

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING

**FILED**

MAY 28 2013

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

Jim Ruby, Executive Secretary  
Environmental Quality Council

**OBJECTION TO McMURRY READY MIX COMPANY'S  
DESIGNATION OF EXPERT WITNESSES**

Objectors Dave and Sandra Goodwin, Harv and Denise Hastings, Debra White, David Payne, Randy Simpson, and Kelly Garside (collectively the "Boulder Residents") respectfully submit this objection to McMurry Ready Mix Company's (McMurry) designation of expert witnesses. For the reasons set forth below, the Boulder Residents respectfully request that McMurry be prohibited from calling any expert witnesses in this matter.

**I. McMurry Previously Represented That It Would Only Call Rebuttal Experts, If Necessary**

At the April 9, 2013 pre-hearing conference conducted before Presiding Officer Thomas Coverdale, McMurry indicated they did not plan to call expert witnesses, except as may be required to rebut any expert witnesses called by the Boulder Residents. Counsel for the Boulder Residents indicated they were considering the need to retain a noise expert. Based on that understanding, a scheduling order was agreed upon by the parties and entered on April 19, 2013 by Mr. Coverdale.

Under the scheduling order, the Boulder Residents were required to designate their expert witness, if any, by May 10, 2013. The deadline for the DEQ and McMurry to designate their expert witnesses was May 20, 2013. It was the Boulder Residents' understanding that the DEQ and McMurry were given additional time to designate expert witnesses in order to find rebuttal witnesses *if* the Boulder Residents designated a noise expert. The Boulder Residents did not

designate a noise expert, or any expert. Nonetheless, McMurry designated two, Steve Stressky, a hydrogeologist, and Mark Eatinger, an engineer. The Boulder Residents have no opportunity, either under the scheduling order, or in practice (given the short time before the hearing in this matter), to designate a rebuttal witness or witnesses. Therefore McMurry should be precluded from designating the expert witnesses they have now identified.

## **II. Mr. Stressky Is a Fact Witness, Not an Expert Witness**

The Boulder residents furthermore object to the designation of Steve Stressky as an expert witness because the topics of his anticipated testimony are not properly the subject of expert testimony. The Boulder Residents do not oppose Mr. Stressky's testimony, as a non-expert fact witness. However, expert designation would be improper.

McMurry's designation states that Mr. Stressky will provide "expert testimony" "regarding the work that he did in compiling the application" as McMurry's consultant "and the efforts that were made to meet each of the statutory and regulatory requirements for obtaining a Regular Mine Permit." McMurry Expert Designation at 3. His testimony will describe his "interaction with the DEQ/LCD," his "interaction with the Wyoming Game and Fish Department" and the "evolution" of the DDCT. He is to testify concerning the "mapping that he completed" and his "research as to the location of 'Mathis Lane.'" McMurry Designation at 5. None of those topics are properly the subject of expert testimony. They are, rather, simply matters of fact to which he may give his lay testimony concerning what was done and when.

Expert testimony is permitted "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." W.R.E. Rule 702. The Wyoming Supreme Court

adopted *Daubert's* two-prong analysis to determine the admissibility of expert testimony. *Bunting v. Jamieson*, 984 P.2d 467, 470 (Wyo. 1999); *See Daubert v. Merrel Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993). Under the first prong the court (or in this case, the EQC) must determine whether reasoning or methodology underlying the testimony is scientifically valid. *Bunting*, 984 P.2d at 470 (citing *Daubert*, 509 U.S. at 589-90). *Daubert* provided a non-exclusive list of four criteria to help the trial courts determine reliability:

- 1) whether the theory or technique in question can be and has been tested;
- 2) whether it has been subjected to peer review and publication;
- 3) its known or potential rate of error along with the existence and maintenance of standards controlling the technique's operation; and
- 4) the degree of acceptance within the relevant scientific community.

*Bunting*, 984 P.2d at 472 (citing *Daubert*, 509 U.S. at 593-94).

Other factors include the experience and specialized expertise of the expert, and whether the expert is proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation. *Bunting*, 984 P.2d at 472 (citations omitted). Under the second prong of the *Daubert* analysis the court must determine whether the testimony fits the disputed facts and will assist the trier of fact in understanding or determining *a fact* in issue. *Id.* “The experts opinion must relate to an issue that is actually in dispute and must provide a valid scientific connection to the pertinent inquiry.” *Bunting*, 984 P.2d at 472 (quotations omitted). There is nothing “scientific” about Mr. Stressky’s efforts on McMurry’s behalf, and the subjects of his anticipated testimony do not require an expert opinion.

Furthermore, Mr. Stresky should not be permitted to testify as an expert because he does not have specialized knowledge, skill, experience, training, or education in the matters he is to testify. Mr. Stresky is designated to testify about sections of the McMurry permit application, including the Wildlife Inventory, the Sage Grouse work, and the Adjudication section. Mr.

Stresky has a Bachelor of Science degree in hydrology and a Master of Science degree in hydrology and geophysics. He is not a biologist and does not have specialized expertise or knowledge of wildlife in the Boulder area, sage grouse biology and protection, or activities that disturb the public peace, or road safety. Further, any experience or knowledge he has gained concerning these activities that is particular to the McMurry mine arises naturally and directly out of the work he has performed in connection with this case. He is simply not an expert on these subjects; he is a fact witness.

Under the first prong of the *Daubert* test, Mr. Stresky's testimony is not scientifically reliable because he does not have specialized knowledge, skill, experience, training or education to testify as an expert concerning all areas of the McMurry mining permit. Specifically, Mr. Stresky should not be allowed to testify as an expert in areas such as sage grouse, road construction and safety, or what constitutes a public nuisance. Mr. Stresky does not have a biology or engineering degree. He has not regularly conducted studies or published material on sage grouse, road safety or public nuisances. Thus, Mr. Stresky's experience in preparing mine permit applications is too broad to make him an expert in the matters of concern involved in this particular permit appeal.

The Boulder Residents also object to the designation of Mr. Stresky as an expert witness because McMurry purports to have him testify on matters of law. "The opinion of a lay or expert witness is not admissible if it amounts to a conclusion of law or a mixed conclusion of law and fact." *Saldana v. State*, 846 P.2d 604, 615 (Wyo. 1993). McMurry indicated that Mr. Stresky will be called to testify about sections of the McMurry mine permit application and "the manner in which they were completed and filed in compliance with Wyoming statutory law, as well as the applicable Rules and Regulations." McMurry Expert Designation, page 3. McMurry also

indicated that Mr. Stresky will testify that the permit application meets the requirements of Executive Order 2011-5, Wyo. Stat. § 35-11-406, and the DEQ/LQD's rules and regulations. *Id.* at 4-5. Whether the permit application is in compliance with Wyoming law is a conclusion of law for the Environmental Quality Council to determine. That matter is not properly the subject of expert testimony and Mr. Stressky should be precluded from offering any purport "expert" opinion on those questions of law

### CONCLUSION

The Boulder Residents respectfully request that the EQC prohibit McMurry from introducing any expert testimony in this matter.

Respectfully Submitted,

DATED: This 27<sup>th</sup> day of May, 2013.

MARK D. SULLIVAN, P.C.

\_\_\_\_\_/s/\_\_\_\_\_  
By: Mark D. Sullivan (6-3824)  
5237 HHR Ranch Road  
Wilson, WY 83014  
p. (307) 733-2021  
f. (307) 732-9807

## CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2013, the foregoing Objection to Expert Witness Designation was served via electronic mail to the following:

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

Harriet Hageman  
Hageman Law P.C.  
222 East 21st Street  
Cheyenne, Wyoming 82002  
hhageman@hagemanaw.com

Jim Ruby, Executive Secretary  
Environmental Quality Council  
122 W. 25<sup>th</sup>, Room 1714  
Herschler Building  
Cheyenne, Wyoming 82002  
jim.ruby@wyo.gov

\_\_\_\_\_/s/\_\_\_\_\_  
Mark Sullivan