



D a v i s G r a h a m & S t u b b s L L P

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September 30, 2010

Walter Avramenko  
Colorado Department of Public Health and  
Environment  
HMWMD-HWC-B2  
4300 Cherry Creek Drive South  
Denver, Colorado 80246-1530

Re: Comments of J.M. Rozell, LLC on Guidance Documents

Dear Mr. Avramenko:

On behalf of our client, J.M. Rozell, LLC (“Rozell”), we submit the following comments on the (1) “Policy for a ‘No Further Action’ Determination When Contamination Remains Above the Colorado Ground Water Standards” (the “NFA Policy”); and (2) “Guidance for the Closure of Low-Threat Sites with Residual Ground Water Contamination” (the “Closure Guidance”) (collectively, the “Policies”).

**I. Introduction.**

As the Policies recognize, there are numerous sites across Colorado that will be impacted by CDPHE’s approach to these important closure issues. We thought that our comments would be most useful if presented in the context of a particular site, especially one that is well known to CDPHE and serves as an excellent prototype. However, we believe that these comments apply to a range of similar sites.

CDPHE’s files contain detailed background information about the Rozell site and our efforts to complete investigation/remediation work under the VCUP program. To frame our comments, the following briefly summarizes key facts.

Rozell owns the subject property, which is located at 4900-4916 West 29th Avenue in northwest Denver, Colorado (the “Site”). The Site is comprised of a 0.38 acre parcel of land containing a commercial building, a portion of which was formerly leased by a dry cleaning operation from approximately 1952 to 1998. The Rozells bought the building in the early 1980s, and never operated or had any role in or control over the dry cleaning business. Contamination was discovered in approximately 2002, in the course of an environmental investigation of the Site triggered by a financial transaction. The building has been leased to various other small businesses since the dry cleaning business shut down.

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Rozell, LLC is an entity managed by Michael and Letty Rozell, who are now retired and of limited means. CDPHE has long recognized that Rozell played no role in activities leading to the contamination and that apparent past solvent releases are not subject to RCRA corrective action. Thus, neither the Rozells nor Rozell, LLC are liable for cleanup under any state law administered by CDPHE and are conducting the extensive work performed to date as a voluntary measure to facilitate cleanup, and to re-establish full property use.

The constituent of concern at the Site is PCE and its related degradation products. Extensive investigation, source removal, indoor-air testing and mitigation, and groundwater treatment work has been completed, and controls on offsite migration have been implemented. However, state groundwater standards are exceeded throughout the plume area, including offsite locations.

Importantly, Rozell has completed two measures directly relevant to these comments. First, as a precaution, Rozell installed an indoor-air remediation system in a multi-unit building immediately downgradient of the Site. Rozell also completed an extensive indoor-air testing program in the neighborhood, which required the installation of an indoor-air mitigation system in just one home. Second, Rozell has conducted significant public outreach and communication with the neighborhood, including periodic notices with updates on Site investigation and remediation activities.

On a personal note, I come to this process with a great deal of experience with both this particular Site and with issues surrounding VCUP, Brownfields, and related property value/stigma/redevelopment/liability matters. This includes creating and teaching several Brownfields law classes at DU Law School; serving on the outside ad-hoc committee that helped develop CDPHE's VCUP guidance; and involvement in one of the most significant early VCUP projects, the Pepsi Center in downtown Denver. As you know, I also serve as a member of the Colorado Solid and Hazardous Waste Commission, but these comments are provided solely as a representative of Rozell, and not as a Commission member. I do not anticipate that the Commission will play any role in the development or implementation of the Policies, but if this were to happen, I would tailor my involvement or recuse myself as appropriate.

## **II. Summary of Comments.**

First and foremost, we applaud CDPHE for the time, effort, thoughtfulness and care taken in developing these Policies. We see them as a useful step towards closure for parties in the situation faced by the Rozells. From a policy standpoint, we support CDPHE's attempt to develop a roadmap for these sites to return to beneficial use – this is critical for the state and the environment as a whole. For decades, parties have grappled with the conundrum presented by meeting Colorado Water Quality Standards ("CWQS") and the difficulty in obtaining a waiver from those standards in reaching site closure. The Policies represent a significant step towards providing the Rozells and other interested parties with an opportunity to marshal their resources, complete necessary steps to reach closure, and obtain the type of formal agency sign-off that often is critical to restoration of property value and full use.

That said, our comments collectively go to the need to inject greater realism, flexibility and resource-sensitivity into the range of prerequisites to closure outlined in the Policies. Our greatest concerns center on: (1) the requirement to secure long-term control over offsite property usage; (2) the failure of the Policies to recognize resource restraints, especially for those involved in VCUP programs; and (3) even where no risk is presented, the apparent mandate that extensive long-term monitoring be conducted prior to NFA issuance.

Given these concerns, we suggest that CDPHE provide a mechanism for parties involved in the VCUP program to obtain an interim NFA letter without meeting all listed criteria in the Policies. Such letter would state that absent new information or changed conditions (or subject to other appropriate “reopeners”), the property has been appropriately remediated and is safe for anticipated uses. A reasonable time frame for such an interim determination would be when source remediation goals are met, and all that remains is long-term groundwater monitoring. Such an interim NFA would be a critical tool in helping property owners navigate the difficult path towards value restoration, and minimize the chance that such properties will be abandoned or foreclosed upon while final closure is pursued. Having been frustrated in pursuing such interim assurances on behalf of the Rozells and many other clients in the past, I believe that an interim letter would be a crucial tool in giving the Policies real life and meaning.

At bottom, CDPHE should recognize that if the closure criteria become too inflexible, and onerous, especially for individuals such as the Rozells, many of these sites will be abandoned short of cleanup, thwarting the purpose of the Policies. We hope these comments provide CDPHE with constructive input on how best to tackle this ongoing dilemma.

### **III. General Comments.**

Our principal comments on key issues are presented in this Section. These comments are supported by further page-specific points provided in Section IV.

#### **A. Time for Closure/Need for Consistency and Realism.**

Numerous Brownfields studies recognize that property owners (including the Rozells) walk a tightrope to avoid adding another abandoned tract to our growing urban blight. Properties devalued by environmental contamination and stigma cannot realize their potential for rent or resale or obtain financing for redevelopment. Yet, there is some amount of money and time that theoretically could be invested in most sites to break the abandonment cycle and redirect them to profitable reuse.

In turn, to serve their purpose, the Policies must provide for flexibility, interim staging, and other techniques that can inch properties closer to revitalization – thereby providing funding for long-term monitoring or other requirements that might be necessary to reach final closure. While the Policies discuss a staged approach to remediation goals, they use inconsistent terms in discussing the timing to reach these goals. They also provide insufficient flexibility to address

situations where the current value simply cannot support long-term monitoring or other steps that might eventually support full closure.

For instance, in addressing the source area remediation on pages 5-6 of the Closure Guidance, CDPHE refers to the need to “timely” achieve groundwater standards or health-based remediation goals. Approval of natural attenuation as a remediation technique is then conditioned on the need to “eventually” reduce contaminant concentrations. *See* p. 6. The full section addressing the time frame for achieving remediation goals under the Closure Guidance (pages 9 through 11) ultimately relies on a list of factors (page 10) to define what is a “reasonable” period to achieve these goals.

Time frame issues are critical here, and should be better defined with the use of consistent terms. Moreover, the list on page 10 of the Closure Guidance and overall discussion omits perhaps the most important factor: whether the party involved in the cleanup has the necessary resources to pursue closure under the suggested time frame, and whether that party otherwise is obligated to pursue cleanup at all. The Policies cannot ignore the reality that a party under no specific CDPHE mandate, and lacking the resources (or in some cases, the life span) necessary to wait out this process, must be given as much flexibility as possible. I would propose that a specific bullet item be added on page 10 that goes to the party’s resources, degree of liability, and whether in the absence of an interim closure stage that entity could reasonably be expected to complete closure at all.

The Closure Guidance also identifies situations where the window for remediation (including natural attenuation) may need to be extended. *See* p. 10. This section is helpful, as it provides flexibility to extend remediation goals where no immediate risk to public health and the environment exists. Yet, CDPHE goes on to add that the duration of monitoring and other steps required to support natural attenuation may also be extended under these circumstances. While we believe the intent here is to assist the involved party in trying to marshal their resources, this wording may actually have the opposite effect – extending the time frame where the property is teetering on the brink of abandonment. Again, a sentence similar to that discussed in the previous paragraph would help clarify that resource considerations will play an important role in CDPHE’s analysis.

B. Property Controls Within the “Affected Area”.

The Policies create a significant impediment towards closure of many sites, including the Rozell site, under the approach taken under Line of Evidence 6 of the Closure Guidance. CDPHE first recognizes that a VCUP program site does not require environmental covenants and restrictive notices to qualify for an NFA letter. *See* p. 11; *see also* NFA Policy, page 3. However, the Closure Guidance then provides that VCUP approval of a no-action petition is dependent on the applicant agreeing to limit the future use of their property for purposes identified in the petition. While this is reasonable with respect to the property under the VCUP applicant’s control, the CDPHE expands the restraints to include “all affected properties.” In turn, page 12 of the Closure Guidance emphasizes that owners with groundwater plumes that

have migrated beyond their property boundary “have the added burden of needing to placing institutional controls on all affected properties” to receive an NFA.

This is unrealistic and will create a major impediment at a number of sites that otherwise should be closed. In most neighborhoods and under most circumstances, property owners like the Rozells lack the ability to adopt and enforce such institutional controls or restrictions; even seeking such controls will exacerbate the very legal concerns and overall exposure which prevent these properties from becoming redeveloped in the first place. In my experience, many property owners will refuse access and/or take offense to placing controls on their property. Moreover, any such suggestion will resurrect issues that may long since have been addressed (such as indoor air, at the Rozell Site) and lead to unwarranted concerns.

At this Site, Rozell simply has no mechanism for ensuring the controls are “robust, durable and maintainable over time” for the neighborhood homes potentially above the offsite plume. (See page 12.) In turn, this part of the Closure Guidance needs to accommodate circumstances where parties have already ensured that offsite owners are fully aware of and protected from exposure to groundwater or other risk pathways. Rozell has completed an extensive indoor-air study, significant public notice has been provided to all property owners, and a continued effort has been made to ensure that the neighborhood is apprised of remedial developments and understands the resource limitations faced by the Rozells.

In sum, for this Policy to be viable, Line of Evidence 6 should be amended to provide an exception from offsite land use restrictions (including institutional controls) in cases where indoor-air risk pathway has been addressed, groundwater is not being consumed (and is not likely to be consumed for the foreseeable future), and appropriate public notice has been provided, especially where the VCUP program is involved. We would be glad to work with the Division to fashion specific appropriate language to provide such assurances; otherwise, the Policy fails to serve its stated goals.

C. Flexibility/Interim Closure.

As noted above, the Policies beg for greater flexibility and an opportunity for the Division to issue interim letter(s) conditionally approving closure, subject to reopening on certain conditions (*e.g.*, a spike in observed levels or situation presenting a health risk concern). This need for interim assurances is exacerbated by the CDPHE’s apparent position that an applicant must satisfy *each* of the criteria listed on page 3 of the NFA Policy to be eligible for closure. (In a recent presentation, CDPHE suggested “that all criteria must be met in order to receive an NFA.”) An ironclad requirement that all listed criteria be met presents too steep a hill for most voluntary cleanup entities to climb. Appropriate qualifications can be included in any interim letters issued by the Division as suggested below, to provide a backstop should unexpected concerns or exposure arise in future years.

#### IV. Page-Specific Comments.

Apart from the global comments above, the following specific changes should be adopted. Many of these support the points mentioned above; others clarify the Policies or provide better guidance to the regulated community. All references to page numbers are to the Closure Guidance.

- Page 5 – Use of Site-Wide Studies. There is a reference under the heading “Site uses” to demonstration that shallow groundwater not be reasonably expected to be used in the future. CDPHE should clarify that such a determination can build on other broader, site-wide studies available for that particular aquifer. Generally, applicants should be able to build on available information to meet any of the referenced criteria in the Policies.
- Page 6 – Add Reference to “Onsite Structures”. The first full paragraph of page 6 cites situations where source identification and remediation may be problematic based on size or location. Perhaps the most significant issue here, which has been particularly troublesome at the Rozell site, is the difficulty in source identification given the location of the onsite structure, which provides the only income stream for the property. This should be specifically referenced in this section as a key reason that source remediation can be difficult.
- Page 7 – Future Land Uses. In the second to last bullet item, the term “reasonably contemplated” should be inserted before the phrase “present and future land and water uses.” This is inherent in the VCUP process and otherwise referenced elsewhere, but needs to be made express here.
- Page 7 – Vapor Intrusion Threat. Please add the words “and/or remediation” after the word “testing” in the first full paragraph on page 7. Often the actual remediation of buildings, with a one round of clearance sampling, is a simpler, more cost-effective, and direct way of addressing the indoor-air exposure pathway.
- Page 9 – Fate and Transport Modeling. We recognize that modeling is important, and Rozell has certainly used modeling in characterizing the Site, but the bullet item on page 9 should inject some flexibility to account for situations where the time and expense associated with developing a “peer reviewed” model is not warranted under the circumstances.
- Page 13 – Public Notice. While we agree that public notice is important and have closely apprised the interested public of key developments at the Site, we note that this passage unequivocally provides that notification must be provided to building tenants and residents “within the footprint of the groundwater plume.” A statement should be inserted in this section that such notice should account for and build on prior notices previously provided to interested parties.

V. **Conclusion.**

We greatly appreciate the opportunity to submit these comments. We suggest that some form of interactive process, *i.e.*, an open meeting of involved parties and commentators or other stakeholder session, be held prior to finalizing the Policies. We would welcome the opportunity to participate in such a session.

Sincerely,

A handwritten signature in black ink, appearing to read "R. L. Freeman", with a long horizontal flourish extending to the right.

Roger L. Freeman  
for  
Davis Graham & Stubbs LLP

RLF:ska