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Jim Ruby, Executive Secretary
Environmental Quality Council

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

IN THE MATTER OF THE OBJECTIONS TO)
THE SMALL MINE PERMIT APPLICATION) DOCKET 13-4802
OF McMURRY READY MIX COMPANY,)
TFN 5 1/237)

**WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MEMORANDUM ON PUBLIC NUISANCE**

The Wyoming Department of Environmental Quality hereby submits the following memorandum on the question of whether the McMurry Eastfork gravel mine constitutes a public nuisance or endangers public health and safety. In light of the reasonable revisions McMurry made to the mine permit application since the previous hearing on this permit, the proposed mine will not create a public nuisance or endanger public health or safety. Accordingly, the Council should not deny the permit based on Wyo. Stat. Ann. § 35-11-406(m)(vii).

I. Public Nuisance Law

The Environmental Quality Act grants DEQ and by implication the Council discretion to deny a gravel mine permit that “constitutes a public nuisance or endangers public health and safety.” Wyo. Stat. Ann. § 35-11-406(m)(vii). The Act does not define

public nuisance, nor does it identify factors the Council should evaluate when considering mine impacts on public health and safety.

Like the Legislature, the Wyoming Supreme Court has said little about public nuisances, except to note in passing that “a nuisance is a class of wrongs which arise from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction or injury to the right of another.” *Lore v. Town of Douglas*, 355 P.2d 367, 370 (Wyo. 1960) (internal citation and quotation omitted).

Nonetheless, public nuisance is a common law claim with deep historical roots that has been widely addressed by other legal authorities. *See, e.g., Lynn v. Hooper*, 44 A. 127 (Me. 1899); *Seigle v. Bromley*, 124 P. 191 (Colo. 1912). The Restatement of Torts, upon which the Wyoming Supreme Court frequently relies, defines public nuisance as “an unreasonable interference with a right common to the general public.” Restatement (Second) of Torts § 821B (2012). Thus, a public nuisance claim must prove both that a public right exists and that the activity complained of unreasonably interferes with the public right. Restatement of Torts, § 821B.

II. The Proposed Mine Will Not Unreasonably Interfere with Public Rights.

In the prior hearing on this permit, the Council found that the lack of permit limitations on mine operation hours, which could allow around the clock noise and dust, would in turn give rise to a public nuisance. Findings of Fact and Conclusions of Law, docket no. 10-4803 at ¶ 63 (March 10, 2011) (hereinafter Findings); *see also* Transcript of Hearing Proceedings, docket no. 10-4803, at 6-7, 12 (Jan. 13, 2011) (statements of Councilmen Coverdale and Boal) (hereinafter Deliberations). In rural parts of Wyoming,

truck traffic and the attendant dust and noise are inherent in everyday life. *See* Deliberations, at 17 (“Unfortunately for those people next to the gravel pits, the nice, quiet, serene country has a responsibility to provide resources to the surrounding communities[.]”) (statements of Councilman Flitner). The task for DEQ and the Council is to make reasonable accommodations in the interest of balancing these industrial impacts with residential values. *See id.* at 12 (“we need to find ways to balance these two interests”) (statement of Councilman Boal).

The Council accordingly suggested in its prior deliberations that appropriate hours of operation for the McMurry mine would be “something akin to ... 7:00 to 7:00 six days a week.” *Id.* at 23-24 (statement of Councilman Searle). In response, McMurry limited its proposed hours of operation to 6:00 a.m. to 7:00 p.m., Monday through Saturday. DEQ Ex. 1, at MP-18. This schedule presents a balance of the Boulder Residents’ interests in restful evenings and McMurry’s interests in mining gravel that does not unreasonably interfere with public rights. Therefore, the proposed hours of operation will not create a public nuisance.

In the previous proceeding, the Council also took issue with the safety of the mine access “due to the significant risk that an accident may occur when trucks enter into the opposite lane to make the turn onto the access road to the McMurry mine or when they exit the access road onto Highway 353.” Findings at ¶ 60. To improve the safety of the mine access, Sublette County rebuilt the access in 2011. *See* DEQ Ex. E. However, DEQ informed McMurry that the rebuilt access did not adequately address the deficiencies noted in the Council’s findings. *Id.* McMurry then worked with the Wyoming

Department of Transportation, which “updated [the access] to a commercial access. It has been paved, widened and **approved by WYDOT.**” DEQ Ex. 1 at ADJ11-AE-2 (emphasis added).

Still, trucks using the access road cross into oncoming traffic. *See* DEQ Exs. Y, Z. Undoubtedly, the public has a right to use public roadways free from obstruction. *See, e.g., State v. Swift & Co.*, 275 P. 176, 177 (Kan. 1929). But, the key question here is whether the obstruction of trucks crossing into oncoming traffic when accessing and leaving the McMurry mine is unreasonable. Restatement of Torts § 821B.

It is not. The Wyoming Department of Transportation, the state agency charged with supervising the public highways of Wyoming, constructed and approved the McMurry mine access. DEQ Ex. 1 at ADJ11-AE-2; *see also* Wyo. Stat. Ann. § 24-2-102(a). In other words, the agency whose area of expertise is highway maintenance and safety considers the McMurry mine entrance to be reasonable. The Council should not second guess that professional judgment.

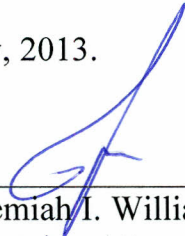
Even setting aside the Department of Transportation’s view that the access is sufficient, any interference with the public’s rights that might arise when trucks periodically cross into the lane of oncoming traffic when using the McMurry mine access is reasonable. In both directions the access provides an adequate line of sight for truck drivers to see and avoid oncoming traffic. *See* DEQ Exs. Q through X. It also would not be feasible for McMurry to further change the access point. WYDOT controls the highway and shoulder. And McMurry holds only a sixty foot wide easement across the

land abutting the highway. *See* DEQ Ex. 1, at ADJ11-AD-2 through -4. DEQ could not reasonably require McMurry to do more than its access rights would allow.

III. Conclusion

McMurry has taken reasonable steps to balance its interests in mining gravel with the Boulder Residents' residential rights. Such reasonable accommodations, designed to avoid unreasonable interference with public rights, provide adequate legal and factual bases for DEQ and the Council to conclude that the McMurry mine will not constitute a public nuisance or endanger public health or safety.

Submitted this 24th day of May, 2013.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of May, 2013, a true and correct copy of the foregoing *Wyoming Department of Environmental Quality's Memorandum on Public Nuisance* was served by placing the same in the United States mail, postage pre-paid, and via electronic mail to the following:

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