



October 29, 2010

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RE: Draft Policy for No Further Action When Contamination Remains Above the Colorado Ground Water Standards and Draft Guidance for the Closure of Low-Threat Sites with Residual Ground Water Contamination

Dear Walter:

Thank you for providing the opportunity to comment on the above-referenced documents. We appreciate the work you and the Hazardous Materials and Waste Management Division put into preparing these documents. The following provides our comments on the draft documents. These comments are not made on behalf of any particular client, but are based on our years of experience representing many different clients on ground water contamination and corrective action matters.

Comments:

- At the top of page 3, the last sentence of the carryover paragraph states that:

This guidance will be applied *only* in situations where the expenditure of additional resources yields *no* increased benefit to human health and the environment and where *all* other conditions noted in this guidance are satisfied.

The absolutes in this statement render the policy meaningless. At most sites, expenditure of additional resources potentially could have some, even if negligible, benefit to human health and the environment. Moreover, when evaluating potential remedial activities, it is impossible to determine in absolute terms that a particular action will have no beneficial

impact on the plume. Consequently, there would be virtually no site at which this policy could be applied.

In many instances, a reasonable conclusion can be made that the remedial activity would have little or no benefit to human health and the environment. Thus, the likelihood and degree of potential benefit could be compared to the cost of the potential actions, and a reasonable conclusion could be made as to whether the potential benefit justifies the resource expenditure. We believe that this balancing approach is a more logical approach and is consistent with the discretionary nature of the Division's lines of evidence analysis outlined in the draft Guidance.

We also believe that the obligation to satisfy "all other conditions" in the guidance is unreasonable and inconsistent with both the Policy and the Guidance. Moreover, it is unnecessary for the Guidance document. The Policy and the Guidance consistently recognize that no further action determinations are reserved to the discretion of the Division and that no one set of facts or circumstances establishes the standard for no further action. Rather, the Division has flexibility to balance lines of evidence and to adjust the weight placed on a particular line of evidence depending on the circumstances at a particular site. Declaring that all other conditions in the Guidance must be satisfied is contrary to that discretionary flexibility.

In addition, the Guidance only defines what must be considered to make a no further action determination when Colorado Ground Water Standards are not met at the site. It defines a process for the Division, in its discretion, to evaluate whether the conditions for no further action are sufficiently satisfied. The process could be applied any time and is used to determine the conclusion. Requiring satisfactory compliance with the conditions in order to apply the process of determining whether the conditions have been satisfied creates a Catch 22 that renders the Guidance meaningless. We recommend deleting the phrase "and all other conditions noted in this guidance are satisfied."

- Line of Evidence 1: Adequate Characterization of the Site.
Overall, the Guidance goes in the right direction to assist appropriate sites to exit the regulatory system when further investigatory or remediation efforts will have little benefit but will be expensive to the owner/operator. We also applaud the "lines of evidence" approach of the Guidance. However, the amount of "evidence" required by Line 1 could still be overwhelming to a small operator, and we encourage the Division to use discretion in applying the Guidance to site circumstances.

- The last paragraph of Line of Evidence 3, on page 7, states that vapor intrusion threats must be evaluated by "direct testing of buildings above the ground water plume." This factor should be modified to allow the Division discretion in determining whether direct testing of buildings is necessary. In many situations, soil gas sampling provides a more reliable indicator of the vapor intrusion threat, since it is not impacted by other indoor sources of contamination. Division discretion on these issues would allow for consideration

of site-specific conditions, such as relative concentration in groundwater, nature of the contaminant of concern, depth to groundwater and geology above the groundwater. There is no need to sample indoor air at every plume that underlies buildings, and in many situations, access cannot be obtained for such sampling. Establishing indoor air sampling as an absolute requirement for a no further action determination is inconsistent with the goal of closing low risk sites through a lines-of-evidence process.

- Although not a part of the Policy or Guidance, we urge the Division to revise its fees regulation to reduce the \$1,000 annual fee for environmental use restrictions that are an element of corrective action decisions. This fee is a significant burden at many sites where use restrictions could be a logical and effective tool. Moreover, the \$1,000 fee seems excess in relation to the likely cost of maintaining use restrictions.

Thank you for this opportunity to comment.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott A. Clark".

Kemper Will
Scott A. Clark