



Woman Creek Reservoir Authority

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SUBJECT: WCRA Written Comments on June 3, 2011 Proposed Plan to Modify the Rocky Flats CAD/ROD

Mr. Surovchak, Mr. Spreng, and Ms. Moritz,

The Woman Creek Reservoir Authority (WCRA)¹, comprised of representatives from the Cities of Westminster, Thornton, and Northglenn, has serious concerns about the DOE Proposed Plan to amend the Rocky Flats Corrective Action Decision/Record of Decision (CAD/ROD) institutional controls (ICs). Specifically, we believe these proposed changes drastically weaken cornerstone protections put in place by careful design in the process of accelerated site closure. WCRA believes the proposed changes go beyond the DOE-stated need to allow for implementation of the remedy and site maintenance activities. WCRA made a statement to this effect at the public meeting on June 16, 2011. This letter provides WCRA's written comments for consideration by DOE, CDPHE, and EPA in the final decision regarding this proposed amendment.

Introduction

On June 3, 2011, DOE released a Proposed Plan for Amendment of the CAD/ROD (Proposed Plan) and corresponding sections of the Rocky Flats Legacy Management Agreement (RFLMA). This plan detailed the following three proposed modifications to the original CAD/ROD:

1. The Proposed Plan would relax specific limits defined in the ICs by adding an option for a regulatory review and approval process for actions outside the limits. Specifically, the following current CAD/ROD IC limits could be circumvented through a regulatory review process:
 - a. Prohibition of excavation, drilling, and other intrusive activities below a depth of three feet,
 - b. Requirements to restore soil to pre-existing grade for any soil disturbances, and

¹ The WCRA is a political subdivision and public corporation of the State of Colorado created under C.R.S. § 29-1-204.2. The WCRA is the owner and operator of the Woman Creek Reservoir, which was completed in 1996 as part of the Standley Lake Protection Project to protect Standley Lake, a municipal drinking water source for the Cities of Westminster, Thornton, and Northglenn.

- c. Protection of engineered components of the remedy.
2. The Proposed Plan would amend the current environmental covenant to reflect these changes or replace that environmental covenant with a restrictive notice.
3. The Proposed Plan would remove the current CAD/ROD requirement for a formal amendment process for any future modifications to ICs in the CAD/ROD.

DOE indicates in the Proposed Plan that these changes are necessary to implement the remedy and maintain the site, and that these changes are merely clarifications of the original intent of the CAD/ROD document. To illustrate the need for these changes, DOE cites four specific examples of necessary site maintenance activities that have been performed that could be strictly interpreted as having violated the current CAD/ROD ICs. WCRA has no interest in preventing DOE from implementing the remedy and maintaining the Rocky Flats Site; however, these proposed modifications loosen IC protections well beyond the stated need.

In the following subsections, WCRA presents its specific concerns with the planned modifications to the original CAD/ROD and associated changes to RFLMA and the environmental covenant.

Weakened Cornerstone CAD/ROD Protection

The selected remedy/corrective action selected for the Rocky Flats Site in 2006 was Alternative 2, which consists of three parts:

1. Environmental Monitoring,
2. Institutional Controls, and
3. Physical Controls.

As such, the institutional controls are one part of a three part remedy selected for Site closure and are therefore an integral part of the remedy.

The institutional controls and the environmental covenant were put in place in the CAD/ROD as strong, clear, and permanent protections, recognizing the contamination and uncertainties remaining at the Site following the accelerated cleanup and closure. Specifically, the CAD/ROD states: "ICs were added to increase the protectiveness of the remedy, because:

- The Comprehensive Risk Assessment (CRA) did not evaluate an unrestricted scenario but instead evaluates potential risk to the anticipated future user. The assumptions used in the CRA human health calculations need to be embodied in an IC.
- If residual soil contamination is disturbed, erosion could cause the contamination to migrate to surface water, which could result in some surface water sample results above surface water standards at some surface water monitoring locations.
- There are no prohibitions on affecting the engineered aspects of the remedy."

The considerations described by these three bullets quoted from the CAD/ROD remain unchanged, yet the specificity and strength of the ICs would essentially be removed by the proposed changes and replaced by a case-by-case review by CDPHE. CDPHE review is not a guaranteed protection. All review agencies are inherently imperfect; funding changes occur; priorities change; staff changes, etc. The original ICs were drafted with specificity to be a strong line of protection. To this end, language from the institutional controls was used to create a binding and permanent restrictive covenant document that was recorded in the records of the Jefferson County Clerk and Recorders Office at Reception No.

2006148295. This action created servitude on the property for the benefit of the State and the public it serves, including downstream entities such as the Woman Creek Reservoir Authority. The original ICs were not designed to allow for any action as long as approved by regulators. Rather, they were designed to permanently preclude certain activities on the property.

The CAD/ROD states: "IC`s are designed to provide the mechanisms that **permanently** [emphasis added] maintain the completed actions." The CAD/ROD further recognizes that: "In the very long term, ICs may fail. The environmental covenant will increase the long-term permanence of the ICs." The WCRA primary concern is that there is no long-term and permanent protection in allowing any action, as long as it is approved by another entity.

Relaxed Requirements for Future IC Modifications in CAD/ROD

In addition to the proposed changes to IC language in the CAD/ROD, the proposed plan also specifies removal of the current requirement to formally amend the CAD/ROD in the event of future changes to the ICs. WCRA does not see any basis for this proposed additional weakening of the ICs in the CAD/ROD.

The EPA guidance on amending RODs (NCP (§300.435(c)), in EPA's ROD Guidance, Section 7) has been in place since 1999 and was therefore in place at the time of completion of the CAD/ROD in 2006. That guidance indicates that formal amendment of the ROD is only required for post-ROD changes classified as *fundamental changes*, the most drastic change category of the three categories. Therefore, the specific provision in the CAD/ROD requiring formal amendment to modify ICs was purposefully written to be more restrictive than the existing guidance and provide additional protection of the ICs, recognizing their important role as part of the remedy.

From the Proposed Plan, it is not clear why DOE is proposing to remove this requirement for formal amendment of the CAD/ROD for future changes to ICs. When asked at the public meeting on June 16, 2011, DOE indicated they did not currently anticipate any future changes to ICs beyond the specific edits discussed in the previous section.

Removal of the requirement for a formal amendment process will not only make it easier to further weaken the ICs, but will also limit the requirements for public involvement in the process. Specifically, a public comment period is only required in the case of a formal amendment to the ROD. Changes to the ROD not categorized as *fundamental changes* do not require a public comment period. DOE does indicate that they will follow RFLMA requirements for public comment "in effect at that time." Currently, RFLMA requires public comment for amendments to RFLMA only if the change is deemed to be "significant" (RFLMA, Part 10, Item 66). The approach to defining whether or not a change is significant is not detailed in RFLMA and is presumably in the hands of the RFLMA parties (DOE, CDPHE, and EPA), the same parties who have jointly proposed these IC changes and may propose future changes.

Summary

In Summary, WCRA does not believe that the proposed changes to the CAD/ROD (and associated changes to RFLMA and the environmental covenant) merely clarify the original intent of the ICs, as DOE suggests. Instead, we see these proposed changes as drastically weakening cornerstone protections put in place by careful design in the process of accelerated site closure. The WCRA is well-informed on Site technical and regulatory issues and has been actively engaged in the public involvement process since the Woman Creek Reservoir was constructed nearly 15 years ago. WCRA continues to work collaboratively with DOE, CDPHE, and EPA, and we have no desire to prevent DOE from implementing the remedy and maintaining the Rocky Flats Site; however, we feel these modifications are unnecessarily broad and go beyond "clarification of original intent."

WCRA requests that DOE, CDPHE, and EPA revise this Proposed Plan to limit the clarifying language to the stated intended purpose: implementation of the remedy and performance of necessary site maintenance activities. Further, WCRA strongly requests that DOE, CDPHE, and EPA retract the portion of this proposed plan that would remove requirements for formal amendment to the CAD/ROD in the event of future changes to ICs. In addition to these specific requests, to facilitate response to the comments, WCRA would appreciate response to the following questions:

- Given the DOE-stated need for this CAD/ROD amendment: to implement the remedy and manage the Rocky Flats Site, why is it necessary to also remove the requirement for formal amendment to the CAD/ROD?
- Can DOE develop language for the CAD/ROD amendment that is more specific about only allowing activities that relate to implementing the remedy and safely managing the Site?
- What future activities are currently planned/anticipated that would follow this proposed process?
- How will the determination be made as to whether a proposed activity is significant under RFLMA and would therefore trigger public involvement?
- How is this merely a clarification of the original intent of the ICs when it removes almost all specificity in the ICs, in exchange for a regulatory review process?

WCRA appreciates the opportunity to comment on these proposed changes and is hopeful that our concerns will be carefully considered and addressed. We would also welcome the opportunity to clarify and further discuss these concerns, as needed.

Sincerely,



Josh Nims
President
Woman Creek Reservoir Authority

cc:

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