



WESTMINSTER

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Sent via Email to rinfo@lm.doe.gov

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

The City of Westminster appreciates the opportunity to review and provide public comment on the Proposed Plan for amending the Corrective Action Decision/Record of Decision (CAD/ROD) for the Rocky Flats Site (Site). The Rocky Flats Legacy Management Agreement (RFLMA) Parties, comprised of the U.S. Department of Energy (DOE), the Colorado Department of Public Health and Environment (CDPHE) and the U.S. Environmental Protection Agency (EPA), jointly released the proposed modification for public comment on June 3, 2011 with the expressed intent to “clarify the ICs (institutional controls) in a CAD/ROD amendment because of public comments questioning the implementation of ICs related to soil disturbance and excavation activities.” In addition to CAD/ROD modification, the proposal also includes actions to modify RFLMA, formalize the Soil Disturbance Review Plan and revise the Environmental Covenant for the Rocky Flats Central Operable Unit (COU). Collectively, the proposed actions are referred to herein as the “Proposed Plan.” Westminster remains in opposition to the Proposed Plan modifications and provides the following comments:





General Comments

Institutional Controls

The Proposed Plan relies on certain objectives and rationales found in the CAD/ROD as the justification for revising the specific wording of several ICs. In doing so, the RFLMA Parties place greater weight on previously obscure objective and rationale language than on the specific IC language itself. Westminster is frankly troubled by this approach and notes that by DOE's prior admission, the objectives and rationale were added only as non-significant details¹ in the approved CAD/ROD without any opportunity for public comment. Moreover, this same "objective and rationale" language was completely omitted from other legally enforceable documents – namely RFLMA and the Environmental Covenant (EC). The Parties now propose to update all three documents (CAD/ROD, RFLMA and EC) to include revised language for three ICs along with the objective and rationale for all seven ICs. Even more troubling is the admission that, since closure, DOE and CDPHE have been relying on the same objective and rationale language to perform Site activities that violate the specific IC language.

Westminster agrees with EPA's recommendations (OSWER 9355.0-74FS-P) regarding the need for layering of institutional controls in order to protect human health and the environment at sites where cleanup did not result in unlimited use and unlimited exposure. Rocky Flats is clearly one such site. In fact, the ICs selected for the Site following accelerated cleanup were intended to be permanent and protective and apply to the entire COU in perpetuity. The ICs at Rocky Flats overlap by design and were intended to be implemented in series to ensure both short- and long-term effectiveness of the remedy. Restrictions on soil disturbance on the entire COU, whether surface or subsurface, eliminate the possibility of opening new pathways for transmission of site contamination to groundwater and eventually to surface water. While it is a fact that contaminated structures remain three feet or more below the surface, so do contaminated soils and groundwater. All sources of contamination must remain isolated from potential pathways to surface water.

¹Rocky Flats Stewardship Council Board Meeting Minutes - Monday, October 2, 2006
Briefing/Discussion on CAD/ROD and Post-Closure Regulatory Agreement

John Rampe from DOE-Rocky Flats ...reported that there are no significant differences between the Proposed Plan and the CAD/ROD, but additional details were added in some areas. The document is posted on the Rocky Flats website. Some of the additional details include objectives, rationale and implementation of institutional controls



As a neighboring community, Westminster has relied on the specific ICs and the related Environmental Covenant as added protection since closure. To now learn that specific language found in the ICs and related Environmental Covenant prohibiting specific activities at the Site has been ignored or interpreted away using certain objectives and rationale is flatly unacceptable. The exact wording of the ICs that were included in the original version of the Proposed Plan in 2006 following appropriate public comment were put there for a reason and the RFLMA Parties' attempt to dismiss the specific IC language in favor of more flexible objective and rationale language is simply unacceptable.

At a minimum, Westminster believes the RFLMA Parties must first engage the public in a formal process for addressing the specific wording of all seven ICs, objectives and rationales before adopting any changes to the ICs.

Public Participation

In addition to modifications to the ICs, the RFLMA Parties are proposing more changes to the CAD/ROD that would effectively eliminate future public comment. Specifically, the proposal to eliminate the requirement for a formal CAD/ROD amendment for any future modifications to the ICs is deeply troubling to Westminster. In basing the requirement for public review and comment on the RFLMA requirements, the public will be virtually eliminated from most changes that currently would require an amendment to the CAD/ROD. In fact, the vast number of changes and importance of the issues included in this Proposed Plan would not rise to the level of requiring a CAD/ROD amendment if this proposal is approved.

Westminster, along with other engaged stakeholders, has been actively participating in Rocky Flats working groups and technical review committees for well over a decade. We have contributed countless hours toward providing the regulatory agencies with a secondary perspective on proposed site activities. Eliminating cooperative discussions and the opportunity to provide comment on future changes to an essential component of the remedy will erode the collective credibility of the regulators. CDPHE and EPA will be held fully accountable for any site activities they approve as a result of implementation of this proposal as the plan states: "The proposed IC clarification is protective of human health and the environment because it **ensures** [emphasis added] through the RFLMA regulatory review and approval process: ... subsurface contamination will not be mobilized and cause unintended exposure to humans or the environment." Westminster encourages the RFLMA parties to withdraw the proposed change to eliminate the requirement for a formal CAD/ROD amendment for all future changes to the ICs.



Long-term Stewardship

The Proposed Plan amendments clearly relax the protections for long-term stewardship of the Site, permitting activities that would violate the original ICs as long as there is regulatory approval. These proposed changes go far beyond DOE's need to implement the remedy and maintain the Site. Coupled with the Colorado Water Quality Control Commission regulations that allow for "less stringent" water quality standards at CERCLA sites, surrounding communities are concerned about future actions. Budget constraints drove the accelerated cleanup actions and now dictate the attempts to reduced operations and maintenance commitments. Without a contingency plan in place in the event "assurances" fail, public health and the environment are at risk.

Westminster asserts that the language in the CAD/ROD was intended to be specific and restrictive and, thereby, protective of the remedy. A great deal of thought and many well-respected scientists, engineers, attorneys and lay people provided input to craft the original Proposed Plan in 2006 to truly ensure that the uncertainties that remain from the accelerated cleanup were adequately addressed in institutional controls. DOE has indicated in public meetings that they cannot recall the basis for crafting the original IC language or the inclusion of the requirement for a formal CAD/ROD amendment for changes to ICs. This failure to recall speaks volumes and clearly demonstrates the need and importance to fully document decisions going forward. Regulations and guidance change, regulatory staff change, interpretations change, standards change, memories fade, yet the contamination and the risk remain.

Specific Comments

1) IC-2

The current version of IC-2 reads: "*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.*"

This language for the IC statement was carefully crafted by the authors for a number of reasons, one of which is stated in the rationale for the IC: contaminated structures remain in certain areas of the COU. However, the ICs apply to the entire COU and there are additional reasons why the specific language was selected:

- Subsurface contamination other than structures remains;
- The Comprehensive Risk Assessment did not evaluate risk below three feet;
- The allowable soil action limits vary based on depth, and
- Non-remedy related components on the COU were not characterized.

The proposal to change the specific IC-2 language will allow excavation below three feet for any purpose provided CDPHE approves the action. Westminster strongly opposes broadening of IC-2 to allow for excavation below 3 feet for non-remedy related purposes.



2) IC-3

The current version of IC-3 reads: *“No grading, excavation, digging, tilling, or other disturbances of any kind of surface soils is permitted, except in accordance with an erosion control plan (including Surface Water Protection Plans submitted to EPA under the Clean Water Act) approved by CDPHE or EPA. Any such soil disturbance will restore the soil surface to preexisting grade.”*

The proposal to change the specific IC-3 language will allow for surface excavation (0-6 inches) provided it is in accordance with an approved erosion control plan. The change could be interpreted to mean that CDPHE approval using the Soil Disturbance Review Plan is only required if the soil disturbance will not restore the soil surface to the preexisting grade. Westminster requests clarification of this interpretation. Is there a limit on the height that the surface could be elevated above preexisting grade? There is a concern about the potential for rerouting surface water flows.

3) IC-7

The current version of IC-7 reads: *“Activities that may damage or impair the proper functioning of any engineered component of the response action, including but not limited to any treatment system, monitoring well, landfill cap, or surveyed benchmark, are prohibited.”*

The proposal to change the specific IC-7 language will allow DOE the freedom to essentially re-engineer the engineered components of the remedy without public comment. The proposed language allows for “modification, removal, replacement or relocation” of any engineered component of the remedy, which includes groundwater treatment systems, monitoring wells, landfill caps and surveyed benchmarks. The requirement for regulatory review of such actions was not added to this IC in the proposed plan as it was for the other ICs. As such, why is consultation and approval by CDPHE and EPA not required for these actions?

4) Soil Disturbance Review Plan

The RFLMA Parties are proposing to codify the Soil Disturbance Review Plan (SDRP) in revision to RFLMA Attachment 2. DOE and CDPHE have been utilizing this review process to permit actions that violate institutional controls since closure. The SDRP applies to excavations related to IC-2 and IC-3. Westminster contends the plan is inadequate as currently written. Please provide responses to these issues:

- Define vicinity.
- Does the SDRP document CDPHE’s assessment that the project meets the rationale and objects of all institutional controls?
- Why is the specific IC language not included in CDPHE’s assessment of the project?
- Exactly how does the SDRP “ensure” the statement on page 11 that reads: “Subsurface contamination will not be mobilized and cause unintended exposure to humans and the environment.”
- Explain the need to characterize subsurface areas that “are or may be contaminated” if the previous bullet is true. Explain the characterization procedure.



- Will non-RFLMA monitoring of soils and/or water be included following projects which require characterization and/or modify the existing surface material or grading?
- Why is surface water not considered when applying the SDRP for IC-3?
- Will the SDRP documentation include pre- and post-activity elevations?

Public dissemination of an ongoing summary table of elevation changes would be beneficial for both the regulators and public to track the historical Site changes relative to new proposed projects. The 3 foot minimum depth will become a moving target over time. Westminster believes the SDRP must be standardized for consistent application of the process. Further, Westminster believes complete documentation of the SDRP, including the basis for approval actions, must be included in the Contact Record to ensure CDPHE can defend the decision to approve proposed activities. Westminster requests that activities requiring SDRP be delayed for two business days following notification to the public prior to start of the activity to allow the public the opportunity to review the approved activity.

5) Regulatory Inconsistencies

CDPHE, through the Soil Disturbance Review Plan, is responsible for ensuring that the proposed project meets the rationale and objectives of the institutional controls. Westminster believes that based on the proposed changes to the ICs, those assurances are inherently weakened, putting the public and the environment at risk.

In the current CAD/ROD, per IC-2, excavation, drilling, and other intrusive activities below a depth of three feet are prohibited. The CAD/ROD rationale for this is to eliminate the possibility of unacceptable exposure. Changing the IC to allow for activities below three feet with regulatory approval no longer “eliminates” the possibility of unacceptable exposure, and instead hinges on the definition of “unacceptable” as well as remaining uncertainties about the exact presence and extent of subsurface contamination.

Similarly, the rationale for IC-3 indicates that the specific CAD/ROD prohibition of permanent modifications to pre-existing grade was designed to minimize the possibility of such disturbances impacting surface water. Opening this IC to allow for new soil grades with regulatory approval increases the potential for new contaminant migration pathways.

Conclusion

For the reasons set forth above Westminster remains in opposition to the Proposed Plan modifications. The City understands that ongoing maintenance and repair of the engineered systems maybe required; however the proposed amendments could permit changes to the Site well beyond remedy maintenance needs and also severely restrict public input about those decisions. The current version of the CAD/ROD is more protective of human health and the environment by ensuring long-term effectiveness of the remedy and restricting irreversible disturbances of the Site that could have unintended consequences.



We encourage oversight agencies to remain accountable to the public and carefully reconsider the proposed changes to the CAD/ROD, RFLMA and EC. Further technical discussions of the potential impacts of the proposed actions are needed. We welcome the opportunity to participate in development of revised language that will meet the intended and limited purpose for the proposed amendments.

Sincerely,



J. Brent McFall
City Manager

CC:

Governor John Hickenlooper
Senator Michael Bennet
Senator Mark Udall
Representative Jared Polis
Representative Ed Perlmutter
Doug Young, Governor Hickenlooper's Office
Stuart Feinhor, Representative Polis' Office
Charles Ozaki, Manager, City and County of Broomfield
David Allen, City and County of Broomfield
Julie Moser, City and County of Broomfield
Jack Etheredge, Manager, City of Thornton
Bud Elliot, City of Thornton
Nancy McNally, Mayor, City of Westminster
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