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From: Salazar, Melissa [msalazar@CityofWestminster.us]
Sent: Tuesday, October 19, 2010 4:53 PM
To: RFInfo
Subject: Comments on RFLMA Attachment 2 Modifications
Attachments: RFLMA Ltr.pdf

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WESTMINSTER

October 19, 2010

Sent via Email to rinfo@LM.doe.gov

RFLMA Attachment 2 Modification Comments
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Re: Comments on RFLMA Attachment 2 Modifications

To Whom It May Concern:

The City of Westminster ("Westminster" or "City") appreciates the opportunity to comment on the proposed revisions to the Rocky Flats Legacy Management Agreement ("RFLMA").

By way of background, Westminster's primary drinking water supply, Standley Lake, is located downstream of the former Rocky Flats Plant Site ("Site"). Westminster helped lead efforts in the 1990's to construct the Standley Lake Protection Project and thereby prevent flows leaving the Site from reaching the City's drinking water supply. Although the Standley Lake Protection Project severed the hydrologic connection between activities on the Site and Standley Lake, water leaving federal property continues to flow through portions of Westminster adjacent to Walnut and Big Dry Creeks. Westminster continues to actively monitor and comment on proposals involving the Site and, in this instance, stands in opposition to the current proposal to revise RFLMA.

RFLMA sets forth the regulatory requirements for monitoring water quality at the Site. Currently, the Department of Energy ("DOE") tests the quality of water leaving the federal lands at Indiana Street. On July 20, 2010, DOE, the U.S. Environmental Protection Agency ("EPA") and the Colorado Department of Public Health and Environment ("CDPHE") released a proposed modification to the water quality monitoring program for public comment. The proposed modifications generally contemplate removing all water quality monitoring at Indiana Street and creating new monitoring points significantly further upstream on DOE controlled lands. These new monitoring points would become points of compliance (POC's) under RFLMA, but, as a result of their upstream location, would no longer be able to monitor all flows leaving federal lands. In a separate, but related, proposal, DOE, EPA and CDPHE also support the breaching of certain upstream dams that provide an additional layer of protection to downstream communities. By separate letter, Westminster has provided comments in opposition to the proposal involving breaching of the upstream dams. The net result of these two proposals is that uncontrolled and unmonitored flows would leave the Site and flow through portions of Westminster and other downstream communities.



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Westminster strongly opposes the proposed RFLMA modifications. Retention of the existing POCs at Indiana Street ensures that all flows leaving the federal lands comply with applicable water quality standards. Westminster encourages DOE and the regulators to withdraw the current proposal. The specifics of Westminster's position and technical concerns are set forth below.

General Comments:

The proposed RFLMA modification was released with Contact Record 2010-04 which provides the detailed rationale for the proposed changes to RFLMA. The Contact Record describes one of the primary reasons for proposing the RFLMA modification for relocating the POCs is based on the dam breaching actions proposed in the Draft Rocky Flats Surface Water Configuration Environmental Assessment ("EA"). Westminster, along with numerous other affected governments, submitted comments opposing the EA proposed actions before the public comment deadline on June 1, 2010. To date, the disposition of all public comments and the final EA have not been released; therefore, we conclude that release of the proposed RFLMA modification for public comment is premature. In providing comments on the proposed RFLMA modification, the public is forced to make assumptions about the final EA decision that may not be accurate. The published version of the proposed RFLMA modification does not accurately reflect the verbal proposals DOE has offered since the draft EA and RFLMA modification documents were released for public comment. The public is not fully informed about DOE's current intentions regarding the surface water configuration and management at the Site.

The City of Westminster respectfully requests that DOE withdraw the proposed modification to RFLMA Attachment 2 due to unresolved issues associated with the rationale for the proposal. We contend that DOE's current proposal is premature for the following reasons:

- The construction of the new POC monitoring stations in the Woman Creek and Walnut Creek drainages below the terminal ponds may be in violation of Institutional Control #2, which prohibits excavation below three feet for purposes that are not remedy-related. DOE could propose modification of the institutional controls by a formal amendment to the Corrective Action Record/Record of Decision (CAD/ROD), which in turn would require modification of the Environmental Covenant (EC) and RFLMA. The process of modifying the institutional controls could be a lengthy process subject to public comment. The resolution of this issue and the subsequent impact on the current RFLMA proposal cannot be assumed or predicted.

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- Contact Records 2010-02 (dam breaching) and 2010-04 (POC relocation) were approved by CDPHE. The City of Westminster encourages CDPHE to recognize the inconsistencies and ambiguities associated with the two interrelated proposals and withdraw approval of the aforementioned contact records. If approval of the contact records is withdrawn or the new POCs cannot be constructed as proposed, there is not sufficient cause for proposing the RFLMA modification as currently presented for public comment.

While we contend the RFLMA modification proposal is premature, Westminster will not forego the first opportunity to provide public comment on the RFLMA document since it was adopted in 2007. Our comments are based on all information provided or referenced in the document released for public comment.

Specific Concerns:

Relocation of the Points of Compliance

Westminster has significant concern about the basic premise of the proposal to relocate the POCs from the Indiana Street locations to the Central Operating Unit ("COU") boundary. Contact Record 2010-04 details DOE's rationale for the RFLMA proposal to modify monitoring locations. One reason suggests that deletion of the Peripheral Operating Unit ("POU") from the National Priority List requires moving the Indiana Street POCs to the COU boundary. Westminster contends that modifying the monitoring locations is not required for the stated reason, as DOE retains the right to access the Indiana Street POCs because the CAD/ROD states *"The selected remedy/corrective action will be implemented through a modification to the Rocky Flats Environmental Covenant (DOE 2006b) to include all of the institutional controls required for the Central OU, through DOE retention of jurisdiction for or access to any real property to be used in carrying out the final response action (that is, the Central OU and designated monitoring points outside the Central OU), and through an interagency agreement/corrective action order among DOE, EPA and CDPHE."* (Emphasis added.) The text in RFLMA itself (February 2007) defines the Rocky Flats Site to include United States Government owned property and provides a map delineating the Site boundary in document Attachment 1, which encompasses both the COU and the POU acreages. Westminster contends that the POCs should be retained at the current locations until such time as active construction of the Jefferson County Parkway forces the relocation. Options for relocating the monitoring stations will be evaluated at that time.

Similarly, the boundary wells, also located on the POU at Indiana Street, currently serve as the last point to measure groundwater leaving the Site. DOE contends in

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RFLMA that *“all contaminated groundwater emerges to surface water before leaving the Central OU.”* Without reference wells located outside the COU boundary, DOE cannot ensure this assertion will remain accurate over time. There are no groundwater wells located downstream of the ponds on the COU. Westminster insists that monitoring at the existing boundary well locations should be retained at the current frequency until such time as active construction of the Jefferson County Parkway forces the relocation. Options for relocating the monitoring stations will be evaluated at that time.

Westminster is a principle member of the Woman Creek Reservoir Authority (Authority). The Authority's comments provided for the proposed RFLMA modification thoroughly detail our concerns about moving the POCs; as such, we support the Authority's opposition to elimination of GS-01 as the Point of Compliance.

Applicable or Relevant and Appropriate Requirement (ARAR)

DOE maintains that the state and federal guidance for locating groundwater POCs as close as possible to the “waste management area” boundary is also applicable to surface water POCs; however, DOE fails to cite state and federal documents that support this claim. If DOE's assertion is correct, it would follow that dilution of surface water downstream of the “waste management area” by supplemental surface water flows from surrounding drainages could jeopardize accurate assessment of the affected areas. For example, the proposed new WOMAN POC will result in significant dilution of the South Interceptor Ditch (“SID”) flows measured at SW027 (SID above Pond C-2) by as much as 2000%. The 2009 annual flow at SW027 was 4.35 acre-feet and the 2009 annual flow at GS59 (closest upstream location from Pond C-2 on Woman Creek) was 177.54 acre feet. The new WOMAN POC is planned to be located downstream from current POC GS31, just below the confluence with Woman Creek, thus combining the flows from SW027 and GS59. The current monitoring location at GS01 adequately provides the compliance data encompassing all flows leaving the Site. Note the 2009 annual flow at GS01 was 217.22 acre-feet.

As stated in Contact Record 2010-04, *“...Under CERCLA guidance, compliance with surface water ARARs is measured at an appropriate point considering groundwater impacts to surface water within the NPL site boundary.”* The same Contact Record further describes how the plans to notch the dams, rather than completely removing them, will effectively capture alluvial groundwater and direct it towards the surface water flowing through the notches. If this assessment is correct, what constraints preclude using or modifying the existing POC locations downstream of the terminal

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ponds (e.g. GS31 below Pond C-2) as the POC when operating the pond in a flow through configuration? The current POCs downstream of the terminal ponds are even closer to the "waste management area" than the proposed new POCs. The current POCs at Indiana Street, in conjunction with the POEs upstream of the terminal ponds and the current POCs below the terminal ponds, provide a clear picture of any contaminant migration.

Environmental Covenant

Lacking any response to comments provided on the EA, Westminster must again provide comment regarding our contention that construction of the new POCs in the Woman and Walnut Creek drainages violates Institutional Control #2. The CAD/ROD, Environmental Covenant and RFLMA reference Institutional Control #2: *"Excavation, drilling and other intrusive activities below a depth of three feet are prohibited, except for remedy-related purposes and routine or emergency maintenance of existing utility easements, in accordance with pre-approved procedures."* The CAD/ROD states *"These controls will extend throughout the Central OU"* and *"will run with the Property in perpetuity and be binding on DOE and all parties having any right, title or interest in the Property."*

To reinforce our position regarding the issue, the following statements paraphrase portions of a memo from Daniel S. Miller (First Assistant Attorney General - Colorado) to Ken Salazar (Attorney General - Colorado) on April 10, 2002 regarding a legal analysis of the federal government's obligation to comply with Colorado's environmental covenant law:

- Colorado Senate Bill 01-145 (SB 145) took effect on July 1, 2001 creating a statutory "environmental covenant" as a mechanism for enforcing use restrictions imposed in connection with remediation of contaminated sites.
- Use restrictions are imposed or relied upon in an environmental remedial decision to protect human health and the environment.
- Institutional controls are required when cleanup levels are set based on land use restrictions being in place. This typically occurs when the party responsible for the cleanup wants to reduce its cleanup costs.
- In the event of an actual or threatened violation of an environmental covenant, the Department (CDPHE) may issue an administrative order requiring compliance with the terms of the covenant, or may ask the attorney general to file suit for appropriate injunctive relief.
- SB 145 also allows other entities that have an interest in ensuring the covenant is not violated to sue for appropriate injunctive relief.

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Westminster acknowledges the provision in the CAD/ROD allowing DOE to propose land use changes to CDPHE and EPA with 45 days advance notice. CDPHE and EPA may approve the proposed changes by formal amendment to the CAD/ROD. An amendment to the CAD/ROD may result in opening the CAD/ROD for public comment. The resolution of this issue and the subsequent impact on the RFLMA cannot be assumed or predicted.

Westminster contends that the current monitoring locations adequately evaluate remedy performance.

Pond Operations

In the event the terminal ponds are operated in a flow through condition, Westminster insists the sampling locations in each terminal pond must be retained for pre-discharge sampling if the dam valves were closed due to concerns regarding release of contaminants off the COU. The ability to close the dam valves is a protective measure advocated by the downstream communities in the case of an unforeseeable event. The specific circumstances requiring terminal pond sampling can be determined during discussions with the RFLMA parties and the downstream communities.

Standards Evaluation

Compliance with surface water standards is based on the Colorado Water Quality Control Commission ("WQCC") regulations. Westminster contends that DOE's protocols for evaluating compliance with the RFLMA Table 1 standards at POCs do not adhere to current WQCC regulations for the following analytes:

Segment 5 – uranium and nitrate

Segments 4a and 4b – plutonium, americium, uranium and nitrate

The WQCC Regulation #38 allows for use of the 12-month flow-weighted rolling average concentration (computed monthly) only for Segment 5 and only for plutonium and americium. Westminster requests clarification on DOE's rationale regarding the application of the current RFLMA protocols for evaluating compliance with surface water standards at the Site.

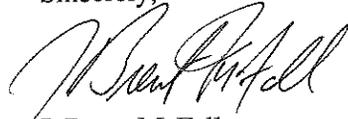
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Temporary Modifications

Revise Table 1 to remove all references to the expired Temporary Modifications. All associated language in the RFLMA text should be removed.

In closing, Westminster strongly opposes the proposed plan to relocate the Points of Compliance. We appreciate the efforts of the RFLMA Parties to dialogue about the issues in an attempt to resolve concerns and clarify information and positions. DOE and CDPHE have committed to a water working group to further explore Site issues with the downstream communities. We fully support this effort and intend to actively participate. Thank you for the opportunity to provide comment on the proposed RFLMA modification.

Sincerely,



J. Brent McFall
City Manager

CC – via Email:

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