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

MAY 24 2013

Jim Ruby, Executive Secretary
Environmental Quality Council

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

FINAL HEARING BRIEF

Objectors Dave and Sandra Goodwin, Harv and Denise Hastings, Debbra White, David Payne, Randy Simpson, and Kelly Garside (collectively the “Boulder Residents”) respectfully submit this final hearing brief by the scheduling order deadline, May 24, 2013 by 5 p.m.

INTRODUCTION

In February of 2008 McMurry Ready Mix Company (McMurry) started a sand and gravel operation in the Boulder area pursuant to a ten-acre limited mining operation permit. Environmental Quality Council, Findings of Fact and Conclusions of Law, Docket No. 10-4803, March 10, 2011, ¶ 9. Although there have been other gravel operations in the area, McMurry’s use was something entirely new, commercial mining at an intensity never before seen in Boulder. Whereas the pre-existing mines operated sporadically, and would (and do) bring a limited number of truck trips a day, even at their peak operation, McMurry’s operation involved, at its peak, in excess of nearly 300 truck trips a day, by area homes. Trucks frequently would arrive before 6 a.m. in the morning and continue unabated all day, passing area homes every two minutes or less. The Boulder Residents kept their windows and doors shut at all times, and still could not escape the noise and vibrations from passing trucks, noise from the onsite crusher and other equipment, and generators running day and night. The Boulder Residents stopped using the outdoors and area public lands and roads because of the noise, dust, and road safety issues

created by McMurry's mining operation, and were even driven out of their homes to escape this unrelenting assault to the senses.

When it had nearly exhausted the aggregate in the limited mining operation, on September 22, 2010 McMurry issued a public notice that small mine permit TFN 5 3/143 was to be approved by the DEQ. *Id.* ¶ 6. The Boulder Residents filed timely objections to the McMurry permit. A contested case hearing was held on December 10, 2010, and the EQC issued a decision denying the permit in March of 2011. *Id.* ¶ 2.

The EQC denied the permit because the McMurry mining operation "endanger[ed] the public health and safety due to the significant risk that an accident may occur," was a public nuisance that "would be an unreasonable interference with the public peace," and the proposed McMurry permit did "not meet the requirements of the Executive Order" concerning sage grouse. *Id.* ¶ 60, 63, 57. Now, McMurry has reapplied for a mining permit. However, because McMurry has not cured the problems with its permit, it is now back before the Environmental Quality Council for a second round.

On February 1, 2013, McMurry issued a public notice that small mine permit TFN 5 1/237 (McMurry permit) was to be approved by the DEQ. The Boulder Residents again timely objected to the issuance of the McMurry permit. McMurry's proposed permit does not address any of the EQC's concerns, and the proposed mining operation continues to endanger the health and safety of the Boulder Residents and members of the public, continues to constitute a public nuisance, and fails to conform to Executive Order 2011-05. For the reasons briefly set forth below, and as will be demonstrated at the hearing in this matter, the Boulder Residents respectfully request that the Environmental Quality Council again deny McMurry's permit application.

ARGUMENT

I. The McMurry Mine Entrance Endangers the Public Health and Safety because Mining Trucks Cannot Safely Turn Into or Out of the Mine.

The EQC may deny “a permit based upon the fact that the public roadway is not constructed to handle the amount and type of traffic created by the enterprise without endangering the public health or safety.” *See* EQC, Findings of Fact and Conclusions of Law, ¶ 59. The EQC denied McMurry’s first permit in part because it did not address the safety issue created by trucks entering and exiting the McMurry mine, or the volume of trucks using the local roadways. *Id.* ¶ 38. The EQC concluded that “[u]se of the entrance to the McMurry mine from Highway 353 . . . endanger the public health and safety 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.” *Id.* ¶ 60.

McMurry’s proposed permit still does not address the EQC’s safety concerns. Although in 2011 the Wyoming Department of Transportation widened the entrance to the mine, that project was completed in conjunction with a bigger paving and leveling project on Wyoming State Highway 353, was not particular to the safety concerns, and this work did nothing to alleviate the EQC’s safety concern. To this day, those trucks still must cross over the double-yellow centerline into oncoming traffic when entering and exiting the mine, as even the DEQ’s Tanya King has acknowledged and cautioned McMurry.¹ This is a clear violation of both state law, and common-sense rules for safe driving. *See* Wyo. Stat. § 31-5-205 (a)(i) (No vehicle shall be driven on the left side of the roadway “when approaching or upon the crest of a grade or a curve in the highway where the driver’s view is obstructed within such distance as to create a

¹ A limited number of trucks continue to access the McMurry Mine, which continues to operate in a greatly reduced manner under its Limited Mining Operation permit. Similarly, trucks continue to use the same access point to reach a nearby pit operated by Sublette County.

hazard in the event another vehicle might approach from the opposite direction”); Wyo. Stat. § 31-5-207 (no driver shall drive on the left side of the roadway within a no-passing zone or on the left side of any pavement striping designed to mark a no-passing zone throughout its length); Wyoming Class C Manual, Rules of the Road, page 65-69 (double yellow line is a no pass zone); Wyo. Stat. § 31-5-209 (a)(i) (“A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety”), Wyo. Stat. § 31-5-201 (upon all roadways of sufficient width a vehicle shall be driven on the right side of the road except when overtaking or passing a vehicle, when a stationary obstruction exists, or on a designated one way road). The trucks furthermore consume the narrow county and state roads that lead to the mine, regularly driving in the middle of the narrow road and frequently forcing drivers off the road, or onto the shoulder.

On September 23, 2011, the Wyoming Department of Transportation (WYDOT) sent McMurry a two-sentence letter stating that the mine entrance has been “upgraded” to a commercial access. However, the limited work that was performed did nothing to address any of the EQC’s safety concerns. A “commercial access” is simply “an entrance to and/or exit from any business, commercial development, cultural/institutional complex, public establishment...” WYDOT Access Manual 2005, page 7. The minimum standards for a “commercial access” are the same for any type of commercial operation, from a McDonalds to a car wash. Thus, simply meeting those requirements has no bearing on the safety of the particular use, and this designation has no bearing on the safety of trucks entering or exiting the proposed mine.

Safety was not considered in any meaningful or documented way when the mine access was widened. WYDOT’s Damon Newsome, a traffic safety engineer, has testified by deposition in this matter that WYDOT has no file on the McMurry entrance and performed no safety studies

regarding the McMurry access when it was widened. Instead, the entrance was simply paved and widened as part of a larger Highway 353 paving project, with no particulars concerning its proposed use evaluated by the DOT.

The Department of Environmental Quality (DEQ) has relied solely on WYDOT's designation of the mine entrance as a commercial access as proof that the EQC's safety concerns were addressed. However, the EQC's previous safety concerns have not been addressed because trucks continue to dangerously cross over the centerline. The permit must be denied for this reason. To do otherwise would be the very essence of an arbitrary and capricious decision.

II. The Proposed McMurry Mining Operation is a Public Nuisance because it Unreasonably Interferes with the Public Peace.

The EQC may deny a permit if “the proposed operation constitutes a public nuisance or endangers the public health and safety.” Wyo. Stat. 35-11-406 (m)(vii). The EQC previously found “A public nuisance is an unreasonable interference with a right common to the general public. The public peace is a right that is common to the general public.” EQC, Findings of Fact and Conclusions of Law, ¶ 62; *See* Restatement (Second) of Torts § 821B (1979). The EQC then found that “operating the McMurry mine 24 hours a day, seven days a week, in accordance with Mr. McMurry's testimony at the contested case hearing would be an unreasonable interference with the public peace.” *Id.* ¶ 63.

McMurry's proposed mining operation will continue to create a public nuisance and disturb the public peace. Indeed, nothing of significance has changed in their current proposed use. Under the proposed permit, mining operations will be conducted from 6 a.m. to 7 p.m., Monday through Saturday. Trucks will travel past Boulder Residents' homes earlier than 6 a.m. on their way to the McMurry mine, as they had done during the mine's previous period of intolerable heavy activity. The mine will not operate on Independence Day, Memorial Day,

Labor Day, Thanksgiving, and Christmas, a total of five days a year. However, equipment maintenance requiring lights, truck travel, or the running of generators may be performed at any time, including holidays. In the past a generator was operated continuously through the day and night. Large, tall floodlights were used at night, sometimes shining into Boulder Residents' homes. McMurry's proposed long mining operation hours and continuous maintenance activity at the mine will destroy the public peace of the Boulder Residents and prevent the public from accessing and using area public roads and public lands, just as it has done in the past.

The proposed McMurry permit does not address the EQC's concern of the frequency of trucks. The EQC previously found that truck traffic associated with the previous permit would result "in trucks traveling on this road in the amount of two trucks per minute or 300 trucks per day." EQC, Findings of Fact and Conclusions of Law, ¶ 14. The permit does not give an estimate of, much less any limitation on, the number of trucks that may leave the site daily, monthly, or annually. The permit contains no discussion of timing or intensity of the hauling activity. Under the proposed permit, McMurry can operate at the same frequency it was prohibited from operating at under its first permit application. The frequency of truck traffic associated with this mine would again severely disturb the public peace and constitute a public nuisance.

Under the proposed permit, and similar to when the McMurry mine was previously operating, the Boulder Residents' will be unable to use the outdoors and area public lands when the mine is operating because of noise, dust, and road safety concerns. The Boulder Residents will not be able to use the road for walking, horseback riding, or using all terrain vehicles. The Boulder Residents will have to keep their windows closed at all times because of dust and noise from mining operations and trucks passing. The noise generated from the mining site including

onsite crushers, onsite vehicle's backing up and beeping loudly, and generators running continuously through the day and night will disturb the public peace. The Boulder Residents' tranquil existence in a beautiful, extraordinarily quiet section of Wyoming was utterly shattered by the mine when it was in operation and will be again if the McMurry permit is approved.

III. The Proposed McMurry Mining Operation Will Have an Adverse Effect on Sage Grouse and Violates Executive Order 2011-5.

McMurry's mining operations have also adversely impacted wildlife, in particular sage grouse, mule deer, and antelope. The noise from operations, in particular truck traffic, has driven these animals away from the area and reduced the Boulder Residents' and the public in general's enjoyment of the area. The Boulder Residents noticed significantly fewer sage grouse in the area during the previous McMurry mine operations. Now, the Boulder Residents have noticed that the birds have returned since McMurry ceased their operations two years ago. The expansion and re-opening of the McMurry Mine will have an adverse impact on Sage Grouse and contradicts the law and public policy in Wyoming relating to the conservation of sage grouse, a critically imperiled species in the State.

The McMurry permit is contrary to the public policy of Wyoming under Wyo. Stat. 406 (m)(iii) because it is not in compliance with Executive Order 2011-05. Executive Order 2011-05 is aimed at preserving core populations of sage grouse and preventing a federal endangered species listing. Greater Sage-Grouse Core Area Protection, Executive Order 2011-05. Under Executive Order 2011-05, all activities are to be evaluated within the context of maximum allowable disturbance of suitable sage grouse habitat within the area affected by the project. *Id.* Attachment B, page 7. The 5 percent maximum disturbance allowed is analyzed using a Density/Disturbance Calculation Tool (DDCT). *Id.* Attachment B, page 8-9. As part of its permit application, McMurry has, working with Wyoming Game & Fish, employed a "Density

Disturbance Calculation Tool” to assess the impact upon sage grouse from the mine. As set forth below, McMurry’s DDCT demonstrates unacceptable impacts, even while badly skewing the data.²

A. The McMurry Mine Will Adversely Affect the Goodwin Lek

The EQC previously found the first McMurry permit did not meet requirements of the sage grouse Executive Order because “it fail[ed] to include monitoring requirements for sage grouse, noise restrictions, and a disturbance analysis for individual leks.” *Id.* ¶ 57. As required by the EQC’s 2011 decision, McMurry’s new DDCT analysis includes an assessment of the impact on the individual leks within a four-mile radius of the mine. McMurry’s analysis demonstrates that the proposed mine creates a disturbance greater than the allowed 5% for an individual lek, the so-called “Goodwin lek.” The Goodwin lek is currently at 4.97% disturbance, and would be at 5.94% disturbance after the project. *See* McMurry permit application TFN 5 1/237, MP D9-AD-A3-3. The proposed mine permit acknowledges this exceedence, yet does nothing whatsoever to address it or explain why it is acceptable.

B. The DDCT Grossly Understates Existing Area Disturbances

For the DDCT area overall, McMurry’s initial DDCT calculation showed a 6.5% disturbance, which, again, exceeds the permissible 5% disturbance cap. *See* McMurry permit application TFN 5 1/237, D9-AD-2. Based on that analysis, no further disturbance within the DDCT area would be permissible and the mine could not be approved.

² Other flaws in McMurry’s analysis include its complete failure to acknowledge noise impacts of the mine (again, in contravention of the EQC’s order), its failure to include meaningful monitoring requirements, and its assumption that particular burned areas are nonetheless suitable. These issues will also be addressed at the hearing.

Executive Order 2011-5 states a habitat assessment “should be conducted when the initial DDCT indicates the proposed project will cause density/disturbance thresholds to be exceeded, *to see whether siting opportunities exist within unsuitable or disturbed areas that would reduce density/disturbance effects.*”³ Executive Order 2011-05, Attachment B, page 8 (emphasis added). McMurry performed such a habitat assessment, but did not do so in order to find an alternative location for the project within the existing disturbed or unsuitable areas. Rather, by mischaracterizing a vast area of hay meadows and grazing areas as “unsuitable” habitat, McMurry’s DDCT used the habitat assessment in an attempt to show that their project, as proposed and in the same location, will not exceed permissible disturbance thresholds.

McMurry’s Habitat Assessment DDCT calculation arbitrarily excluded flood-irrigated or subirrigated areas, primarily associated with areas irrigated for agriculture. This area, totaling 7,645.2 acres, should be considered disturbed. Disturbed suitable sage-grouse habitat “is land that has been converted from formerly suitable habitat to grasslands, croplands, mined, or otherwise physically disturbed areas.” Sage Grouse Implementation Team Update, March 13, 2013. The majority of this “unsuitable” area is in agricultural use and has been long used for growing grass for livestock, which is then mowed periodically. It is this agricultural use that renders the area “disturbed” and unusable by the birds. Were it not in agricultural use, it would be suitable sage grouse habitat. As McMurry’s initial analysis showed, this area should properly

³ A habitat assessment requires the identification of suitable and unsuitable habitat within the DDCT area, disturbed habitat within the DDCT area, sage grouse use of suitable habitat (seasonal densities), priority restoration areas (which would reduce the 5% cap), areas of invasive species, and areas with other assurances or approved development in place. Determination of existing and allowable suitable habitat disturbance is calculated by taking the acres of disturbance within suitable habitat and dividing it by the total suitable habitat within the DDCT area times 100. Subtracting the percentage of existing disturbed suitable habitat from 5% equals new allowable suitable habitat disturbance. Executive Order 2011-05, Attachment B, page 8.

be considered a disturbed area and included in the Density/Disturbance calculation. Instead, McMurry's analysis excluded this area from the calculation entirely by simply labeling it unsuitable and then re-calculating the disturbance area without including it. There is no basis in the Executive Order, or in Wyoming Game & Fish guidance, for doing so. By excluding this vast agricultural area from the Habitat Assessment DDCT calculation, McMurry's faulty and misleading analysis reduced the disturbance to 3.36%.

The evidence introduced at the hearing will show that McMurry, with Wyoming Game & Fish's encouragement, manipulated the DDCT process to justify its project and skirt the requirements of Executive Order 2011-5. The Environmental Quality Council should not countenance such an abuse. The Boulder Residents respectfully request that the Council find that McMurry's DDCT understates the disturbed areas, and deny the permit as inconsistent with Wyoming's strong public policy in favor of protecting this critically imperiled species.

CONCLUSION

The proposed McMurry mine does not address the EQC's previous concerns. The McMurry mine continues to endanger public health and safety, is a public nuisance, and is not in compliance with Executive Order 2011-05. For the reasons set forth above, and as will be demonstrated at the hearing in this matter, the Boulder Residents respectfully request that the Environmental Quality Council again deny McMurry's permit application.

Respectfully Submitted,

DATED: This 24th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, the foregoing Final Hearing Brief were served via electronic mail to the following:

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