

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

IN THE MATTER OF THE OBJECTION)
TO THE SMALL MINE PERMIT OF) Docket No. 10-4803
McMURRY READY MIX CO.)
TFN 5 3/143)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER came before the Environmental Quality Council (EQC) for a contested case hearing on the 10th day of December, 2010 at 8:30 a.m., Councilman Dennis Boal presiding. Luke Esch, from the Wyoming Attorney General’s Office represented the Department of Environmental Quality (“DEQ”). Mark Sullivan represented the objectors, Dave and Sandra Goodwin, Harv and Denise Hastings, Debra White, David Payne and Randy Simpson and Kelly Garside (collectively the “Boulder Residents”). Jon Aimone represented the objector East Fork Limited Partnership. Harriet Hageman represented the applicant, McMurry Ready Mix (“McMurry”).

McMurry’s Exhibits A, G, J, K, N, P, U, Y, DD, FF and GG were admitted into evidence. The Boulder Residents’ Exhibits 1, 8, 10, 13, 14, 16, 17, 21, 23, 26, 31, 32, 33, 34, 35 and 36 were admitted into evidence. East Fork Limited Partnership’s Exhibits 1, 2, 3, 4 and 5 were admitted into evidence. DEQ Exhibits A, B, C and H were admitted into evidence.

The parties also presented live testimony. The DEQ presented the testimony of its permit administrator, Tanya King, and Wyoming Game and Fish representative Mary Flanderka. The Boulder Residents presented the testimony of area residents Kelly Garside, Sandra Goodwin, David Goodwin, Denise Hastings and Randy Simpson. East Fork Limited Partnership presented

the testimony of Ken Routh. McMurry presented the testimony of Ron McMurry and Steve Stresky.

The Council, having considered the evidence and arguments of the parties, makes the following findings of fact and conclusions of law, and enters its order as follows:

I. Jurisdiction

The Wyoming Environmental Quality Act, W.S. § 35-11-101 et seq., endowed the EQC with jurisdiction to act as the hearing examiner in contested case hearings involving mine permit applications. W.S. § 35-11-406(k) gives any person the right to file written objections to mine permit applications and request a hearing before the EQC, which hearings are to be conducted by the EQC pursuant to the Wyoming Administrative Procedures Act, W.S. § 16-3-101 et seq. and the Environmental Quality Council's Administrative Rules and Regulations. W.S. § 35-11-112(a)(iv) states that the EQC shall "conduct hearings in any case contesting the grant, denial, suspension, revocation or renewal of any permit, license, certification or variance authorized or required by this act."

In this matter, the EQC presided as the hearing examiner for the DEQ pursuant to that statutory authority. McMurry filed an application for a small mine permit pursuant to W.S. § 35-11-406. The Boulder Residents and East Fork Limited Partnership timely objected to that permit application. Therefore, the EQC has jurisdiction to hear and decide this matter.

II. McMurry Bears the Burden of Proof

The issue before the EQC in this hearing is whether McMurry's mine permit application complies with the requirements of the Environmental Quality Act, W.S. § 35-11-406(m). McMurry bears the burden of proof on this question. W.S. § 35-11-406(m) states: [t]he

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.”

III. The Boulder Residents’ Objections

The Boulder Residents timely filed their objections to the permit, and presented three principal issues to the EQC in opposition to the permit: (1) that the mine and its related heavy truck traffic constitute a threat to public health and safety and a public nuisance in violation of W.S. § 35-11-406(m)(vii); (2) that McMurry’s application would adversely affect greater Greater Sage Grouse populations in a “core” sage grouse area and is thus inconsistent with Executive Order 2010-4, and contrary to the law or public policy of the state of Wyoming and the federal government in violation of W.S. § 35-11-406(m)(iii); and (3) that McMurry’s history of violations of its mining permits demonstrates a 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, and thus McMurry should not be issued a permit pursuant to W.S. § 35-11-406(o).¹

IV. Findings of Fact

1. The McMurry mine is a sand and gravel operation located in Boulder, Wyoming, in Sublette County. It has been operated pursuant to a 10-acre exemption since 2008. During that time, its operations have caused considerable controversy in the Boulder area, with neighboring landowners registering complaints with McMurry and Sublette County regarding noise, truck traffic, dust and safety concerns. At times, the mine has generated in excess of 300

¹ This third argument will not be addressed in the council’s conclusions of law and order because, for other reasons, the Council has decided to deny the permit application.

truck trips a day, resulting in trucks passing the Boulder Residents' homes every 2-3 minutes. This truck traffic has seriously disrupted the lives of the Boulder Residents, as each of them testified.

Truck Traffic Accessing the Mine Presents a Danger to Public Safety

2. The evidence presented at the hearing demonstrated that the McMurry mine is accessed by several state highways and county roads. From the north and east, it is accessed by Wyoming State Highway 353. From the west, trucks travel from Highway 191 to County Road 113, then County Road 133, and finally State Highway 353.

3. The entrance to the mine for all trucks is on State Highway 353. Boulder Residents' Exhibit 14 included three photographs showing that the mine entrance is narrow and follows a nearly blind curve. Exhibit 14 also shows that the highway department had erected signs to alert drivers that trucks may be entering the highway.

4. The testimony of Kelly Garside demonstrated that trucks traveling to the mine on State Highway 353 from the north must make a difficult and dangerous turn into the mine. In executing this turn, truck drivers must make a wide sweep that requires them to cross over the oncoming lane of traffic, and even onto the opposite shoulder, before rounding into the access road for the mine. This turning movement is particularly dangerous in light of the high volume of trucks accessing the mine.

5. The permit application makes no attempt to mitigate or even acknowledge this threat to public safety. The route used by trucks to access the McMurry mine is not addressed in any way, and alternatives that might address this public safety concern were not presented by McMurry.

6. In addition, the evidence demonstrated that the number and size of the trucks, coupled with the narrow, gravel character of County Roads 113 and 133, creates a threat to public safety.

7. The Boulder Residents presented a video (Boulder Residents Exhibit 1), which showed trucks repeatedly driving down the center of County Road 133, consuming nearly the entire road. One Boulder Resident, Randy Simpson, testified that he has been forced off the road by heavy truck traffic and had several close calls. Another, Kelly Garside, testified that he and his wife simply do not leave their home when the trucks are running. Another, Denise Hastings, testified that she and her husband will not walk or ride an ATV on the road because of the nearly constant truck traffic. Still another, Sandra Goodwin, testified that she cannot allow her grandchildren to cross the road when the trucks are running, and will not herself attempt to cross on horseback.

8. Again, the permit application made no attempt to address these concerns. There is no discussion of the volume of truck traffic accessing the mine in the permit application, let alone any measures to address or mitigate the public safety impacts of that traffic by reducing the volume, improving the road, or finding an alternative route to the mine.

9. The evidence presented by the Boulder Residents demonstrated that there is such an alternative route available, a county-controlled road easement that is currently a two-track known as Mathis Lane. Mathis Lane would require improvements by the applicant or Sublette County before it could be used by the heavy truck traffic accessing the McMurry mine. However, the evidence also showed that Mathis Lane would be shorter (both to U.S. 191 and McMurry's principal market for sand and gravel, the Jonah Field), would be further from active sage grouse leks, and would not pass any occupied dwellings. Furthermore, the evidence

showed that if trucks accessing the mine were to use Mathis Lane, they would avoid entirely the need to make the dangerous turn from State Road 353 into the mine.

10. At this time the council makes no judgment concerning the appropriateness or reasonableness of that alternative route. However, the application made no attempt to evaluate whether it is possible, let alone preferable, to improve and use Mathis Lane. If it intends to continue to pursue this permit, the applicant must evaluate all available alternatives that would eliminate the public safety and public nuisance impacts created by the mine.

Unrestricted Hours of Operation Create a Public Nuisance

11. The application does not contemplate any restrictions on hours of operation at the McMurry mine. The applicant's representative, Ron McMurry confirmed this fact in his testimony.

12. The evidence demonstrated that in its more than two-year history, the mine has at times started loading trucks well before sunrise, and throughout the day. This results in trucks passing by the Boulder Residents' homes as early as 5:15 in the morning. The noise and vibration caused by these trucks is a significant disruption of the public peace in an otherwise tranquil, rural area. Such unrestricted operation constitutes an unreasonable interference with the public peace, and is therefore a public nuisance.

13. At this time, the Council makes no judgment regarding what would constitute reasonable hours of operation restrictions. No testimony or evidence was presented to establish McMurry's needs, or what restrictions they could operate within. That is a matter that must be determined among McMurry and the DEQ, with the objectors' legitimate concerns in mind. At this time, in the absence of any evidence concerning what would be reasonable under the circumstances, such a judgment would be premature.

The Application Fails to Adequately Protect Sage Grouse

14. The evidence presented demonstrated that the McMurry mine is located in a Greater Sage Grouse “Core Population Area.” Greater Sage-Grouse are an imperiled species, and are threatened with listing as under the federal Endangered Species Act (“ESA”).

15. On August 18, 2010, Governor Freudenthal signed Executive Order 2010-4 entitled “Greater Sage-Grouse Core Area Protection.” EO 2010-4 states: “New development or land uses within Core Populations Areas should be authorized or conducted only when it can be demonstrated that the activity will not cause declines in Greater Sage-Grouse populations.”

16. Mary Flanderka, a representative of the Wyoming Game & Fish Department, testified at the hearing that EO 2010-4 is the State of Wyoming’s regulatory regime aimed at protecting Greater Sage-Grouse in the hope of avoiding ESA listing for the bird. EO 2010-4 imposes obligations on permit applicants to conduct a detailed assessment, before a project is permitted, to determine whether their project will adversely impact Greater Sage-Grouse. EO 2010-4 also imposes certain stipulations for developments within the core areas.

17. The evidence presented by the Boulder Residents shows that McMurry has failed to meet the requirements of EO 2010-4. The DEQ concedes that no disturbance analysis has been performed for the individual leks within the Project Impact Analysis Area or (“PIAA”), and no monitoring plan is in place, both of which are required by EO 2010-4. To cure these problems, the DEQ recommends issuance of the permit, and after-the-fact compliance by McMurry. To permit such now-for-then compliance would be inconsistent with the public policy embodied in EO 2010-4, which reflects a critical need to protect this species.

18. Furthermore, McMurry has failed to conduct a habitat assessment to determine suitable and unsuitable habitat in the area. EO 2010-4 describes the habitat assessment as follows:

3. Habitat Assessment: A habitat assessment will be conducted to create a baseline survey indentifying:

a. Suitable and unsuitable habitat within the PIAA

b. Sage-grouse use of suitable habitat (seasonal, densities, etc.)

c. Priority restoration areas (which could reduce 5% cap)

- i. Areas where plug and abandon activities will eliminate disturbance
- ii. Areas where old reclamation has not produced suitable habitat

d. Areas of invasive species

e. Other assurance in place (CCAA, easements, habitat contracts, etc.)

EO 2010-4 at B-2. That information is then used to determine whether the proposed activity will exceed the 5% cap on “existing and allowable suitable habitat disturbance” set forth in EO 2010-4.

19. No habitat assessment was performed for this project, as McMurry and the DEQ concede. Instead of performing a habitat assessment, the Wyoming Game and Fish simply assumed that all habitat within the PIAA was suitable, and now the DEQ and Game & Fish have claimed that this was the more conservative approach.

20. This assumption is not provided for anywhere in EO 2010-4. On the contrary, EO 2010-4 states that a habitat assessment “will be conducted.” EO 2010-4 at B-2.

21. Had a habitat assessment been performed, it may well have determined that a portion, perhaps even a substantial portion, of the PIAA constitutes unsuitable habitat for one

reason or another. For example, large areas may not provide adequate sage brush cover (5% or greater sagebrush canopy cover is required).

22. Furthermore, as testified by Mary Flanderka, there are large swaths of land within the PIAA that are used for alfalfa and hay production by area landowners, which areas were assumed to provide suitable sage grouse habitat. In her testimony, Ms. Flanderka asserted that such alfalfa and hay fields are considered suitable habitat. However, a close examination of EO 2010-4 shows that only areas of alfalfa and other “forbs” “within 60 meters of sagebrush habitat with 10% or greater canopy cover” are considered suitable. See EO 2010-4 at B-9. We cannot know what portion, if any, of the alfalfa and hay fields within the PIAA meet these criteria because no habitat assessment was performed. One thing is certain, though, not all of the existing haying and alfalfa operations are suitable habitat, and their inclusion in the calculation skewed the results.

23. Finally, the DEQ’s Tanya King acknowledged during her testimony that a nearby Greater Sage-Grouse breeding area, or “lek”, known as the Goodwin Lek may well be within 1.9 miles of the project’s haul roads. Ms. King could not say, because the perimeter of that lek had not been evaluated. Again, this is a violation of the general stipulations of EO 2010-4. See EO 2010-4 at B-4.

24. McMurry has failed to perform the analysis required by EO 2010-4 and has thus failed to show that the permit will not cause a decline in Greater Sage-Grouse in the area. McMurry conducted no habitat assessment, no disturbance analysis for individual leks, and has no monitoring plan. Furthermore, it has not been demonstrated that the project’s haul roads are more than 1.9 miles from the nearest lek, the Goodwin Lek, or that the project will not exceed the 5% disturbance cap.

V. CONCLUSIONS OF LAW

25. McMurry's permit application must be denied. McMurry's permit would endanger public health and safety by creating hazardous conditions on area roads (W.S. § 35-11-406(m)(vii)). McMurry's application constitutes a public nuisance by unreasonably interfering with the public peace (W.S. § 36-11-406(m)(vii)). Finally, McMurry's operation is contrary to the law or policy of the state of Wyoming by failing to ensure the protection of Greater Sage Grouse (W.S. § 35-11-406(m)(iii)).

VI. DECISION

26. Pursuant to the authority vested in the Environmental Quality Council by W.S. 35-11-406, the Council hereby **DENIES** the small mine permit application submitted by McMurry Ready Mix Co., TFN 5 3/143.

VII. ORDER

27. IT IS THEREFORE ORDERED that the Permit Application filed by McMurry Ready Mix Co., TFN 5 3/143 is hereby **DENIED**.

DONE this ___ day of February, 2011

Dennis Boale, Presiding Officer
Environmental Quality Council

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2011, the foregoing document, was served, by e-mail, on counsel for the parties, the EQC, and counsel for the EQC at the following addresses:

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