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MAY 29 2013

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

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)

McMURRY READY MIX COMPANY'S BRIEF IN RESPONSE TO
OBJECTION TO MOTION *IN LIMINE*

The Objectors are making yet another run at limiting McMurry Ready Mix Company's (McMurry) ability to support its Mine Permit Application, and to defend against their claims. Their most recent effort in that regard involves making the argument that McMurry is prohibited from filing a Motion *in limine* at the end of discovery, because it was somehow required to do so before it knew what irrelevant and inadmissible evidence the Objectors would attempt to submit. They are also seeking to apply such a preclusive rule against McMurry only, while still preserving their own right to file any Motion that they see fit – regardless of timeliness.

The April 19, 2013 Order of Schedule speaks for itself, and clearly refutes the approach that the Objectors are advocating here. While the Environmental Quality Council's ("EQC" or "Council") set a deadline of April 19, 2013 for "preliminary" motions, it is clear from the April 9, 2013 Hearing Transcript that deadline was

directed towards McMurry's arguments regarding the *res judicata* and finality of the decisions made by the EQC following the December 10, 2010 hearing on McMurry's first Permit Application. McMurry raised issues regarding *res judicata* and claim preclusion during the April 9th telephone hearing, and challenged the scope of these proceedings in terms of the issues involved. *See* Hearing Transcript at 12-14, 20-21, relevant pages attached as Exhibit A. The Objectors challenged McMurry's arguments regarding the narrow scope of this EQC hearing, claiming instead that any and all issues associated with the Application were up for review and decision. *Id.* at 14-15 (Exhibit A).

The word "preliminary" in the Order of Schedule was used for a reason – to make clear that the "preliminary" issues of the scope of these proceedings were filed by April 19th (the day the Order of Schedule was actually entered). That deadline, however, did not apply to all motions to be filed, a fact confirmed by the other parties' most recent motion practice. It would also be inconsistent with general trial practice to require a party to file motions *in limine* prior to knowing what evidence another party may seek to introduce, or what arguments may eventually be proffered. The discovery process, in other words, is the mechanism through which parties are able to "discover" what evidence and arguments should be anticipated. The *in limine* process allows a party to file the necessary evidentiary motions if such evidence or

arguments are not proper admissible.

McMurry eventually made the decision not to focus upon *res judicata* and issue preclusion as stand-alone issues, being instead confident in the EQC's knowledge about this history of this action, and its understanding of the previous decisions made. That strategic decision did not foreclose McMurry's right to file other motions seeking to exclude irrelevant information and arguments.

On May 24, 2013, and pursuant to the Order of Schedule, McMurry, as well as the Department of Environmental Quality, Land Quality Division (DEQ/LQD), each filed their respective Motions *in limine* regarding the admissibility of certain evidence in this action. Both McMurry and the DEQ/LQD have raised the jurisdictional issue regarding whether the use of public roads to access McMurry's sand and gravel operations should be considered here. Based upon the Objectors' attorney's actions during discovery in this case, it has become apparent that they may also seek to challenge McMurry's compliance with the 2010-4 Sage Grouse Executive Order (an order that no longer has any force and effect), and to introduce evidence of noise and other monitoring (as required by the previous Executive Order, but no longer included in SGEO 2011-5). Finally, McMurry has sought to preclude evidence related to air quality matters – which are clearly within the purview of the DEQ Air Quality Division (who has already issued a permit for the East Fork Ranch gravel

operations). McMurry's Motion as to those topics is entirely appropriate under the circumstances and, as is typical in most lawsuits, would not have been filed until after discovery had closed.

McMurry's Motion is not directed to the issues of *res judicata* and issue preclusion, focusing more specifically on particular arguments that we believe the Objectors will improperly attempt to make at the EQC hearing. McMurry has exercised its rights to seek such an evidentiary ruling from the EQC on these topics, and the Order of Schedule provided for a deadline of May 24th – a deadline that McMurry has met.

The Objectors' most recent motion has no merit. McMurry was as entitled as any other party to file motions up to and including the May 24th cut-off date.

The Objectors' motion must be denied.

Id. at 14-15.

Dated this 29th day of May, 2013

/s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of May, 2013, a true and correct copy of the foregoing McMURRY READY MIX COMPANY'S BRIEF IN RESPONSE TO OBJECTION TO MOTION *IN LIMINE*, was served upon the following:

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/s/
Harriet M. Hageman

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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF THE OBJECTIONS
TO THE SMALL MINE PERMIT APPLICATION
OF McMURRY READY MIX COMPANY Docket No. 13-4802
TFN 5 1/237

TRANSCRIPT OF TELEPHONIC SCHEDULING HEARING PROCEEDINGS

PURSUANT TO NOTICE duly given to all parties
in interest, this matter came on for telephonic scheduling
hearing on the 9th day of April, 2013, at the approximate
hour of 10:00 a.m., EQC Offices, 122 West 25th Street,
Cheyenne Wyoming, before the Wyoming Environmental Quality
Council, with Chairman Thomas Coverdale presiding via
telephone.

Mr. Jim Ruby, Executive Director to the
Council, and Mr. Joe Girardin, paralegal and technical
specialist, were also in attendance.



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A P P E A R A N C E S

For the DEQ:	MR. JEREMIAH WILLIAMSON MR. ANDREW KUHLMAN Assistant Attorneys General ATTORNEY GENERAL'S OFFICE 2424 Pioneer Avenue, Second Floor Cheyenne, Wyoming 82002
For McMurry Ready Mix:	MS. HARRIET HAGEMAN Attorney at Law HAGEMAN & BRIGHTON, PC 222 East 21st Street Cheyenne, Wyoming 82001 (By telephone)
For the Petitioners:	MR. MARK D. SULLIVAN MS. LAURA ETHINGTON Attorneys at Law MARK D. SULLIVAN, P.C. 5237 HHR Ranch Road Wilson, Wyoming 83014 (By telephone)

1 may have one. All right.
 2 So let's do this. Because the DEQ witnesses and
 3 the Game & Fish witnesses will not be -- they are not
 4 considered expert witnesses, they're just considered
 5 witnesses based upon what they've done with regards to this
 6 permit. Is there any objection to that understanding?
 7 MS. HAGEMAN: No.
 8 MR. RUBY: Jeremiah?
 9 MR. WILLIAMSON: No.
 10 MR. RUBY: Mark?
 11 MR. SULLIVAN: No.
 12 MR. RUBY: Okay. So, Harriet, based upon
 13 what Mark has indicated, that he may -- he may have an
 14 expert --
 15 Well, let me ask you this, Mark. Can you give us
 16 an idea what the area or which part of the complaint that
 17 expert would testify to? Would it be the sage grouse or
 18 the safety -- road safety concerns or dust or what?
 19 MR. SULLIVAN: It's a -- a public nuisance
 20 expert regarding noise, potentially.
 21 MR. RUBY: Okay. So it's a noise -- so he
 22 would be testifying on a noise issue.
 23 Harriet, would you be -- based upon just that
 24 little bit of information, does that give you enough
 25 information to say, yes, I'm going to have to come in with

1 Mr. Coverdale, the issue that Miss Hageman is
 2 raising is a question as to whether or not there is any
 3 issue preclusion.
 4 Is that right, Harriet?
 5 MS. HAGEMAN: Essentially, yes. Those
 6 matters are res judicata. I think that they've been
 7 decided. I think we're only dealing with the three issues.
 8 MR. RUBY: And that's a very complicated --
 9 CHAIRMAN COVERDALE: I have -- I have a
 10 question or a comment. As I recall, and, again, my
 11 memory's not perfect, but when we were discussing the hour
 12 of operations issues, noise -- noise was an issue with --
 13 with the hours of operation. So I don't know that that
 14 would exclude more testimony on noise.
 15 MS. HAGEMAN: Okay. And I don't know who
 16 that was that just spoke.
 17 MR. RUBY: That was Mr. Coverdale, Harriet.
 18 That was the presiding officer.
 19 MS. HAGEMAN: All right.
 20 MR. RUBY: And that would be the issue,
 21 Mr. Presiding Officer, and it certainly is one the
 22 parties -- you know, if they want to raise that issue and
 23 try and preserve that for an appeal issue, we will need
 24 to -- it will be a -- it's a complicated issue. Issue --
 25 CHAIRMAN COVERDALE: I understand.

1 another -- a different expert?
 2 MS. HAGEMAN: Yeah, I probably will.
 3 MR. RUBY: Okay. Jeremiah?
 4 MR. WILLIAMSON: I don't think the State
 5 has any noise experts on roster, and so we probably won't
 6 be bringing one.
 7 MR. RUBY: Okay. So --
 8 MS. HAGEMAN: But I have -- I have a
 9 question about that. Again, I believe that there's only a
 10 couple of issues that are involved here. We've -- we've
 11 tried this case, and there were only a couple of issues
 12 that the EQC remanded. So I guess one of the issues that
 13 we have is this a complete rehashing of everything, because
 14 that sure was not my understanding, or are we dealing with
 15 the three issues that the EQC identified when they
 16 essentially, well, denied it, but remanded it back with the
 17 understanding that there would be another permit
 18 application addressing these issues brought forward. So
 19 I've got the entry onto the highway, the sage grouse issue,
 20 and the hours of operation are the three that the EQC
 21 identified, with the other issues being resolved.
 22 MR. RUBY: Yeah. And, Harriet, all I can
 23 say is that if you want to make a motion in limine to the
 24 Council, I guess that would be the best way to try and
 25 clarify that.

1 MR. RUBY: Determining an issue of
 2 preclusion in a case can be very complicated.
 3 CHAIRMAN COVERDALE: Yeah. Yeah. Yeah. I
 4 understand.
 5 MR. SULLIVAN: Yeah. This is Mark Sullivan
 6 on behalf of the objectors, again. You just raised exactly
 7 the point I would make, which is that we need to make a
 8 complete record here for any potential appeal. And,
 9 therefore, I don't see res judicata coming into play in
 10 this case. I think the entire record is open and all of
 11 these issues are open. And we do intend to put in a
 12 substantial amount of evidence concerning public nuisance
 13 created by this operation, and that's not going to be
 14 limited to the hours of operation. It will be -- it will
 15 include all the truck trips and the noises generated by
 16 those trips and the effect that's had on the use of the
 17 area by the Boulder residents. So, you know, my position
 18 would be that res judicata does not come into play here.
 19 There's no reason to believe that the prior decision by the
 20 EQC addressed all of these issues that we now intend to
 21 raise, and, therefore, you know, these -- certainly a noise
 22 expert will be relevant. Again, I'm not sure we're going
 23 to need one or put one forward, but I wanted to reserve our
 24 ability to do so.
 25 MR. RUBY: Right.

1 MR. SULLIVAN: And now this issue's been
2 raised, I want to stress that, you know, this record is not
3 confined to the issues that Ms. Hageman has identified, but
4 it's open to, you know, any challenge and all the issues
5 that was before the EQC previously as well.

6 MS. HAGEMAN: Well, again, I would object
7 to that, and I disagree, and I'll file motion in limine to
8 that effect. I think it's very clear that there were only
9 three issues that were to be addressed. And while --
10 again, with Mr. Coverdale, whether the noise issues comes
11 within the hours of operation, I think we can go back and
12 look at that record to determine it, but it still would be
13 confined within the issues that have been identified by the
14 EQC. So I'll just file a motion in limine.

15 Mr. Ruby, I think that that's a good suggestion.

16 MR. RUBY: Okay. So let me -- let me just
17 ask everyone, are we committed to a May -- let me ask
18 this -- let me ask this question.

19 Harriet, how many days do you think you need for
20 this hearing?

21 MS. HAGEMAN: Well, I think that if --
22 again, it's going to depend upon the scope. If it's
23 limited to the three issues, then the one day on the 9th or
24 perhaps starting earlier on the 8th, or something like
25 that, would be appropriate. But if we're going to retry

1 out on the hearing. I don't know how the other parties may
2 feel about that. I agree with you completely that if we're
3 going to brief issue preclusion, that could get very
4 complicated and require a good deal of time and work. And,
5 you know, you'd want it to be thoroughly done, so I think
6 you want well-prepared submissions, and that may take some
7 time, and that would gobble up any opportunity we have to
8 conduct, you know, depositions or perform discovery that
9 may otherwise be required. So I wouldn't be opposed to
10 moving the hearing date. I'd have to consult with my
11 clients on their availability, but I don't anticipate any
12 problems on that front.

13 I agree with Harriet that one day, to my mind --
14 and I was going to raise this today -- seems a little
15 pinched. I'm not sure that we can get this all done in one
16 day. We may not be putting on as many witnesses, because
17 several of my witnesses, the parties, the objectors, are
18 not well and may not be able to attend. And I was going to
19 raise the question of possibly some testimony by telephone
20 or otherwise. But I still think that the issues here are
21 complicated and involved, and we're going to have to
22 present a good deal of evidence, and so one day might be a
23 little too confined.

24 So I'm flexible and open to moving the schedule
25 and changing the date of this hearing. I suppose that

1 this entire case, I think part of the problem that we had
2 last time was that for us, for McMurry Ready Mix, I don't
3 think the other parties finished until after 3:00 in the
4 afternoon.

5 MR. RUBY: Right.

6 MS. HAGEMAN: And then we had a short
7 period of time to present our case. I don't want to run
8 into that circumstance again.

9 MR. RUBY: Right.

10 And so, Mr. Sullivan, based upon where you're at
11 right now today -- understanding these are -- these are
12 short hearings, and the May -- the May 9th date -- you
13 know, in order for us to go out, you know, we need all
14 three parties to agree to a date. So -- and I'm -- and I'm
15 telling you that my -- my experience with motions in limine
16 on issue preclusion, they are complicated issues that take
17 some real thought and some real strong arguments. And
18 so -- and they aren't -- and they aren't the typical
19 arguments brought before a citizen administrative law
20 group. And so -- I mean, is there any way I can convince
21 the parties that the date for the hearing needs to be
22 pushed out?

23 MR. SULLIVAN: Again, Mark Sullivan here
24 for the objectors.

25 I would have no opposition to pushing the date

1 would have to be agreed to by the other parties.

2 MR. RUBY: Yes. Mr. Williams?

3 MR. WILLIAMSON: State has no objection to
4 pushing the hearing date out.

5 MR. RUBY: Okay. Harriet, I know this is
6 going to be an issue for you, so what do you think?

7 MS. HAGEMAN: I -- I am not going to oppose
8 pushing the hearing date out. It's going to depend upon
9 when we can do it, but no --

10 MR. RUBY: Okay. Let's --

11 MS. HAGEMAN: -- I'm not opposed to that.

12 Again, one of -- I don't want McMurry Ready Mix
13 to be the one that kind of gets shortchanged, if you
14 will --

15 MR. RUBY: Okay.

16 MS. HAGEMAN: -- with the amount of time we
17 have.

18 MR. RUBY: Right.

19 MS. HAGEMAN: So if we need to do that --
20 and I think the issue about the scope of this hearing is
21 incredibly critically important to what kind of a case
22 we're putting on.

23 MR. RUBY: Right.

24 MS. HAGEMAN: I would prefer to have an
25 answer to that question so that we know what witnesses are

1 relevant and should be brought in.
 2 MR. RUBY: Okay.
 3 MS. HAGEMAN: And then we can determine how
 4 long that hearing needs to be. If my position is correct,
 5 that's a shorter hearing than if -- if Mr. Sullivan's
 6 position is correct.
 7 MR. RUBY: Right.
 8 Mr. Sullivan and Ms. Hageman, I mean, it really
 9 is -- I mean, I've watched the Department in how they kind
 10 of present their cases on this stuff, and you guys have
 11 seen it all. I mean, literally --
 12 And, Mr. Sullivan, as you know, the burden of
 13 proof going forward on this deal is going to be on you and
 14 to show the Department did things -- something wrong -- or
 15 is getting it wrong.
 16 And so is it possible that Harriet and Mark, the
 17 two of you, could put together a cop -- a scheduling order
 18 that would make everything work for everybody?
 19 MS. HAGEMAN: Well, yes, but I would like
 20 Jeremiah Williamson to be a part --
 21 MR. RUBY: Oh, he'll be a part of it.
 22 MR. WILLIAMSON: Thanks, Harriet.
 23 MR. RUBY: I just know Jeremiah is going to
 24 be much more flexible than the two of you may be able to be
 25 with, you know, the constraints that come with being a --

1 they're going to have to prove or disprove.
 2 MS. HAGEMAN: I -- I --
 3 CHAIRMAN COVERDALE: Yeah, I think that's
 4 the way to go. I do not want to see this thing drag out
 5 too long.
 6 Now that we -- now that it's expanded to two
 7 hearings, let's get going to that first hearing, so --
 8 MS. HAGEMAN: I like that idea. I think it
 9 makes sense, and I think in the long run it's actually
 10 going to be more cost effective to do that.
 11 MR. RUBY: Mr. Sullivan?
 12 MR. SULLIVAN: That is acceptable, yes.
 13 MR. RUBY: Okay. So let's -- let's do
 14 this. Let's plan on May 9th at 9:00 --
 15 And, Harriet, you'll file your motion in limine,
 16 you know, before -- let's say before Friday of this --
 17 before the end of business this Friday.
 18 MS. HAGEMAN: I can't -- there's no way I
 19 can do that.
 20 MR. RUBY: What about Tuesday of next week?
 21 How about seven days? Or give me your best date for a
 22 brief that still leaves time for Mr. Sullivan to respond.
 23 MS. HAGEMAN: Sure. We've got -- have 30
 24 days. If you give me 10 days and give him 10 days, that
 25 gives us -- and then give me a five-day reply period, that

1 you know, representing a true live person.
 2 CHAIRMAN COVERDALE: Mr. Ruby?
 3 MR. RUBY: Yes.
 4 CHAIRMAN COVERDALE: Mr. Ruby, this is
 5 Tom Coverdale.
 6 Are we looking, then, at two separate hearings,
 7 one on the scope and one the actual hearing?
 8 MR. RUBY: Yes, we are, Mr. Hearing
 9 Officer. It's the only way --
 10 CHAIRMAN COVERDALE: Okay. Is it
 11 possible --
 12 MR. RUBY: It literally is the only way to
 13 handle that kind of issue.
 14 CHAIRMAN COVERDALE: Okay. Is it possible
 15 that the first part of this program can be heard on -- on
 16 the date of our meeting in May?
 17 MR. RUBY: Yes. Yes. That was going to be
 18 my suggestion to the parties is targeting their motion in
 19 limine arguments for May 9th, either in person or by phone,
 20 probably here in Cheyenne, since it wouldn't be an
 21 evidentiary hearing. It would all be -- it would be briefs
 22 and oral argument. And then -- and then based upon that
 23 decision, which we would hope to make that day, the parties
 24 then, based upon that, could then target their discovery
 25 and everything else toward understanding exactly what it is

1 should be -- that should work.
 2 MR. RUBY: Okay. So today is April 9th.
 3 So April 19th is -- is a week from Friday.
 4 MS. HAGEMAN: Okay.
 5 MR. RUBY: By the end of business -- so
 6 5:00 on the 19th, you file your motion in limine.
 7 And then --
 8 MS. HAGEMAN: All right.
 9 MR. RUBY: -- Mr. Sullivan, you would file
 10 your motion -- your -- your response brief by the -- one,
 11 two, three, four, five, six, seven, eight -- by say the
 12 30th of April.
 13 MR. SULLIVAN: May I ask for just a
 14 one-day extension on that? I have a trial on the 30th
 15 that could --
 16 MR. RUBY: May 1st?
 17 MR. SULLIVAN: That would be great.
 18 MR. RUBY: That's fine?
 19 And then, Harriet, you -- if -- any response you
 20 would file by -- two, three, four -- May 7th.
 21 MS. HAGEMAN: That will work.
 22 MR. RUBY: And that will give the Council
 23 the day of the 8th and then -- to kind of read through your
 24 stuff, and then hear your arguments on the 9th.
 25 MS. HAGEMAN: That will work.