

FILED

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

APR 16 2013

Jim Ruby, Executive Secretary
Environmental Quality Council

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

DOCKET 13-4802

McMURRY READY MIX COMPANY'S
MOTION FOR SCHEDULING ORDER AND TO ESTABLISH
MAY 30 AND 31, 2013 AS THE HEARING DATES

McMurry Ready Mix Company (McMurry), by and through its attorneys, Hageman Law P.C., hereby moves the Environmental Quality Council (EQC) for an Order setting a pre-hearing schedule in the above-captioned matter, and to establish May 30 and 31, 2013 as the hearing dates. McMurry provides the following information in support of this Motion:

1. On June 21, 2011 McMurry filed with the Land Quality Division (LQD) of the Department of Environmental Quality (DEQ) two copies of an application for a Permit to Mine, prepared in accordance with Wyo.Stat. § 35-11-406, the *LQD Non-Coal Rules and Regulations* and associated guidelines.
2. On January 25, 2013 the DEQ/LQD notified McMurry that its application was technically complete, and that the second public notice was authorized.
3. The Public Notice related to McMurry's DEQ/LQD application was published

in the Pinedale Roundup Newspaper for four (4) consecutive weeks. The Public Notice was first caused to be published on February 1, 2013, and the last publication was made on February 22, 2013.

4. March 25, 2013 was the deadline by which objections to McMurry's application were to be filed with the DEQ/LQD. Attorney Mark D. Sullivan, who participated in the December, 2010 hearing proceedings related to McMurry's original permit application, and that culminated in the March 10, 2011 EQC Findings of Fact and Conclusions of Law, filed objections on behalf of his clients.
5. Pursuant to Wyo.Stat. § 35-11-406(k), a public hearing "shall" be held within twenty (20) days after the date for filing objections unless a different period is stipulated to by the parties.
6. By electronic-mail messages dated March 20 and 21, 2013, the EQC Staff inquired as to whether the parties would agree to extend the date by which the hearing in this matter had to be held. Mr. Sullivan on behalf of his clients (the objectors), Jeremiah Williamson (on behalf of the DEQ/LQD), and the undersigned (on behalf of McMurry) agreed to such an extension. The EQC hearing was then scheduled to take place on May 9, 2013, with the location to be determined.

7. On Tuesday, April 9, 2013 the EQC held a short pre-hearing conference via telephone in which Mr. Sullivan, Mr. Williamson, and McMurry's attorney participated, as did EQC Staff. Chairman Coverdale presided.
8. The issue of the scope of the EQC hearing was discussed by the parties. Most specifically, the parties debated the question of what issues have already been decided by the EQC, and which issues remain for resolution in relation to the McMurry permit application. It was eventually decided to develop a schedule whereby preliminary motions (motions *in limine*) would be filed by 5:00 p.m. on April 19, 2013, with response briefs to be filed on or before May 1st, and reply briefs to be filed on or before May 7th. The point of these motions will be to determine whether the scope of the EQC hearing can be narrowed by the proper application of the doctrines of issue preclusion, res judicata, and/or law of the case. The resolution of these issues will determine the number and identity of the witnesses to be called, the exhibits that will be submitted, and the time needed for the hearing.
9. The Hearing Office and the parties agreed to take advantage of the previously-agreed-to May 9, 2013 date for holding oral argument on such motions. The parties also agreed to submit a proposed Order of Schedule on or before May 14, 2013.

10. McMurry would like to schedule the EQC hearing in this matter as soon as possible after the May 9th hearing date. While McMurry agreed to the EQC's initial request to extend the twenty-day statutory deadline, and requested to use May 9, 2013, as the hearing date on the motions *in limine*, it also believes that the parties should be able to move this matter along. Waiting until May 14, 2013 to set the hearing date will most assuredly delay the resolution of this matter even further.
11. McMurry's efforts to proceed quickly to hearing is fully sanctioned and approved by Wyo.Stat. § 35-11-406(k), which contemplates a very short period of time between the date on which objections must be filed and a hearing must be held. The public policy of Wyoming – as established by the Wyoming Legislature – is to ensure that such permit applications can be addressed quickly. The Legislature established a twenty-day period for all discovery to be completed and a hearing to be held in order to carry out that policy.
12. The attorneys and parties' calendars tend to fill up quickly. It is for that reason that on April 10, 2013, McMurry's attorney requested that this matter be set for hearing sooner rather than later. Attached as Exhibit A is an e-mail chain in which the schedule was discussed. McMurry's attorney identified seven (7) days in May, and seven (7) days in June for the EQC hearing. *See* pages 3-4

of Exhibit A.

13. All of the attorneys are currently available on May 30 and 31st for a hearing in the above-captioned matter. May 30th is twenty-one (21) days after the May 9, 2013 hearing date on the motions, so fully comports with the time-frame that the Legislature established as appropriate and sufficient.
14. McMurry's attorney has been in contact with EQC Staff (James Ruby), and inquired as to whether those hearing dates are available on the EQC calendar. He has reported that they are.
15. McMurry's attorney has also proposed a pre-hearing schedule for the parties, with such dates being set out in the e-mail chain attached as Exhibit A. *See* pages 1-2. Specifically, McMurry requests that the following dates be adopted by the EQC for purposes of pre-hearing discovery and other activities:
 - a. April 24, 2013: Deadline to submit written discovery; (McMurry's attorney had originally suggested April 17; Mr. Williamson (DEQ) requested that the date be extended to April 24).
 - b. May 10, 2013: Deadline for Objectors to designate expert witnesses. Such designation shall consist of either a written report prepared and signed by the witness or disclosure signed by counsel for the objectors. The designation must otherwise comply with the requirements of

Wyo.R.Civ.P. 26(a)(2).

- c. May 15, 2013: Deadline for responding to written discovery requests.
 - d. May 20, 2013: Deadline for DEQ and McMurry to designate their respective expert witnesses. Such designation(s) shall consist of either a written report prepared and signed by the witness or disclosure signed by the attorneys for these parties. The designation must otherwise comply with the requirements of Wyo.R.Civ.P. 26(a)(2).
 - e. May 24, 2013: Deadline for exchanging Witness List, Exhibits, and Statement of Issues by 5:00 p.m.
 - f. May 28, 2013: Deadline for completing discovery.
 - g. May 30 and 31: Final Hearing before the EQC to begin at 9:00 a.m. (Location to be determined).
 - h. The parties may exchange all of the foregoing documents and materials by electronic means.
 - i. The parties may file all of the foregoing documents with the EQC by electronic means.
16. McMurry also respectfully requests that a quorum of the EQC members be present at the hearing to the extent that it is possible.
17. McMurry's proposed schedule actually provides the parties with substantially

more time than is contemplated by Wyo.Stat. § 35-11-406(k). It has the advantage of ensuring that the issues are properly narrowed and defined, allows the parties to engage in substantive discovery, and meets the requirements under the Environmental Quality Act.

18. The attorneys for all of the parties have confirmed that they are available on May 30 and 31. If we are unable to take advantage of those two dates it will be July or August before the hearing in this matter can go forward. That delay would cause substantial prejudice to McMurry, and result in economic hardship.
19. McMurry has shown good cause for the relief requested.
20. McMurry is submitting a proposed Scheduling Order with this Motion.

WHEREFORE, McMurry respectfully requests that the EQC issue a Scheduling Order establishing the foregoing discovery, pre-trial schedule and hearing dates as controlling in this action. McMurry also seeks such other relief as is appropriate under the circumstances.

Dated this 15th day of April, 2013

1/s/

Harriet M. Hageman
Harriet M. Hageman (Bar No. 5-2656)
Stacia C. Berry (Bar No. 7-5001)
Hageman Law P.C.
222 East 21st Street
Cheyenne, Wyoming 82001
Telephone: 307-635-4888
Facsimile: 307-635-7581
hhageman@hagemanlaw.com
sberry@hagemanlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of April, 2013, a true and correct copy of the foregoing McMURRY READY MIX COMPANY'S MOTION FOR SCHEDULING ORDER AND TO ESTABLISH MAY 30 AND 31, 2013 AS THE HEARING DATES, was served upon the following:

Jim Ruby
Environmental Quality Council
122 W. 25th, Room 1714
Herschler Building
Cheyenne, Wyoming 82002
Facsimile: 307-777-6134
jim.ruby@wyo.gov

U.S. Mail, Postage Prepaid
 Hand Delivery
 Federal Express
 Facsimile: _____
 Other: Electronic-Mail

Jeremiah Williamson
Wyoming Attorney General's Office
123 Capitol Building
Cheyenne, Wyoming 82002
jeremiah.williamson@wyo.gov

U.S. Mail, Postage Prepaid
 Hand Delivery
 Federal Express
 Facsimile: _____
 Other: Electronic-Mail

Mark Sullivan
5237 HHR Ranch Road
Wilson, Wyoming 83014
mark@mdslawoffice.com

U.S. Mail, Postage Prepaid
 Hand Delivery
 Federal Express
 Facsimile: _____
 Other: Electronic Mail

1/s/
Harriet M. Hageman
Harriet M. Hageman

Harriet M Hageman

From: Mark Sullivan <mark@mdslawoffice.com>
Sent: Thursday, April 11, 2013 5:37 PM
To: Harriet M Hageman; 'jeremiah williamson'
Cc: 'Jim Ruby'
Subject: Re: McMurry Ready Mix Eastfork Gravel Operations Permit -- RE: Scheduling Order

I think the schedule you outline is too tight.

But, I will await Mr. Ruby's suggestion regarding the EQC's preference, and whether it will hear this matter outside of its regularly-scheduled meetings.

I do believe and wish to note, however, that the applicant has waived its right to a hearing within 20 days, and it is your motion in limine that is now holding this up further.

Sincerely,

Mark Sullivan

From: Harriet Hageman <hhageman@hagemanlaw.com>
Date: Wed, 10 Apr 2013 11:29:49 -0600
To: Mark Sullivan <mark@mdslawoffice.com>, 'jeremiah williamson' <jeremiah.williamson@wyo.gov>
Cc: 'Jim Ruby' <jim.ruby@wyo.gov>
Subject: RE: McMurry Ready Mix Eastfork Gravel Operations Permit -- RE: Scheduling Order

Dear Everyone:

The statutory hearing requirement provides for a trial within twenty (20) days after the proper notices are provided re: completeness of the application, etc. The purpose for that requirement is to ensure that applicants are able to move forward quickly with an EQC hearing if there are objections. It is sometimes difficult to meet that 20-day requirement, but we were able to do so the first time we had an EQC hearing on this matter in December, 2010 – also traveling to Rock Springs, having our witnesses available, etc. I do not believe that that particular hearing was held at the EQC's "regularly scheduled" meeting, but I could be corrected. In fact, I believe that the EQC's regularly-scheduled hearing actually took place in January, 2011, which is when the Board issued its decision.

We initially agreed to extend the statutory hearing date to May 9th. We have now agreed that it would be best to use that date for the hearing on the Motions in Limine. Considering the statutory requirements (of 20 days), I believe that we should easily be able to hold a hearing in this matter on May 30 and 31 if the EQC is available. That is actually 21 days after the May 9th hearing. In the meantime we can move forward with written discovery, designation of expert witnesses, etc.

I strongly request that we hold the hearing on this permit application on May 30 and 31 if the EQC is available. If so, I recommend the following schedule:

April 17, 2013: Deadline to exchange written discovery
May 8, 2013: Deadline for responding to written discovery (that is 3 weeks)
May 9, 2013: Hearing on Motions in Limine



May 10, 2013: Designation of Expert Witnesses – Objectors
May 20, 2013: Designation of Expert Witnesses – State and McMurry
May 28, 2013: Completion of Discovery
May 30 and 31: Hearing before EQC

In order to adequately anticipate what is coming up, I am happy to work with Mr. Sullivan and Mr. Williamson to schedule depositions dates as necessary.

Thank you.

Harriet M. Hageman
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Cheyenne, Wyoming 82001
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From: Mark Sullivan [<mailto:mark@mdslawoffice.com>]
Sent: Wednesday, April 10, 2013 10:40 AM
To: jeremiah williamson; Harriet Hageman
Cc: Jim Ruby
Subject: Re: McMurry Ready Mix Eastfork Gravel Operations Permit -- RE: Scheduling Order

My understanding was that the EQC preferred to hear this matter at its regularly scheduled meetings, in part due to budget and travel constraints, which I can certainly respect. Jim Ruby, can you speak to that question? Its the EQC amenable to dates other than their regularly-scheduled meetings for the hearing?

Please note that, as I mentioned on the phone, the scheduled July EQC hearing dates will not work for me as I have a long-scheduled trial, in Florida, during that period.

To my mind, the May dates that you propose are too close to the hearing that will resolve your motion in limine. If the issues are as I see them, there may well be a need for expert testimony. If they are to be confined to the issues as you see them, that may not be necessary. So, its hard to know how much time we'll need between the resolution of your motion and the hearing date. Other discovery may also be affected by the outcome of the motion hearing as well.

So, of the dates you proposed, the only dates I could see working would be May 30th and 31st, although I think that too would be a bit rushed and I would not be in favor of those dates.

The june dates you provide will not work for me, as I will be traveling with my family.

June 17th and 18th could work.

July 1st and 2nd could work.

After that it gets hard for me. I have a complex trial through July 17th.

But, July 22 to August 2nd are completely open.

Lets try to work this out.

MDS

From: jeremiah williamson <jeremiah.williamson@wyo.gov>
Date: Wed, 10 Apr 2013 10:20:08 -0600
To: Harriet Hageman <hhageman@hagemanlaw.com>
Cc: Mark Sullivan <mark@mdslawoffice.com>, Jim Ruby <jim.ruby@wyo.gov>
Subject: Re: McMurry Ready Mix Eastfork Gravel Operations Permit -- RE: Scheduling Order

Harriet,

I am fine with developing a mutually agreeable schedule prior to the motion hearing. The only date you proposed for a hearing that will not work for me is May 24.

Best,
Jeremiah

On Wed, Apr 10, 2013 at 10:11 AM, Harriet Hageman <hhageman@hagemanlaw.com> wrote:

Dear Gentlemen:

I understand that the decision made yesterday was to wait until after the May 9, 2013 hearing on our motions in limine to schedule the EQC hearing in this matter. I believe, however, that it makes more sense from a timing standpoint to make an effort to do so now. My schedule is becoming very complicated through the first part of November. It is critically important for my client's operations that we hold the EQC hearing as soon as possible so that this matter may be resolved. While the ultimate scope of that hearing will not be decided until around May 9th, even the longest period of time needed for a hearing would not exceed 1 1/2 to 2 days.

I believe that it would be best to work with our schedules right now, as well as the schedules of the EQC members, in order to establish the hearing date and put it on our calendars. We can set aside two (2) days to be on the safe side.

I am available on the following dates in May and June for a hearing:

May 21, 22, 23, 24, 29, 30 and 31.

June 3, 4, 5, 10, 11, 12, and 13.

Please let me know whether we can proceed as I have proposed. Thank you.

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From: Harriet Hageman [mailto:hhageman@hagemanlaw.com]
Sent: Tuesday, April 09, 2013 3:19 PM
To: 'Mark Sullivan'; 'jeremiah williamson'; 'Jim Ruby'
Cc: 'Harriet Hageman'
Subject: RE: Scheduling Order

Dear Everyone:

1. I agree with the idea of the State DEQ filing its own Motion in Limine on this issue.
2. I will potentially want the opportunity to respond to the DEQ's position. I will comply with the schedule for response briefs that was set today.
3. I respectfully suggest that the Order simply state that the deadline for filing motions in limine is April 19th, responses on or before May 1, and replies on or before May 7. The deadline for all filings will be 5:00 p.m.
4. I would like to reserve the right attend any hearing on the motions in limine in person.

Thank you.

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From: Mark Sullivan [<mailto:mark@mdslawoffice.com>]
Sent: Tuesday, April 09, 2013 2:29 PM
To: jeremiah williamson; Jim Ruby
Cc: Harriet Hageman
Subject: Re: Scheduling Order

Okay. Without knowing what the nuances of the DEQ's position may be, I think it may be best if the DEQ file its own motion so that we can respond.

Jim, I would like to confirm my understanding that the EQC will conduct a hearing on these motions by telephone, which would be my preference.

Thank all,

Mark

From: jeremiah williamson <jeremiah.williamson@wyo.gov>
Date: Tue, 9 Apr 2013 11:01:20 -0600
To: Jim Ruby <jim.ruby@wyo.gov>
Cc: Harriet Hageman <hhageman@hblawoffice.com>, Mark Sullivan <mark@mdslawoffice.com>
Subject: Scheduling Order

Jim,

DEQ would like an opportunity to respond to McMurry's motion in limine. Will you please draft the scheduling order so that it allows DEQ such an opportunity?

Harriet and Mark, please feel free to chime in if you have any qualms with this request.

Many thanks.

Jeremiah

--
Jeremiah I. Williamson

Assistant Attorney General

Wyoming Attorney General's Office

Water and Natural Resources Division

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--
Jeremiah I. Williamson