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

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE OBJECTION)
TO THE SMALL MINE PERMIT OF) Docket No. 13-4802
McMURRY READY MIX CO.)
TFN 5 1/237)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Mark D. Sullivan, Mark D. Sullivan, P.C., with assistance from Laura Ethington, represented Dave and Sandra Goodwin, Harv and Denise Hastings, Debbra White, David Payne, Randy Simpson, and Kelly Garside (the Objectors).

Jeremiah Williamson, Assistant Attorney General, represented the Wyoming Department of Environmental Quality (DEQ).

Harriet Hageman and Stacia Berry, Hageman Law P.C., represented McMurry Ready Mix Co. (McMurry).

JURISDICTION

“The [Environmental Quality Council] shall act as the hearing examiner for the department [of environmental quality] and shall hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” WYO. STAT. ANN. § 35-11-112(a).

STATEMENT OF THE CASE

Dave and Sandra Goodwin, Harv and Denise Hastings, Debbra White, David Payne, Randy Simpson, and Kelly Garside challenge the grant of a mining permit allowing McMurry Ready Mix Co. to operate a gravel mine in Sublette County, Wyoming. The Objectors previously challenged the permit for this mining operation in 2010, and the Environmental Quality Council (Council) reversed the grant of the permit and remanded to the DEQ for further consideration in 2011. *See Findings of Fact and Conclusions of Law*, Docket No. 10-4803 (March 10, 2011) (hereinafter “2011 Findings”). In early 2013, DEQ again approved a permit for the McMurry small mining operation, having examined the 2011 deficiencies identified by the Council. The Objectors again filed objections, and this second Council hearing followed.

The Council held a two-day contested case on May 30-31, 2013 in Cheyenne, Wyoming. Chairman Thomas Coverdale served as hearing officer. Other council members present included Dr. David Bagley, John Morris, Andrew Schwartz, and Tim Flitner. Vice Chairman David Searle was absent, and council member Rich Fairservis recused himself from participation in this matter. The Objectors were present and represented by attorney Mark D. Sullivan. The Department of Environmental Quality was

represented by Assistant Attorney General Jeremiah Williamson. Permit applicant McMurry was present and represented by Harriet Hageman.

The Wyoming Department of Environmental Quality, McMurry Ready Mix, Co., and the Objectors presented testimony and exhibits. The Department called Tanya King, a Natural Resources Analyst for DEQ, and Mary Flanderka, the Habitat Project Coordinator for the Wyoming Department of Game and Fish. The Objectors presented testimony from David Goodwin, Sandra Goodwin, David Payne, Randy Simpson and Kelly Garside, each of whom own property near the permit area. The Objectors also presented testimony by Darrell Snyder, the Maintenance Area Foreman for the Wyoming Department of Transportation and testimony, by deposition, from Damon Newsome, District Traffic Engineer for the Wyoming Department of Transportation, and Denise Hastings, a property owner near the proposed mine. McMurry presented testimony from Ron McMurry, President and General Manager for the McMurry Ready Mix Co.; Joel Bousman, the property owner who has leased minerals to McMurry for mining; John Penton, Superintendent of Roads and Bridges for Sublette County; Jim Bousman, a land owner in the vicinity of the proposed mine; Eugene A. Brummond, a Supervisor for McMurry; and Mark Eatinger, the President of Rio Verde Engineering. The following Exhibits were received into evidence by the Council: DEQ Exs. A–F & H; Objectors Exs. 1–2, 6, 9, 11–13, 15, 21–23, 25, 30 & 37; McMurry Exs. 3, 15–17, 19, 31, 36–38, 55–57, 59–61, 64, 74, 79, 80, 82–86, 88a–88t, 89, 92, 96-J & 97.

The Council heard testimony from the parties, received and reviewed exhibits presented and were otherwise fully advised in the premises. Having fully considered the evidence and arguments presented, the Council hereby adopts and enters the following findings of fact and conclusions of law as its decision, as decided at the Regular Meeting of the Council duly noticed as required by law and held on the 11th day of July, 2013.

STATEMENT OF THE ISSUES

The Council previously considered objections to the proposed mining operation in 2011, and the Council concluded that, with the exception of three issues, DEQ had properly approved McMurry’s mining operation. *2011 Findings* at ¶ 45. For this permit, the Council and the Parties agreed to limit review and evidence to the issues that were the basis of the Council’s prior decision. These are:

- A. Whether the proposed mine would “constitute a public nuisance or endanger[] the public health and safety” in violation of WYO. STAT. ANN. § 35-11-406(m)(vii) because:
 - 1. the truck traffic from the McMurry mining operation endangers the public in how it accesses and uses public roadways; or
 - 2. the proposed hours of operation will constitute a public nuisance.

- B. Whether the proposed mine operation is “contrary to the law or policy of this state, or the United States,” WYO. STAT. ANN. § 35-11-406(m)(iii), because the operation will adversely affect the population of Greater Sage-Grouse in Wyoming in manner contrary to the Governor’s Executive Order 2011-5.

FINDINGS OF FACT

- 1. The Eastfork Ranch Pit, to be operated by McMurry, would represent an expansion of a gravel mining operation located in Sublette County, Wyoming. The mine has operated pursuant to a ten (10) acre exemption since 2008, and approximately one-half of the gravel in this area has been removed. (H’rg Tr.

vol. 1, 32–33 & 101; *2011 Findings* at ¶ 9.) See WYO. STAT. ANN. § 35-11-401(j) (authorizing modification or suspension of mining permit requirements for certain operations).

2. The Eastfork Ranch Pit is located in an agricultural area north of the Eastfork River. This area is rural, with small ranches and a few residential properties. (Hr’g Tr. vol. 1, 33.) Under the zoning regulations of Sublette County, a gravel pit is considered a permissible use consistent with an agricultural area. (Hr’g Tr. vol. 1, 242 & vol. 2, 427.) The proposed mine location is adjacent to a gravel pit owned by Sublette County and another gravel pit operated by the Wyoming Department of Transportation. (Hr’g Tr. vol. 1, 32 & 33-34.) There is also a private gravel pit approximately one and one-half miles from the McMurry gravel operation. Prior gravel pits have operated in the area, but they have been abandoned for several years. *Id.*

3. On September 22, 2010, DEQ authorized McMurry to issue a public notice that its application for a small mine permit was to be approved by DEQ pursuant to WYO. STAT. ANN. § 35-11-406. At that time, the Objectors filed timely opposition to the proposed issuance of the McMurry Permit—alleging, among other things, that the mine would constitute a public nuisance, endanger the public health and safety, and the mine did not comply with the Governor’s Executive Order for the protection of the Greater Sage-Grouse. (*2011 Findings* at ¶¶ 6, 7).

4. The Council reviewed DEQ’s approval of that permit in a contested case hearing on December 10, 2010. (*2011 Findings* at ¶ 1.)

5. At the 2010 hearing, the Objectors explained their concerns regarding dust, noise, traffic safety, and other concerns. The Council determined that the manner in which the gravel mine traffic would enter and exit U.S. Highway 353 endangered the public health and safety due to the risk that an accident might occur. (*2011 Findings* at ¶ 60.) The Council found the proposed hours for the McMurry permit—which the mine operator interpreted to permit operation for twenty-four (24) hours a day, seven days a week for up to six months of a year—would constitute a public nuisance. (*2011 Findings* at ¶¶ 61–63.) The Council found the application for the proposed mining operation had not complied with the requirements of Executive Order 2010-4, which required certain analyses of a project that may potentially impact Greater Sage-Grouse survival. (*2011 Findings* at ¶¶ 53–57).

6. Subsequent to the Council’s opinion denying the requested permit in 2011, McMurry worked with DEQ to develop a small mining permit that was consistent with the Council’s concerns and could be sustained. This permit application was approved by DEQ and admitted into evidence as DEQ Exhibit A.

7. The proposed mine permit increases the current ten (10) acre size of the Eastfork Ranch Pit gravel mine to 335 acres, with no more than thirty-two (32) acres actually mined at any one time and no more than 292 acres disturbed over the life of the mine. (Hr’g Tr. vol. 1, 33.) Under the permit’s 20-year mine plan, approximately one-half of the permitted area would be developed. (Hr’g Tr. vol. 1, 52.)

8. The Objectors again filed objections in a timely manner to the proposed issuance of the permit for the McMurry mine operation, renewing the three objections that had led the Council to deny the earlier permit application.

9. The McMurry mine is accessed from State Highway 353, in Sublette County, Wyoming. Trucks traveling to the McMurry mine also use County Road 133 as one way to travel to and from Highway 353. The parties disagree about the extent of the truck traffic that will result from the operation of the McMurry mining operation. Objector David Goodwin testified that when the McMurry mine was operating, prior to the Council's denial of its previous permit application, he experienced 300-400 gravel trucks per day traveling past his home on Country Road 133 for six days every week. (Hr'g Tr. vol. 1, 192.) Ron McMurry, the President of the McMurry mining operation, presented logs that indicated that the mine had only sold more than one hundred (100) truck loads of gravel in eleven days of its operation. (Hr'g Tr. vol. 2, 442-43; McMurry Exs. 36 & 37.) This would constitute, given that a truck must arrive and depart, about 200 truck appearances outside of the Objectors' homes. Ron McMurry further testified that the average number of truck loads sold per day, when the mine was operating under the ten-acre exemption, was forty-eight (48). (Hr'g Tr. vol. 2, 447-48.) Given the limits on annual mine extraction under the proposed permit, Ron McMurry estimates that he could not sell more than an average of 37 loads of gravel per day, assuming there was such a market for his gravel. (Hr'g Tr. vol. 2, 449). Of this conflicting evidence, the Council concludes that McMurry's information is a more credible assessment of possible traffic.

10. The Objectors testified that that the intensity of the traffic makes them feel unsafe, that the noise and dust from the mine makes them anxious and otherwise affects their health, and they enjoy their property less. (*E.g.* Hr'g Tr. vol. 1, 195-96, 263-64 & vol. 2, 414-15.)

11. Testimony demonstrated that prior to McMurry's gravel operation there were no posted speed limits on County Road 133 that passes by the homes of many of the Objectors. At the request of McMurry, the Sublette County Commission limited the speed on County Road 133 to thirty-five miles per hour. (Hr'g Tr. vol. 1, 267-68 & 250, vol. 2, 434-35.) Testimony further demonstrated the County placed signs that instruct truck drivers that they may not use compression, or "Jake brakes" on that road. (Hr'g Tr. vol. 1, 251-252, vol. 2, 607.) These traffic restrictions are intended to limit the impact of trucks from the mine, which are usually operated by McMurry's customers and not by the McMurry company. (Hr'g Tr. vol. 2, 434-35.)

12. Sublette County Road and Bridge—to address complaints concerning the dust on county roads—continues to spray the county roads with magnesium chloride. (Hr'g Tr. vol 2, 505-506, 517 & 523). Ron McMurry testified that McMurry sprays the access roads to its pits, twice a year, with magnesium chloride to control and maintain the dust from the mining operation. (Hr'g Tr. vol. 2, 506.)

13. After the Council's decision in 2011, the Sublette County Road and Bridge Department rebuilt the highway access point for the proposed mining operation. (Hr'g Tr. vol. 1, 45-46). After this was deemed insufficient by DEQ, Ron McMurry testified that he met with the Wyoming Department of Transportation and Sublette County's road supervisor about how to address the traffic safety concerns. (Hr'g Tr. vol. 2, 453-454). The Wyoming Department of Transportation paved, widened and updated the gravel pit access to a commercial access. (McMurry, Ex. 38); (Hr'g Tr. vol. 2, 393-398).

14. The Wyoming Department of Transportation, considering the relevant facts and circumstances, approved the access. (Hr’g Tr. vol. 2, 382); (Hr’g Tr. vol. 1, 45). The Wyoming Department of Transportation determined the mine access qualified as a commercial access under the road design standards of the State of Wyoming. (Hr’g Tr. vol. 2, 347-48, 366–67.) Additionally, the Wyoming Department of Transportation determined the access met the site distance requirements for the gravel pit mining entrance and that the view from the cab of a truck was adequate enough that a truck driver could execute a safe turn that would not endanger the public using the roadway. (Hr’g Tr. vol. 2, 382). The Department of Transportation’s District Traffic Engineer further testified that the lack of accidents from the operation of the State and County gravel pits, which use the same access point to Highway 353, was evidence that the access point is adequate. (Hr’g Tr. vol. 2, 368-69.)

15. The Objectors presented evidence that some trucks—it was uncertain whether these trucks are associated with the McMurry mining operation—take more than one lane of traffic when entering onto or exiting off of Highway 353, even after the improvements at the access point. (Hr’g Tr. vol. 1, 46–47). Witnesses for the permit applicant testified that it is customary for trucks to make wide turns, when safe, to help prevent damage to a truck or to the roadway. (Hr’g Tr. vol. 2, 489–490 & 541–543.)

16. The Objectors argued that DEQ erred in approving the permit without requiring that the proposed truck traffic use an alternate route known as Mathis Lane. (Hr’g Tr. vol. 1, 47–48, vol. 2, 525–529.) The permit applicant presented testimony that the proposed alternate route is not feasible, because DEQ does not redefine new roads into permits, the existing, undeveloped two-track road is located in Greater Sage-Grouse habitat, and the actual right-of-way for the road is not certain. (Hr’g Tr. vol. 1, 47–48, vol. 2, 525–529). Further, Joel Bousman, who serves as a Sublette County Commissioner, testified that the County had previously—prior to development of this mine—explored the possibility of placing a road in the vicinity of Mathis Road and was told that the U.S. Bureau of Land Management would not approve such a right-of-way on its land. (Hr’g Tr. vol. 2, 526-27.)

17. DEQ concluded that the permit did not endanger public health and safety, or present a public nuisance, from the traffic that would accompany the mine. This conclusion was based on the Wyoming Department of Transportation’s determination the access was safe and sufficient under that Department’s standards and requirements. (Hr’g Tr. vol. 1, 45). It is the standard practice of DEQ to defer to the judgment of other state agencies when they have more experience in a specific field, such as traffic safety. (Hr’g Tr. vol. 1, 89-90.)

18. The current proposed permit limits the hours of operation of the proposed mining operation to 6:00 a.m. to 7:00 p.m., Monday through Saturday. (Hr’g Tr. vol. 1, 72–74, Hr’g Tr. vol. 2, 483–484. *See also* DEQ Ex. A.) The testimony presented at the hearing demonstrated that other mines operating in the vicinity of the McMurry gravel mining operation operate with similar hours to those proposed in the McMurry permit, 6:00 a.m. to 7:00 p.m. (Hr’g Tr. vol. 1, 42–43, 72–74 & 191).

19. Since the 2010 contested case before the Council, a new executive order for the protection of Greater Sage-Grouse has replaced Executive Order 2010-4. This new Executive Order is No. 2011-5. (Hr’g Tr. vol. 1, 10–11; DEQ, Ex. H.) As a result of new executive order, McMurry was required to redo its analysis of Greater Sage-Grouse impacts. (Hr’g Tr. vol. 1, 37-38.)

20. McMurry, working with the Wyoming Department of Game and Fish and its Sage Grouse Implementation Team (“SGIT”), conducted a habitat assessment of the permitted area to determine the impact on sage grouse habitat. The habitat assessment was conducted using a Density Disturbance Calculation Tool. (Hr’g Tr. vol. 1, 109–110); (McMurry, Ex. 15).

21. Mary Flanderka, the Habitat Project Coordinator for the Wyoming Game and Fish Department, testified the analysis used complied with the 2011-5 Executive Order, although the review process consumed some time as the reviewers confronted novel issues. (Hr’g Tr. vol. 1, 111-49.) Ultimately, the sage grouse team concluded that the proposed mining operation complied with Executive Order 2011-5. (McMurry, Ex. 15); (Hr’g Tr. vol. 1, 41–42 & 105–110). Mary Flanderka, an employee of the Department of Game and Fish, further testified it is the ultimate opinion of her Department “that there would be no declines in sage grouse populations, provided [McMurry] compl[ies] with [its] worksheet and the way that the permit was applied for.” (Hr’g Tr. vol. 1, 110).

22. DEQ defers to the expertise of the Wyoming Game and Fish when addressing sage grouse determinations for permit approval. (Hr’g Tr. vol. 1, 29 & 88). The DEQ—based on the Wyoming Game and Fish determinations—found the permit complied with Executive Order 2011-5 and was therefore consistent with the policy of the State of Wyoming in this respect. (Hr’g Tr. vol. 1, 86–88). McMurry is required to continue to monitor for sage grouse impacts from its operation. (Hr’g Tr. 183-84.)

23. On February 1, 8, 15, and 22, 2013, McMurry issued a public notice that the proposed permit for the mining operation was subject to approval by DEQ pursuant to WYO. STAT. ANN. § 35-11-406. (*Affidavit of Publication*, docket no. 13-4802 (March 12, 2013)).

CONCLUSIONS OF LAW

24. To the extent any of the above findings of fact or the decision below includes conclusions of law, they are hereby incorporated as such.

25. The EQC has jurisdiction over the subject matter and the parties to this proceeding pursuant to WYO. STAT. ANN. § 35-11-112. All notice requirements for the hearing have been met pursuant to the Wyoming Environmental Quality Act (hereinafter referred to as the “Act”). *Findings of Fact* at ¶ 8.

26. McMurry’s small mining permit application is complete within the meaning of WYO. STAT. ANN. § 35-11-406.

27. WYO. STAT. ANN. § 35-11-406(m) provides that a permit “shall be granted” if the applicant demonstrates the application complies with the requirements of the Act and all applicable state and federal laws. The DEQ “shall not deny a permit” except for one of the enumerated reasons outlined under WYO. STAT. ANN. § 35-11-406(m).

28. The Wyoming Supreme Court has “repeatedly found the word ‘shall’ in a statute to be mandatory,” and it removes discretion from the decision-maker. *In re MN*, 171 P.3d 1077, 1080 (Wyo. 2007). Therefore, if DEQ concludes that the statutory criteria have been met, a mining permit must be granted.

29. Before the Council, the Objectors must provide evidence and argument that the Council can use to conclude that one of enumerated criteria under WYO. STAT. ANN. § 35-11-406(m) has not been met and therefore that the Council should deny the McMurry permit. *See Knight v. Env'tl. Quality Council*, 805 P.2d 268, 273 (Wyo. 1991) (“The burden of proving arbitrary, illegal or fraudulent administrative action is on the complainant, and this burden includes not only the clear presentation of the question, but also the placement of evidence in the record to sustain the complainant’s position.”)

DECISION

30. Wyoming law favors the issuance of mining permits. If the statutory criteria are met, then the Wyoming DEQ shall issue a mining permit. The statute’s obligation not only requires issuance of permits, but it limits the factors that can be considered when deciding whether to approve a completed application for a mine permit. *Conclusions of Law* at ¶¶ 27-28.

31. Although the Objectors prevailed in 2011, they must still demonstrate to this Council that, even with the changes made to the access point, the mine’s hours of operation, and the sage grouse review, the Council should conclude that the permit should not be issued. *Conclusions of Law* at ¶ 29. They have failed to do so.

32. The evidence demonstrates that the Wyoming Department of Transportation improved the mine access to the highway and that the entrance was constructed in accord with design standards for the Wyoming Department of Transportation. *Findings of Fact* at ¶¶ 13,14. The evidence further demonstrated that the Sublette County Road & Bridge posted speed limit signs and no Jake brake signs to minimize safety and noise concerns from truck traffic. *Findings of Fact* at ¶ 11. Sublette County Road & Bridge and McMurry sprayed the county roads with magnesium chloride to control the dust in the area. *Findings of Fact* at ¶ 12.

33. DEQ acted appropriately in deferring to the judgment of the Wyoming Department of Transportation about whether the entrance to Wyoming Highway 353 from the mine created unsafe conditions. While the operation of a gravel mine, by its very nature, will impact the Objectors, the Council does not find any traffic-related impacts that would constitute a “public nuisance” or otherwise “endanger the public health and safety.” WYO. STAT. ANN. § 35-11-406(m)(vii). *Findings of Fact* at ¶ 17.

34. At the December, 2010 hearing, the Objectors expressed concern about the ability of McMurry to operate the mine twenty-four hours a day, for seven days a week, (24/7) under the original permit application. The evidence shows that the new proposed hours by the McMurry permit, 6:00 a.m. to 7:00 p.m., are similar hours to other mines operating in the area. The Council does not find these hours unreasonable. *Findings of Fact* at ¶ 18.

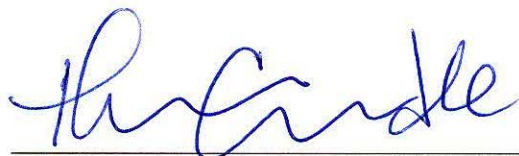
35. The Objectors have stated that the DEQ approval of the small mine permit is “contrary to the law or policy of this state” as embodied in the Governor’s Executive Order for the protection of Sage Grouse. WYO. STAT. ANN. § 35-11-406(m)(iii). The Governor’s Executive Order explicitly commands that state agencies “shall work collaboratively” to ensure that the goals of the Executive Order are met. DEQ Ex. H at § 12. The evidence demonstrates that the Wyoming Department of Game and Fish Department, working with the Sage Grouse Implementation Team, found “that there would be no declines in sage grouse populations, provided [McMurry] compl[ies] with [its] worksheet and the way that the permit was applied for.” *Findings of Fact*, at ¶ 21. The DEQ did not err when it relied on the expertise of this state agency to determine the McMurry permit complies with Executive Order 2011-5. *Findings of Fact* at ¶ 22. Although the Objectors would reach a different conclusion, the DEQ and this Council found the current review to have been credible and this Council finds no evidence that the approval of the mining permit was based on anything other than a desire to properly balance the various obligations under the Governor’s order.

THEREFORE pursuant to the authority vested in the Wyoming Environmental Quality Council, the Council hereby **AFFIRMS** the decision of the Director of the Department of Environmental Quality to grant the small mine permit application submitted by McMurry Ready Mix Co., **TFN 5 1/237**.

ORDER

IT IS THEREFORE ORDERED that the decision of the Director of the Department of Environmental Quality to grant the small mine permit application submitted by McMurry Ready Mix Co., **TFN 5 1/237** is hereby **AFFIRMED**.

DATED this 11th day of July, 2013.



Tom Coverdale, Chairman, for the
Environmental Quality Council

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of July, 2013, 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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