.2d 872, 879 (Wyo.), *cert. denied*, 423 U.S. 904, 96 S.Ct. 205, 46 L.Ed.2d 134 (1975). When the agency's findings do not adequately explain the justification for its position, we must remand the matter to the agency for the necessary supplemental findings. *Mekss*, 813 P.2d at 202. (Emphasis in original).

McMurry's proposed Findings and Conclusions comport with both the substance and format that the Council has historically used, and properly addresses each of the bases for the decision that was made by the EQC on January 13th.

Finally, the Wyoming Department of Environmental Quality ("DEQ") has


prepared a paragraph-by-paragraph analysis of the specific problems with the BR Objectors' proposed findings of fact and conclusions of law, and McMurry does not intend to reiterate that information here. MRM instead adopts that analysis by reference, as though fully set forth in this Objection.

McMurry respectfully requests that the Council reject the BR Objectors' proposed "Findings of Fact, Conclusions of Law and Order." McMurry further requests that the Council instead adopt its proposed Findings of Fact, Conclusions of Law and Order as contemporaneously submitted herewith.

Dated this 24th day of February, 2011

McMURRY READY MIX

/s/



Harriet M. Hageman (Bar No. 5-2656)
Hageman & Brighton, P.C.
222 East 21st Street
Cheyenne, Wyoming 82001
Telephone: 307-635-4888
Facsimile: 307-635-7581
hhageman@hblawoffice.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of February, 2011, a true and correct copy of the foregoing **McMURRY READY MIX COMPANY'S OBJECTION TO PROPOSED "FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER" SUBMITTED BY THE BOULDER RESIDENTS**, was served upon the following:

Kim Waring
Environmental Quality Council
122 W. 25th, Room 1714
Herschler Building
Cheyenne, Wyoming 82002
Facsimile: 307-777-6134
kwarin@wyo.gov

U.S. Mail, Postage Prepaid
 Hand Delivery
 Federal Express
 Facsimile: _____
 Other: Electronic-Mail

Marion Yoder
Environmental Quality Council
122 W. 25th, Room 1714
Herschler Building
Cheyenne, Wyoming 82002
Facsimile: 307-777-6134
myoder@state.wy.us

U.S. Mail, Postage Prepaid
 Hand Delivery
 Federal Express
 Facsimile: _____
 Other: Electronic-Mail

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

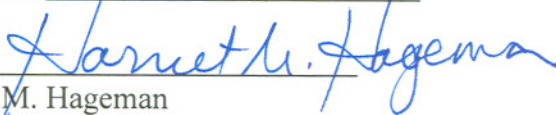
U.S. Mail, Postage Prepaid
 Hand Delivery
 Federal Express
 Facsimile: _____
 Other: Electronic-Mail

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

U.S. Mail, Postage Prepaid
 Hand Delivery
 Federal Express
 Facsimile: _____
 Other: Electronic Mail

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

U.S. Mail, Postage Prepaid
 Hand Delivery
 Federal Express
 Facsimile: _____
 Other: Electronic Mail

/s/ 
Harriet M. Hageman