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Jim Ruby, Executive Secretary
Environmental Quality Council**BY FAX**

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date: September 7, 2010

no pages 9 including attachment

Re: DEQ AQD Permit Application No. AP-9645
DEQ AQD Permit No. AP / MD-9645, dated March 17, 2010

Notification to Parties of Expert Witness and Expert Reports

Dr. James H. Myers, DVM will be offering a professional explanation to Council Members of the term "dust pneumonia". His report will be available later this month. The purpose of Dr. Myers's report is to confirm the existence of and to describe the nature of the condition often referred to in veterinary medicine as "dust pneumonia".

Dr. Myers is uncertain at this time whether he will be able to attend the hearing either in person or by telephone. I have informed Dr. Myers that the hearing may take place either on January 13th or January 14, 2010, and that neither the location of the hearing nor the time of the hearing have yet been set.

I have passed my understanding of dust pneumonia by Dr. Myers, and he has confirmed that my understanding is essentially correct - namely that dust pneumonia

is a layman's term for a phenomenon where dust is a causative / precipitating factor in the onset of pneumonia in cattle. Pneumonia in cattle, as in humans, is an inflammation / infection of the lungs, normally involving either a virus, a bacteria, or both. Often a viral infection is followed by a bacterial infection. Cattle naturally harbor and /or are exposed to a number of virus and / or bacteria which can cause pneumonia. Normally, their immune system prevents pneumonia from developing. However, there are a number of factors which can undermine cattle' immune systems' ability to resist infection, and the number one exacerbating factor is dust, particularly as it affects the upper respiratory tract.

The same holds true for other animals as well as humans, the difference is that humans normally have the option and the common sense to remove themselves from an excessively dusty outdoor environment. Cattle grazing and wintering over in pastures adjacent to a limestone mining operation are breathing in this dust 24-7. They are breathing the dust before it settles. When they graze, they are stirring up the volumes of dust which has settled and breathing in clouds of it.

Council members had no questions for my witness, Bush Ranches' Manager, Mr. Dewey Turbiville, when, on December 21, 2009, he expressed his concern about dust pneumonia affecting our cattle at the public hearing regarding the Croell Redi-Mix application to DEQ LQD to expand its operation at the Rogers Pit - the same Croell Redi-Mix limestone mining and crushing operation which DEQ AQD Permit MD 9645 modifies from a ten acre minesite with a maximum production of 100,000 tons / year to a 600.07 acre minesite with a maximum yearly production of 500,000 tons per year.

However, on January 14, 2010, during discussion preceding Council's vote to approve the Croell Redi-Mix DEQ LQD Application to expand the existing Croell Redi-Mix 10 acre LMO mining operation at its Rogers Pit location to a Regular Mining operation with a 600 acre minesite, several Council members stated, citing

no evidence, that dust pneumonia did not exist. ¹

The appropriate time for Council to have questioned the nature of dust pneumonia would have been at the December 21, 2009 public hearing, when objecting parties would have had the opportunity to respond and / or defend their concerns.

In addition, the assertion that the notion of dust pneumonia was bogus was the lead-in to imply that other (unspecified) and equally bogus issues were raised by objectors, and that issues raised by objectors at that hearing were emotional as opposed to factual and by extension of no legal significance.

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¹ The following excerpts are from the transcript of the January 14, 2010 meeting of the Environmental Quality Council, at which the EQC voted in favor of approving Croell Redi-Mix DEQ LQD Application TFN 5 6/072 (EQC Docket No. 09-4806):

Tim Flitner
Council member

And, you know, there was a lot of that testimony on the other side, too, that wasn't – just flat didn't hold water. There's no such thing as dust pneumonia in cattle. And few things like that popped up, which those kind of things bothered me. And when you get to that point and start listening to people's emotions and their opinions and get away from the facts, and that's where we spent a lot of those hours that day, was listening to people's emotions. And the facts say that, you know, this should be okay. So that's where I am.

*Transcript January 14, 2010 meeting of EQC Docket 09-4806
page 14 line 21 - page 15 line 6
(District Court Civil Case No. 8016 Record pages 1178 - 1179)*

Tom Coverdale
Council member

... Although there is no pneumonia in cows. I agreed with Tim (Flitner). I looked that up and it's bullshit.

*Transcript January 14, 2010 meeting of EQC Docket 09-4806
page 18 line 13 - 15
(District Court Civil Case No. 8016 Record page 1182)*

This latter assertion adds insult to injury, since I was denied the opportunity either to present my legal arguments or to explain my exhibits at the December 21, 2009 public hearing.

note

These exhibits had been delivered to the EQC, attorney for the DEQ LQD Mr. Burbridge, and Croell Redi-Mix on Friday, December 18, 2010.

They showed that Croell Redi-Mix had been aware of lack of legal access to and from its LMO minesite to the first public road (the Rifle Pit Road) for its mining operation since December of 2007 (Exhibits 20 and 21). (Croell Redi-Mix did not inform the LQD of this fact.)

Exhibit 22 was a LQD Form 8 Surface Landowners' Consent Form sent to me by Croell Redi-Mix which had been filled out in such a way that, had the owners of Bush Ranches signed this form, we would have signed over all of our owned mineral rights in Section 25 T 52N R 62W to Croell Redi-Mix.

Exhibits included three separate Notices of Violation issued to Croell Redi-Mix in 2007, 2008 and 2009 respectively. The 2008 Notice of Violation relating to its Rogers Pit LMO operation lumped four separate violations (including mining-related activities taking place on more than double its permitted 10 acres) into one Notice.

At the December 21, 2009 public hearing, I stated that this type of conduct did not bode well for the future compliance of Croell Redi-Mix.

Please note that within one month of having been issued its regular mining permit, Croell Redi-Mix was already in violation with the terms of that permit, having disturbed lands beyond its disturbance boundary where the expanded minesite borders Bush Ranches property. This boundary, which Croell Redi-Mix immediately violated, was described in the Mine Plan of the Application approved by Council as follows:

MP 4.9 Public Nuisance and Safety

The affected area boundary has been pulled back from the permit area to minimize impacts to adjacent lands...

Croell Redi-Mix, warned by the DEQ LQD to discontinue to disturb the land outside of the disturbance boundary, nevertheless continued to

do so, and on July 1 of this year was issued a Notice of Violation by the DEQ LQD. Unfortunately for Bush Ranches, the DEQ LQD has also issued a amended permit to Croell Redi-Mix to permit the company to continue disturb land within the minesite right up to its legal boundary eliminating what small protection which the disturbance boundary had afforded Bush Ranches in this area which our cattle graze for much of the year and where they winter over.

This is the fourth DEQ LQD Notice of Violation issued to Croell Redi-Mix, Inc. in as many years.

note

The Croell Redi-Mix Application to LQD was to expand its existing 10 acre LMO mining operation at its Rogers Pit location to a regular mining operation with a 600+ acre minesite. I was told that the conduct of Croell Redi-Mix while operating its LMO was irrelevant to whether or not Council would grant the company's application to expand its activities at this location. It was further asserted by both Mr. Burbridge and the EQC at the hearing that Croell Redi-Mix was in compliance with the Environmental Quality at at the time that the December 21, 2009 public hearing took place.

I challenged these assumptions, both in my December 30, 2009 closing arguments and in my March 3, 2009 response to the Proposed Findings. There has never been a response, or even an acknowledgement of these and other objections to misstatement of facts which are a matter of record or to conclusions of law concluded on the basis is these incorrect facts.

I had thought that there had never been any response to or acknowledgement of issues addressed in either in my December 30, 2009 closing arguments or in my March 3, 2010 response to the Proposed Findings of Fact, Conclusions of Law and Order. However, I was recently provided with a recording of discussion by the EQC Council at their March 11 and 12, 2010 meeting, where the Findings of Fact, Conclusions of Law and Order regarding Docket 09-4806 was considered. Although much of the recording is not audible, I have been able to transcribe the following comments of Mr. Ruby, Executive Secretary of the EQC, relating to my March 2, 2010 response:

Mr. Ruby's comments at the March 11, 2010 Meeting of the EQC (Docket 09-4806)

Ruby Ok, what happened was the council requested Mr. Burbridge as the prevailing party to prepare a proposed Findings of Fact, Conclusions of Law and Order, ah, Mr. Burbridge did that, he delivered it to the objectors who were given, - based upon the Council's direction were given 15 days from the time of the order - the delivery to file objections to that proposed order. Ah, there was a couple of changes, insignificant changes, date changes ah in the initial order, proposed order, and so Mr. Burbridge sent out an amended Proposed Order, ah two days later I think it was and gave the parties until March 3rd to respond or the objectors until March 3rd to file their objections if any. Um, which is still in excess of the 15 days.² ...

Ah, the objectors filed. Mr. Turgeon ah filed ah - some objections, I think it was about a page and a half. Ah, Croell filed no objections to my recollection. And Miss Judith Bush filed a twenty-five page paper -
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² The Proposed Findings of Fact, Conclusions of Law and Order was sent out on February 11, 2010, and parties were asked to respond by March 3, 2010. The Amended Proposed Findings of Fact, Conclusions of Law and Order was sent out on February 19, 2010, and parties were asked to respond by March 3, 2010;

The Office of the Attorney General mailed the Proposed Orders to Canada. If the DEQ LQD had not had the courtesy to fax these documents to me, I would have had no opportunity to respond at all.

note I had written to the EQC requesting that the approved Findings of Fact, Conclusions of Law and Order be faxed to me when issued. Evidently the EQC chose not to honor this request. Council's March 12 Findings of Fact, Conclusions of Law and Order were sent to me by US mail and arrived belatedly in Canada with postage due (copy of envelope is attached)

Both Mr. Turgeon and I requested an extension of the March 3, 2010 deadline to respond after the February 19, 2010 Amended Orders were sent. There were so many inaccuracies in both versions of these proposed orders that responding in a responsible manner, documenting the errors in the proposed orders with information contained in the record and citing appropriate statutes and rules was a gargantuan task. This request for an extension was denied.

twenty-five pages ? - I think it was of proposed objections. Most of those objections were ah not what I would quantify as objections that pertained to the proposed Order of Findings of fact they were just continued ongoing arguments about why she should win and why the department and Croell should lose. Um, or arguments about why the timing wasn't right or why the notices weren't right. They were not objections with - to the merits of the way Mr. Burbridge drafted the proposed Findings of Fact, Conclusions of law and order. ³

In general, I believe that the EQC has shown bias and behaved unprofessionally. I have requested that Dr. Myers explain what is meant by the term "dust pneumonia" to Council Members for the following reasons:

- 1) Dust pneumonia is a valid concern relating to the health of our cattle and the viability of our cattle operation;
- 2) Council members undertook to (incorrectly) discredit this concern and to use this as a jumping off point to attack the general credibility of objectors at a time when objecting parties to the December 21, 2009 public hearing regarding EQC Docket 09-4806 had no opportunity to respond;
- 3) This attack on credibility could easily carry over to the upcoming hearing regarding the DEQ AQD permit relating to the expansion of the same Croell Redi-Mix limestone mining and crushing operation at its Rogers Pit location.

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³ The document was about twice that length. It precisely followed the format of the Proposed Order, commenting upon specific findings of fact and conclusions of law. It documented objections to specific facts by citing the record, and it identified relevant statutes and rules. It challenged Conclusions of law based on incorrect findings of fact. It criticized the legal language in which the Findings of Fact had been phrased, and noted a general lack of information relating to this specific case. It could have shorter, but the time to edit it down was not provided.

I will also be submitting the following two articles as exhibits for the upcoming hearing (EQC Docket # 10-2803)

1) **Pneumonia in Beef Cattle** SAC, September 2005

authors **George Caldow**, Regional Veterinary Manager, SAC
St. Boswells Veterinary Centre,
Greycrook, St Boswells TD6 0EQ
ph 01835 822456

Mark Crawshaw, Veterinary Centre Manager, GAC
Ayr Veterinary Centre, Auchincruive, Ayr KA6 6AE
ph 01292 520318

2) **Drought and Livestock Disease on the High Plains**

authors **Dr. Donal O'Toole, Dr. Meri Raisbeck and Dr. Lynn Woodard**
Wyoming State Veterinary Laboratory
Department of Veterinary Sciences
University of Wyoming

The purpose of these articles is to confirm the precipitating and /or exacerbating role that dust can play in the onset and / or severity of pneumonia in cattle, and that failure to thrive and even death are legitimate concerns.

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