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Jim Ruby, Executive Secretary
Environmental Quality Council

Attorneys for Respondent
Croell Redi-Mix, LLC

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

In the Matter of the Appeal)
and Petition for Hearing of:)
Croell Redi-Mix, DEQ AQD Permit) Docket No. 10-2803
Application No. AP-9645)
and DEQ AQD Permit No. MD-9645)
dated March 17, 2010)

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent Croell Redi-Mix, by and through its undersigned counsel, respectfully submits this Motion for Summary Judgment, pursuant to WY. R. CIV. P. 56 and the Rules of the Environmental Quality Council. Defendant requests that the EQC grant summary judgment in favor of Croell Redi-Mix, Inc., and the Wyoming Department of Environmental Quality for the reasons stated below. The Petitioner's complaint, which neither cites nor references a single statute or regulation, fails to indentify the legal basis of her challenge to the AQD Permit No. MD-9645 (the Permit). However, it appears the Petitioner's concern regards: 1) whether the public notice of the Permit was adequate; and 2) whether the Permit will cause dust pneumonia in cattle on Petitioner's ranch. Respondent Croell adopts and incorporates the Motion for

Summary Judgment submitted by WDEQ in regard to all other issues that may be gleaned from Petitioner's complaint.

Before continuing to a hearing on this case at great cost and expense in time and money for all parties, including the Council, the Council must answer two questions of law as to which there are no disputed issues of material fact:

- 1) Whether the public notices published in relation to the Permit were adequate as a matter of law; and
- 2) Whether a challenge to the adequacy of Wyoming's air quality standards and rules and regulations regarding dust is a proper basis for appeal before the EQC in a contested case.

PROCEDURAL BACKGROUND

On March 17, 2010, with the approval of the Administrator of WDEQ/AQD and the Director of WDEQ, Air Quality Permit MD-9645 (the Permit), was issued to Croell Redi-Mix, Inc., (Croell) authorizing construction and operation of a limestone quarry in Crook County, Wyoming. The Petitioner appealed by permit on May 14, 2010.

Responses were filed by the Wyoming Department of Environmental Quality (DEQ) and Croell June 11 and June 17, 2010 respectively. Pursuant to the Council's Amended Order, fact discovery was to have been completed by September 30, 2010, and expert witnesses were to have been designated by the Petitioner by September 7 and by the Defendants by October 4, 2010. On September 7, 2010, Petitioner filed a pleading entitled Notification to Parties of Expert Witness and Expert Reports proffering Dr. James Myers to testify on the term "dust pneumonia." Croell responded on October 1, 2010 by moving to strike Petitioner's expert designation and

asking the Council to prohibit the Dr. Meyers' testimony. Croell submitted its expert designation on October 4, 2010.

STATEMENT OF UNDISPUTED FACTS

Croell submitted its application to modify its air quality permit on July 6, 2009 (Permit No. MD-9645 referred to hereinafter as the "Permit.") WDEQ informed Croell that its application was complete on September 3, 2009 (Ex. 3).¹ On September 24, 2009, WDEQ/AQD informed Croell that the Agency had completed its review and that Croell's application, WDEQ/AQD's analysis and proposed permit conditions would be put out for public comment. (Ex. 6). Pursuant to Chapter 6, Section 2(m) of the AQD rules and regulations, public notice of the draft permit was provided by publication in the Sundance Times/Wyoming Pioneer on October 1, 2009. (Ex. 10). The notice described the general nature of the proposed facility, namely that the Roger's Rock Pit is located approximately five miles northeast of Sundance, Wyoming and would "include limestone crushing, screening, blasting, exposed acreage, stockpiling, haul activity, a hot mix asphalt plant, and a concrete batch plant" with an estimated annual production of 500,000 tons. *Id.* The notice explained that a copy of the permit application and the AQD's analysis were available for public inspection at the Crook County Clerk's Office in Sundance, Wyoming, and that public comments were to be submitted to WDEQ/AQD by November 2, 2009. *Id.* Finally, the public notice explained that a public hearing would be conducted if an aggrieved party requested a hearing, or if in the opinion of the AQD administrator sufficient interest in the permit warranted such a hearing. *Id.*

¹ Documents in WDEQ/AQD's record are described and provided with the Affidavit of Steve Dietrich, submitted by respondent WDEQ with their Motion for Summary Judgment. Copies of the portions of the documents referenced herein as exhibits are attached for ease of reference. Also attached are those exhibits that are not included in the WDEQ/AQD record.

Comments and objections to the Permit were received from a number of individuals in the Sundance/Crook County area, including the Petitioner, who requested a public hearing be held on the permit. (Ex.13, Bates No. 00053, ¶4). A public hearing was held on December 14, 2009 after WDEQ/AQD published notice of the hearing on November 26, 2009 in the Sundance Times/Wyoming Pioneer. (Ex. 18). The hearing was held as scheduled with the Petitioner's ranch manager, Dewey Turbiville, attending and giving an oral statement (Ex. 22, Bates No. 00188-189 and Bates No. 00192-194). On March 17, 2010, AQD issued the Permit (Ex. 25).

WDEQ/AQD identified fugitive particulate matter emissions as the primary emissions to result from the limestone mining and crushing activities. (Ex. 5). The particulate matter of concern is coarse particles – that is particles smaller than 10 micrometers in diameter which are referred to as PM₁₀. (Ex. 33 - EPA Fact Sheet, pp. 1, 3, 4). Pursuant to Chapter 6, Section 2(c)(ii) of the WDEQ/AQD rules and regulations, an air quality permit may be approved only if the proposed facility will not prevent the attainment or maintenance of any air quality standard. One such standard is the air quality standard for PM₁₀ concentrations. Wyoming's PM₁₀ air quality standard is described in Chapter 2, Section 2(a) of the WDEQ/AQD rules and regulations and is 150 µgm/m³ for a 24-hour average and 50 µgm/m³ for the annual arithmetic mean. The U.S. Environmental Protection Agency (EPA) recently reviewed and revised the national ambient air quality standards for particulate matter.² The EPA reviewed thousands of scientific studies and retained that the PM₁₀ 24-hour average of 150 µgm/m³ “to protect against health and welfare effects associated with exposure to some types of coarse particles.” and stated that “Retaining this standard will provide protection in all areas of the country against the effects of short-term exposure to such coarse particles.” (Ex. 33 - EPA Fact Sheet pp. 1, 3). The EPA

² See EPA's report entitled Integrated Science Assessment for Particulate Matter-Final Report (December 2009, 2228 pp.) for a complete description of the review and analysis of the particulate matter standards. The report is available at: <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=216546#Download>.

eliminated the annual standard because it found that “there is insufficient evidence linking health problems to long-term exposure to inhalable coarse particle pollution.” *Id.* at 3.

In addition to the air quality standard for PM₁₀, fugitive dust emissions are governed by a number of other regulations. Chapter 3, Section 2(f) of the WDEQ/AQD rules and regulations, requires those engaged in clearing or leveling of land, earthmoving, excavation or movement of trucks and construction equipment over haul roads to take steps to minimize fugitive dust emissions. Chapter 6, Section 2(c)(v) of the WDEQ/AQD rules and regulations requires large mining operations to utilize the Best Available Control Technology (BACT) to reduce and eliminate dust emissions from the facility. Pursuant to that regulations, specific measures normally required and to be considered include: (1) the paving of access roads; (2) treating major haul roads with suitable dust suppressant; (3) treating temporary haul roads; (4) the use of silos, trough barns, or similar enclosed containers for the storage of large volumes of material awaiting load out and shipment; (5) treatment of active work areas; (6) treatment of temporary ore stockpiles.

Frequent watering and/or chemical stabilization are considered by WDEQ/AQD to be BACT for fugitive particulate matter emission control for this facility. (Ex. 5; See Bates No. 00027). Accordingly, the Permit imposes a number of conditions upon Croell’s operation, including the application of chemical dust suppressant to disturbed areas, stockpiles, and unpaved haul roads. (Ex. 25, Bates No. 000168). Additionally, the Permit requires Croell to stabilize all disturbed areas against wind erosion within 60 days of completion of stripping. Reclamation areas are also to be stabilized within 60 days of reaching the approved post mining topography. Approved stabilization practices include ripping chiseling and seeding to obtain temporary vegetative cover. (Ex. 25, Bates No. 000168). Petitioner has not challenged WDEQ’s

decision in this regard and offers no evidence to suggest any error or impropriety in WDEQ/AQD's analysis of appropriate controls.

Finally, Defendant Croell's expert, Dr. Robert Glock, states that the current state of research and knowledge on the effects of dust in pastured cattle would not allow any expert to conclude with a reasonable degree of scientific probability whether livestock pastured in the vicinity of a limestone quarry would be exposed to any significant health risks from dust. (Ex. 34, ¶11). Furthermore, Dr. Glock is of the opinion that cattle are no more susceptible than are humans to lung disease from dust (Ex. 34, ¶ 10).

ARGUMENT

A. Issues Presented on Summary Judgment and Standard of Review

Pursuant to WY. R. CIV. P. 56(c) summary judgment may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The purpose of summary judgment is to eliminate formal trial where only questions of law are involved and where no material issues of fact exist. *England v. Simmons*, 728 P.2d 1137, 1141 (Wyo. 1986). Summary judgment is improper where there are genuine issues of material fact, but the purpose of summary judgment is defeated if a case is forced to trial merely because a genuine issue of material fact is asserted to exist. *Id.* This appeal presents two issues of law about which there are no disputed issues of material fact. The first is whether the public notices published in relation to the Permit were adequate as a matter of law. The second is whether the Wyoming air quality standards, rules and regulations regarding dust is a proper basis for appeal before the EQC on the grounds that they are not protective of livestock.

B. Public Notice Was Adequate as a Matter of Law.

The Petitioner has complained that the public notices published in relation to the permit were inadequate and insufficient. Chapter 6, Section 2(m) provides in relevant part

After the Administrator has reached a proposed decision based upon the information presented in the permit application to construct or modify, the Division of Air Quality will advertise such proposed decision in a newspaper of general circulation in the county in which the source is proposed. This advertisement will indicate the general nature of the proposed facility, the proposed approval/disapproval of the permit, and a location in the region where the public might inspect the information submitted in support of the requested permit and the Air Quality Division's analysis of the effect on air quality. . . . The public notice will include notification of the opportunity for a public hearing. . . . The public will be afforded a 30-day period in which to make comments and recommendations to the Division of Air Quality. A public hearing may be called if sufficient interest is generated or if any aggrieved party so requests in writing within the 30-day comment period. After considering all comments, including those presented at any hearings held, the Administrator will reach a decision and notify the appropriate parties.

The public notice, published on October 1, 2009 in the Sundance Times/Wyoming Pioneer newspaper, satisfied these requirements. It explained that WDEQ proposed to approve a permit for the Roger's Rock Pit limestone quarry that would include crushing and screening and haul activity and explained that a copy of the permit application and the agency's analysis were available at the Crook County Clerk's Office in Sundance, Wyoming . It also allowed 30 days for public comment. (Ex. 10). The Petitioner complains that the legal description of the facility was in error and that it failed to inform her of the full extent of the proposed activities. (Petition pp. 1 – 2; Amended Petition, pp. 7-9, 10-11). The notice for the public hearing held December 14, 2009 perpetuated the flawed legal description. (Ex. 18). Petitioner also complains that she did not receive notice of WDEQ/AQD's decision to issue the Permit (Petition, p. 3). However, the Petitioner was aware of WDEQ/AQD's proposed approval of an air quality permit for the

Roger's Rock Pit, participated fully in the administrative process and was not prejudiced by the content and any errors in the public notice.

An error in a public notice must be prejudicial and affect the substantial rights of the petitioner to warrant reversal of an administrative decision. *Pfeil v. Amax Coal West, Inc.*, 908 P.2d 956, 960 (Wyo. 1995). In *Pfeil*, the appellant appealed the issuance of a coal mining permit complaining that the permittee violated statutory notice requirements when it did not mail her notice to her current address and also contending that the notice did not comply with the statute's requirements. *Id.* at 959. The notice statute at issue in *Pfeil* was WYO. STAT. § 35-11-406(j) which required that

The applicant shall cause notice of the application to be published in a newspaper of general circulation in the locality of the proposed mining site once a week for four (4) consecutive weeks commencing within fifteen (15) days after being notified by the administrator. The notice shall contain information regarding the identity of the applicant, the location of the proposed operation, the proposed dates of commencement and completion of the operation, the proposed future use of the affected land, the location at which information about the application may be obtained, and the location and final date for filing objections to the application. The applicant shall mail a copy of the notice within five (5) days after first publication to all surface owners of record of the land within the permit area, to surface owners of record of immediately adjacent lands, to any surface owners within one-half (1/2) mile of the proposed mining site. . . . Proof of notice and mailing shall be attached to and become part of the application.

The appellant in *Pfeil* complained that she did not receive the mailed notice until one day before the deadline for filing objections. However, the statute requires no requirement for actual receipt of notice. Publication and mailing is sufficient. The appellant in *Pfeil* also complained that she should have been notified when the proposed revision to the permittee's mining plan would begin and end and what future use of the affected lands was proposed. The appellant in *Pfeil* claimed that the failure to include this information in the public notice prejudiced her since she could not understand what the permittee was proposing and did not have sufficient

information for her to research the issue. *Pfeil* 908 P.2d at 959-60. The Wyoming Supreme Court, noting that the appellant timely filed an objection, participated in the proceedings, stated concerns about hydrology and blasting, and not only had the opportunity to review the permit, but actually did so, cited the above described rule found that the appellant was not prejudiced by any deficiencies in the public notice and upheld the WDEQ/AQD decision to issue the permit.

Likewise here, the Petitioner was not prejudiced by the error in the legal description of the facility contained in the public notice. She was aware of the permit application, reviewed the permit application, provided comments and requested a public hearing. (Ex.13, Bates No. 000053-54). As to her complaint that the public notice should have better apprised her of the nature of the proposed activity, the statute requires only a general description of the proposed activity, and that was provided. (Exs. 10 and 18). Chapter 6, Section 2(m), the rule governing public notice of this action, simply doesn't require that that information Petitioner says is missing be included in the public notice. Additionally, the Petitioner's comments and her petition wherein she expressed concern about dust raised by mining, crushing and screening limestone show that she was informed as to the specific nature of the proposed activity. She was not prejudiced by the advertized notice's failure to include additional, and un-required, information. Finally, the fact that the Petitioner timely appealed the issuance of the Permit shows she was not prejudiced by having failed to receive notice of WDEQ/AQD's decision of March 17, 2009 to issue the Permit. There being no question of fact regarding the content of the notice and no question that Petitioner was not prejudiced by the content or delivery of notice, summary judgment in favor of the respondents is necessary as a matter of law.

C. Challenging the Adequacy and Coverage of Wyoming's Air Quality Standards and Rules and Regulations Regarding Dust is Not a Proper Basis for Appeal Before the EQC in a Contested Case.

The Petitioner's complaint that fugitive dust from the facility, which by the terms of the Permit must be controlled so as to maintain the air quality standards for PM₁₀, poses a risk to the health of her pastured livestock is really an attack on the air quality standard itself. The promulgation of regulations occurs through statutorily distinct rulemaking proceedings, not contested cases. This is not the proper basis for appeal. The time for appealing their adoption is long past and the Petitioner may not circumvent this prohibition by attacking the air quality standard through an appeal of this Permit.

WYO. STAT. § 35-11-801 requires that the WDEQ/AQD issue a permit upon proof that the rules, regulations, and permitting procedures of the agency have been complied with. There is no evidence that such is not the case here, and Petitioner has failed to identify a single regulation, rule or statute that she alleges has been violated or otherwise not complied with. The permittee's application provided all of the information DEQ required to analyze the proposed activity (Ex. 3) and WDEQ/AQD analyzed the facility operations and imposed appropriate conditions to ensure all rules and regulations were satisfied.

One such regulatory requirement is found in Chapter 6, Section 2(c) which provides that a permit may be granted only if the facility will not prevent attainment or maintenance of any ambient air quality standard. Chapter 6, Section 2(c)(v) and Chapter 3, Section 2(f) require facilities to employ controls to limit fugitive dust emissions. To ensure that the air quality standards are maintained, DEQ analyzed the amount of fugitive dust that may be generated by the activity and imposed conditions in the Permit requiring Croell use BACT to control fugitive dust to acceptable levels – namely a minimum of twice annual chemical dust suppressant

application, with additional chemical suppressant and water applications as necessary. (Ex. 25). The permit also limits production to 500,000 tons (the limestone production rate upon which DEQ analyzed the activity and estimated fugitive dust emissions) to ensure the air quality standard for PM₁₀ is not violated. (Ex. 25). Petitioner has presented no evidence that the Permit fails to comply with this or any other regulatory requirement.

The gravamen of Petitioner's appeal regarding dust is that the dust generated from facility will adversely affect the health of her livestock. (Amended Petition, p. 10; See also Petitioner's Notification to Parties of Expert Witness and Expert Reports). Since, as DEQ has determined, the operations as permitted will meet air quality standards, the essence of Petitioner's complaint is that the air quality standard for dust is not protective of her pastured cattle. However, the time to appeal the air quality standard before the EQC is long past. According to the Forward for Chapter 2 of the WDEQ/AQD rules and regulations, the PM₁₀ air quality standard became effective on February 13, 1989. Pursuant to WY. STAT. § 16-3-114 and WY. R. APP. P. Rule 12.04, appeal of a rule must be taken within 30 days of such action. "It is well established in our case law that, under the current Wyoming Rules of Appellate Procedure, timely filing of a petition for review of administrative action is mandatory and jurisdictional." *Chevron U.S.A., Inc. v. Department of Revenue*, 155 P.3d 1041, 1043 (Wyo. 2007) (citing *Stagner v. Wyo. State Tax Comm'n*, 642 P.2d 1296, 1297 (Wyo.1982); *Sheridan Ret. Partners*, 950 P.2d at 557.) Petitioner cannot circumvent this prohibition by challenging the air quality standard through objection and appeal of a Permit and summary judgment should be granted in favor of the Respondents.

WYO. STAT. §35-11-202 requires WDEQ/AQD to promulgate ambient air standards or emission controls "as may be necessary to prevent, abate, or control pollution." These standards

are to be adopted after consideration of the following factors:

- A) The character and degree of injury to, or interference with the health and physical well being of the people, animals, wildlife and plant life;
- B) The social and economic value of the source of pollution;
- C) The priority of location in the area involved;
- D) The Technical practicability and economic reasonableness of reducing or eliminating the pollution; and
- E) The social welfare and aesthetic value.

Id. However, even if the Council were amenable to considering whether the fugitive dust that may be generated from the permitted activities poses a health risk to the Petitioner's cattle, there is absolutely no evidence as to what dust concentrations pose such presumed risks. As Dr. Glock explains in his affidavit, there are no controlled or peer-reviewed studies as to the effects, if any, of inorganic dust on the health of pastured livestock. (Ex. 34, ¶¶4-9). Any such evidence would be pure speculation, and cannot be the basis for denying the permit. *See O'Brien v. Hunt*, 464 P.2d 306, 310 (Wyo. 1970) (McIntyre, J. dissenting and stating the rule that "Guesswork cannot be substituted for evidence or inference; and an inference cannot be based upon a mere possibility or probability; it can only be based upon a fact proved, or something known to be true. . . . [N]o inference can be based on mere surmise, guess, speculation or probability.").

Finally, as explained above, the air quality standard for PM₁₀ is based on protection of human health (Ex. 33, EPA Fact Sheet, p. 1). In Dr. Glock's expert opinion, cattle are no more susceptible to dust caused lung disease than are humans (Ex. 34, ¶10). Therefore, the only evidence available regarding risks posed by fugitive dust at the levels anticipated by WDEQ/AQD indicates that Petitioner's cattle will be protected.

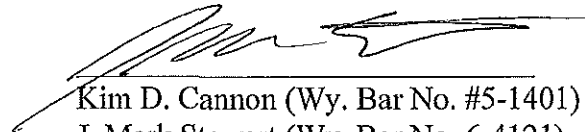
There being no disputes of material fact as to whether the Permit complies with air quality standards, summary judgment should be granted in favor of the Respondents. Even if the Council were to consider whether the air quality standards fail to adequately protect Petitioner's

livestock, there is no data available in the scientific literature, let alone in the record in this appeal, as to what standards and concentrations would be protective of livestock health and welfare and summary judgment in favor of the Respondents is required.

CONCLUSION

There are no genuine issues of material fact as to the two issues of law presented by Petitioner's appeal. Petitioner has not been prejudiced by any failure of notice, and her complaints regarding dust emissions from the proposed facility as authorized by the Permit are not the proper grounds for appeal. Therefore, for the reasons stated herein, Respondent Croell Redi-Mix requests that the Council grant its Motion for Summary Judgment.

DATED this 20th day of October, 2010.



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CERTIFICATE OF SERVICE

I, J, Mark Stewart, attorney for Croell Redi-Mix, Inc. in the above-entitled and numbered cause, do hereby certify that on the 20th day of October, 2010, I caused a true and correct copy of the foregoing Respondent's Motion for Summary Judgment to be served as follows:

F. David Searle, Presiding Officer	<input type="checkbox"/>	U.S. Mail
Environmental Quality Council	<input type="checkbox"/>	Federal Express
Herschler Building	<input type="checkbox"/>	Facsimile
122 West 25th Street	<input checked="" type="checkbox"/>	Hand-Delivered
Cheyenne, Wyoming 82002	<input type="checkbox"/>	Electronic Transmission
Nancy Vehr	<input type="checkbox"/>	U.S. Mail
Sr. Asst. Attorney General	<input type="checkbox"/>	Federal Express
Wyoming Attorney General's office	<input type="checkbox"/>	Facsimile
123 Capitol Building	<input checked="" type="checkbox"/>	Hand-Delivered
Cheyenne, Wyoming 82002	<input type="checkbox"/>	Electronic Transmission
Amanda Kroul	<input type="checkbox"/>	U.S. Mail
Office of Attorney General	<input type="checkbox"/>	Federal Express
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Steve Dietrich	<input type="checkbox"/>	U.S. Mail
DEQ, Air Quality Administrator	<input type="checkbox"/>	Federal Express
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122 West 25th Street, Room 1714	<input checked="" type="checkbox"/>	Hand-Delivered
Cheyenne, Wyoming 82002	<input type="checkbox"/>	Electronic Transmission
Gina Johnson	<input type="checkbox"/>	U.S. Mail
DEQ, Air Quality Division	<input type="checkbox"/>	Federal Express
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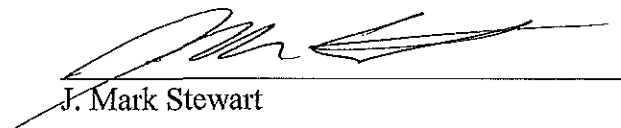
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