FOR IMMEDIATE RELEASE ON BEHALF OF CYNTHIA BURBACH

June 10, 2013

On June 7, 2013, Colorado Attorney General John Struthers issued a press release. The Attorney General’s press release included a redacted version of a report regarding an internal personnel investigation conducted on behalf of the Colorado Department of Public Health & Environment (“CDPH&E”). The decision to release a redacted version of the report reversed the previous position of the Attorney General’s Office.

The investigation began as a personnel investigation in early 2013. On the advice of some attorneys in the Attorney General’s Office, CDPH&E advised Ms. Burbach that CDPH&E considered the report exempt from the public disclosure requirements under the Colorado Open Records Act. *See* Colo. Rev. Stat. § 24-72-204(3)(a)(II)(A).

On at least two occasions, CDPH&E received subpoenas to produce the report in court. On both occasions, attorneys from the Attorney General’s office convinced the trial judge to find the report irrelevant to the pending case, and to quash or cancel the subpoenas.

Cynthia Burbach participated in the investigation as a witness. Cynthia Burbach did not have any knowledge of the content of the investigative report until its release by the Attorney General on June 7, 2013. The report did not result in any disciplinary action by CDPH&E against Cynthia Burbach.

Cynthia Burbach retired from CDPH&E at the earliest date that she became eligible for retirement. CDPH&E did not request or suggest that Ms. Burbach should retire because of the report or for any other reason. The date of Cynthia Burbach’s retirement and the date of the release of the report remain only a coincidence.

Cynthia Burbach offers this press release as her sole contribution to the public discourse in response to the Attorney General’s press release. Cynthia Burbach will not make any other statements to the public or to the news media. Ms. Burbach requests that members of the news media respect her privacy and the privacy of her children.

1. CAREER OVERVIEW
2. Cynthia Burbach enjoyed a 30 year career at CDPH&E.
3. For the final 13 years of her career, Ms. Burbach served as the public face of the CDPH&E as expert witness in toxicology for prosecutions of criminal charges for various charges including:
	* + 1. Driving Under the Influence (DUI) and
			2. Driving While Ability Impaired (DWAI) and
			3. Driving under the Influence of Drugs and
			4. Drug Possession.
4. Cynthia Burbach rarely testified as a technician on the results of any particular test.
	* + 1. Technicians separately ran the actual testing on actual samples and testified to the results of their particular tests.
			2. When called to court, technicians typically testified only on their testing and the results of their testing.
			3. Work leaders supervised the technicians and Cynthia Burbach signed off on testing results for the work leaders.
			4. Cynthia Burbach would not testify to the results of testing unless she personally witnessed the technician conduct the testing – an exceedingly rare occurrence.
			5. Cynthia Burbach testified generally about the procedures in the Toxicology Lab at CDPH&E.
			6. Cynthia Burbach almost always testified as an expert toxicologist on the likely effects of the tested level of intoxication on an individual.
5. Cynthia Burbach never received a disciplinary action as an employee of CDPH&E.
6. Cynthia Burbach never received a corrective action as an employee of CDPH&E.
7. Cynthia Burbach received excellent performance evaluations every year as an employee of CDPH&E.
8. Cynthia Burbach enjoyed an impeccable record as a public servant.
9. Cynthia Burbach enjoyed success in helping law enforcement receive convictions for criminal activities.
10. Cynthia Burbach became a constant target of undeserved character assaults by defense counsel looking for legal loopholes for criminally intoxicated drivers.
11. Cynthia Burbach served as a middle manager at CDPH&E’s Toxicology Lab with little actual power or influence on critical decisions.
12. Cynthia Burbach retired from CDPH&E on May 31, 2013.
13. Cynthia Burbach’s retirement decision had nothing to do with the report from March 2013.
	* + 1. Cynthia Burbach had no knowledge of the report until its release on June 7, 2013.
			2. Cynthia Burbach never received any feedback from her supervisors that the report reflected poorly on her performance.
14. Cynthia Burbach is not scheduled to testify regarding any matter on behalf of CDPH&E in the future.
15. The report is irrelevant to any pending or future cases involving CDP&E.
	* + 1. In two cases in which Cynthia Burbach was NOT a scheduled witness, trial judges reviewed copies of the report.
			2. In both cases, the judges ruled that the report remained irrelevant to any issue of substance in those cases.
			3. In both cases, the judge refused to release the report to defense attorneys because it lacked relevance to any matter of consequence.
16. The report relates to the past but has no relevance to current operations at the Toxicology Lab.
17. SYSTEMIC PROBLEMS AT TOXICOLOGY LAB
18. Constant staffing shortages plagued the Toxicology Lab at CDPH&E.
	* + 1. Vacant positions created a backlog of samples for testing.
			2. State’s hiring process too cumbersome and too slow.
				1. Could take 6 months to locate and hire an acceptable candidate.
				2. Depending on the experience of a recruit, it could take 3 to 12 weeks to train an employee to adequate competency after hired.
			3. Work leaders had training responsibilities in the Toxicology Lab.
				1. High employee turnover and many new hires made the work leader’s training responsibilities more stressful and difficult.
				2. An experienced work leader and trusted trainer retired from CDPH&E at an inopportune time.
			4. Lab work is demanding on employees and some trainees do not succeed.
			5. Lab work is demanding on employees and many successful employees either leave CDPH&E or transfer out of the Toxicology Lab.
			6. Vacant positions require remaining technicians to conduct lab tests in a greater number of cases.
			7. Vacant positions require remaining technicians to testify in a greater number of trials.
			8. Having technicians in court rather than in the lab creates an even greater backlog of testing.
			9. Entire system in the Toxicology Lab has gotten into this vicious cycle causing problems to become progressively worse in recent years.
			10. Cynthia Burbach chose to retire when the vicious cycle had created unbearable circumstances for herself and her family.
19. Cynthia Burbach did not have any control over staffing, hiring, and firing decisions.
	* + 1. Staffing level decisions made by Director
			2. Individual hiring decisions made by Director
			3. Individual firing decisions made by Director
			4. Individual discipline and corrective action decisions made by Director.
			5. Cynthia Burbach had to work with the staff that the Director gave her.
20. Legislature and Governor set budgetary priorities.
	* + 1. Budget cuts to other missions at the CDPH&E had impacts on law enforcement missions.
			2. Cannot cut testing and enforcement for environmental regulations without spillover effects on law enforcement missions.
			3. Legislature and Governor have significant culpability in the understaffing problems at the Toxicology Lab.
21. Cynthia Burbach has been the sole testifying expert witness as a toxicologist on behalf of the Toxicology Lab for 13 years.
	* + 1. She had to travel to the four corners of the state to provide testimony.
			2. She sometimes traveled into Wyoming and Nebraska to provide testimony.
			3. She had to wait in courthouses until called to testify in particular cases.
			4. The travel and duties for in-court testimony has for years taken her away from her duties as a mother of two now teenaged children.
			5. Travel and duties for in-court testimony has for years kept her away from the Toxicology Lab and minimized her ability to be physically present to perform other supervisory duties.
			6. CDPH&E tasked Cynthia Burbach to do two jobs – testifying expert witness and laboratory supervisor.
				1. CDPH&E should have hired two people to do these two separate jobs.
				2. CDPH&E paid the salary for only one position to one person.
				3. Duties have mutually-exclusive requirements (travel and in-court testimony versus in-lab supervision)
				4. Cannot do both jobs at once because cannot be two places at once.
				5. CDPH&E set impossible standards for an impossible job.
			7. Travel and duties outside of the Toxicology Lab made it impossible for Toxicology Lab to obtain advanced accreditation.
				1. Five year process to obtain advanced accreditation
				2. Two years of full time work by supervisor to obtain advanced accreditation
				3. Toxicology Lab does not have advanced accreditation because CDPH&E did not have sufficient budget and personnel to pursue the accreditation.
				4. Criticisms regarding absence of advanced accreditation for the Toxicology Lab must remain elsewhere with individuals who set budgetary priorities.
			8. Cynthia Burbach had to endure hostile cross-examination from desperate defense attorneys in virtually every case.
			9. Cynthia Burbach had to endure constant snooping by defense attorneys looking to find any speck of arguably professional or personal imperfection.
			10. Cynthia Burbach gave in-person testimony in at least two cases per week, 50 weeks per year, or at least 100 times per year and at least 1,300 times in the past 13 years.
			11. Cynthia Burbach had a physically and emotionally exhausting position.
			12. Cynthia Burbach certainly earned her retirement after a 30 year career.
22. Report did not find any fault worthy of any level of personnel action by CDPH&E against Cynthia Burbach – not even a verbal reprimand.
23. Finding of fault in the report, if any, involved budgetary priorities from a higher level.
24. Investigation started by complaint by disgruntled and unsuccessful former employee, and complaints by hostile defense attorneys.
25. SPECIFIC ALLEGATIONS
26. Superiors at CDPH&E put Cynthia Burbach in an impossible position.
	* + 1. Obviously, the Toxicology Lab was short-staffed on many levels.
			2. Supervisors would not acknowledge that everyone in the Toxicology Lab was badly overworked.
				1. One higher supervisor said other toxicology labs did more with fewer people, and remained unsympathetic to the under-staffing.
				2. Supervisors gave Cynthia Burbach orders to make current inadequate staff cover current overwhelming workload with current inadequate equipment.
				3. Cynthia Burbach had to follow unreasonable directions from her supervisors and deliver those unreasonable directions to her subordinates.
				4. Subordinates blamed her as the “messenger” for the unreasonable direction from her superiors.
				5. Subordinates had almost no interaction with Cynthia Burbach’s supervisors.
				6. Thus, subordinates erroneously assumed that Cynthia Burbach was the source of the systemic problems.
				7. These unreasonable circumstances that supervisors imposed on Cynthia Burbach naturally created some resentment and disrespect for her supervisors.
				8. These unreasonable circumstances that supervisors imposed on Cynthia Burbach naturally created animosity from her subordinates.
				9. Eventually, the burdens of these unreasonable circumstances made Cynthia Burbach decide to retire as soon as she became eligible.
				10. None of the circumstances in the report resulted in discipline to Cynthia Burbach because the problems arose at higher levels in the CDPH&E.
				11. No connection exists between Cynthia Burbach’s decision to retire and the release of the report.
			3. Over the past few years, Cynthia Burbach knew that she could not get more staff and equipment without more money and a greater budget.
				1. CDPH&E closed the Toxicology Lab in Colorado Springs which made matters worse for the Toxicology Lab in Denver.
				2. Already spread too thin from a workload perspective, but now also spread too thin from a geographic perspective.
				3. Compounded the logistical problems for testing and testimony.
			4. The Toxicology Lab is a fee-for-service lab
				1. Users pay a fee to the Toxicology Lab for its services.
				2. The Toxicology Lab could not increase its budget until it increased revenue.
				3. The Toxicology Lab could not increase its staff until after revenues increased and the budget increased.
				4. The State Lab in Denver increased its revenue by absorbing lab work for the closed Toxicology Lab in Colorado Springs.
				5. The Denver Toxicology Lab could only maintain and increase its revenue by providing excellent customer service for District Attorneys and law enforcement.
				6. The need to increase revenues necessarily required the Toxicology Lab to cater to the needs of District Attorneys’ Offices.
				7. The Toxicology Lab had to cater to District Attorneys’ offices even when the District Attorneys’ staffs did not comply with the subpoena rules for the Toxicology Lab.
				8. The budgetary goals necessarily required the Toxicology Lab to cater to the needs of

22 District Attorneys in 22 judicial districts in order to satisfy its 22 primary customers.

The United States Attorney’s Office for cases arising on tribal lands that required testing in the Toxicology Lab.

District Attorneys in Wyoming and Nebraska that also sent samples to the Toxicology Lab for testing.

* + - 1. The only option for the possibility of an improved future in the Toxicology Lab was for current staff to bear an unreasonable burden until revenue increased.
				1. Long term goals for the Toxicology Lab remained inconsistent with short term preferences of its current staff.
				2. Long term goals for the Toxicology Lab could not be realized with anything less than the most-efficient staff possible.
				3. Pressures from senior supervisors at CDPH&E caused high staff burnout and staff turnover in the Toxicology Lab.
				4. Short term staff turnover at the Toxicology Lab undermined the long term goals to improve staffing.
				5. Cynthia Burbach found herself in terrible “Catch-22” situation created by her superiors.
			2. Live testimony in court remains a requirement unless both the prosecution and the defense consent to testimony by video or by phone.
				1. Live testimony remains more persuasive, so DA’s rarely consent to anything but live testimony in court.
				2. Defense attorneys hope that the failure to appear by witnesses from the Toxicology Lab might create grounds for dismissal, so defense attorneys do not consent to video or phone testimony.

Defense attorneys have every incentive to make testimony as inconvenient as possible for the staff of the Toxicology Lab.

Defense attorneys’ desires remain completely contrary to the desires of the staff in the Toxicology Lab.

* + - * 1. Live testimony in court is a function of the judicial system over which Cynthia Burbach had no control.
				2. Staff criticism of Cynthia Burbach for requiring in-court testimony remains completely misplaced and entirely unfair.
1. Nature of the work creates unavoidable preferences.
	* + 1. District Attorneys and law enforcement become the natural customers of the Toxicology Lab.
			2. District Attorneys promote and defend members of the Toxicology Lab who testify as witnesses in court.
			3. Defense attorneys tirelessly attack, defame, and belittle members of the Toxicology Lab who testify as witnesses in court.
			4. Pro-prosecution mindset is both unavoidable and understandable.
			5. Defense counsel frequently inquired of Ms. Burbach about the frequency with which she testified for the prosecution.
				1. Defense counsel almost never called Ms. Burbach as a witness except for cross-examination as a hostile witness.
				2. If testing results did not favor the prosecution, the District Attorney would dismiss the case or plea bargain the case to avoid the need of unfavorable testimony by Ms. Burbach.
			6. Defense counsel pointed out the pro-prosecution mindset of Ms. Burbach, and jurors assessed the allegation during their deliberations.
			7. If jurors still convicted defendants, they did so because of the totality of the evidence.
2. Attacks on the Toxicology Lab by defense counsel are self-serving and demeaning of the jury system.
	* + 1. Juries convict persons accused of drunk-driving – the Toxicology Lab does not.
			2. Results from the Toxicology Lab provide only one piece of evidence that leads to criminal convictions.
				1. Officers’ observations and testimony provide more persuasive evidence.
				2. Officers will not know the results of testing for weeks or months.
				3. Video cameras in patrol vehicles provide more persuasive evidence.
				4. Testimony of vehicle passengers may provide evidence.
				5. Testimony of bystander witnesses may provide evidence.
				6. The testing results from the Toxicology Lab either supports or contradicts evidence from other sources.
				7. Technicians must provide testimony regarding the actual tests performed because Cynthia Burbach did not perform the actual testing.
				8. Many times, evidence from the Toxicology Lab is exculpatory.
				9. Cynthia Burbach added testimony as an expert toxicologist on the effects of intoxication at the level tested by technicians.
			3. Accused defendants have the right to take a preserved sample to an alternate lab in order to challenge the results of the Toxicology Lab at the CDPH&E.
				1. Most often, defense attorneys do not pursue independent testing.
				2. Independent testing would most-likely confirm the results from the Toxicology Lab.
				3. Defendants who know that they are guilty of drinking and driving do not want to create more evidence to support their guilt.
				4. Attacks on the Toxicology Lab remains the only remaining avenue for persons charged with driving while intoxicated.
				5. Defense attorneys have to make “mountains out of ant hills” because they have nothing else to say in defense.
			4. Not one of the problems mentioned in the report suggests that the Toxicology Lab reached a wrong conclusion on the individual testing and analysis in any particular case.
			5. Systemic problems at the Toxicology Lab indicate an unfriendly work environment for employees, but do not indicate an unjust result in any particular case in any particular court.
			6. Any current allegations of improper convictions involve nothing more than wildly self-serving and unsupported speculation by defense attorneys and convicted intoxicated drivers.
3. Unbeknownst to the complaining and disgruntled former employee that triggered the report, Cynthia Burbach had raised these systemic problems to her superiors for years.
	* + 1. Only the Director could replace the experienced work leaders and trainers after their retirements.
			2. Cynthia Burbach lacked the authority or the power to choose which positions to fill or which persons to fill them.
			3. Cynthia Burbach had to make due with what her supervisors permitted.
4. The taxpayers have an expectation for supervisors such as Cynthia Burbach to get the most of the employees of the CDPH&E.
	* + 1. Disgruntled employees who expected a “cushy” state job should not be tolerated by the taxpayers or the press.
			2. Salaried employees in private labs reasonably expect to work 50 hours per week under pressure.
			3. Having the same expectations of public employees working at the CDPH&E’s Toxicology Lab should not raise concerns for anyone.
5. Unlocked refrigerator for samples
	* + 1. No evidence that an unlocked refrigerator involved any deviation from any accepted standard for similar labs.
			2. Staff still had to pass through two locked doors and two secure areas to access the unlocked refrigerator containing samples.
			3. All evidence indicates that the chances for tampering with evidence were extremely small or remote.
			4. No evidence exists that any tampering with evidence EVER actually occurred.
			5. The refrigerator is now locked and the problem ceases to exist.
6. Cynthia Burbach’s supervisors approved her use of staff in the Toxicology Lab for her thesis.
	* + 1. Ms. Burbach’s thesis involved analysis of public data generated by public employees.
			2. Without Ms. Burbach’s analysis, neither the CDPH&E nor the public at large would have obtained the benefit of the analysis of the public data.
			3. Ms. Burbach’s analysis of the data created greater knowledge from previously unanalyzed data, and created a public good.
			4. Some current members of the staff helped generate the raw data and represented a valuable source for its analysis.
			5. Staff would have been made available to a person outside of the CDPH&E who had sought to reduce the same data.
				1. CDPH&E would have answered any request for information about the data under the Colorado Open Records Act.
				2. CDPH&E had an interest in having the raw data reduced and analyzed.
				3. CDPH&E had an interest in assisting anyone, public or private, who sought to reduce and analyze the public data.
				4. As it happened, Ms. Burbach decided to reduce and to analyze the data rather than some private outside person or entity.
			6. Makes sense logically to have the staff familiar with the raw data help with its reduction and analysis.
			7. Makes sense for CDPH&E to have its sole testifying expert to obtain a higher degree because it will make her more effective as an expert and provide a benefit to the taxpayers of Colorado.
			8. The allegation in the report starts with a false premise that CDPH&E did something wrong in assisting Ms. Burbach to obtain a higher degree.
			9. In fact, assisting Ms. Burbach in obtaining a higher degree was the prudent thing for CDPH&E (and the taxpayers), and CDPH&E did the right thing in providing that assistance.
			10. Any conclusion to the contrary simply lacks insight and understanding to the greater public good in the operation of the Toxicology Lab.
7. All alleged problems at the Toxicology Lab involve conditions in the past and do not have any relevance to any pending or future case.