1168933 - R8 SDMS

KAPLAN KIRSCH ROCKWELL

October 13, 2010

VIA U.S. MAIL AND ELECTRONIC MAIL

Ms. Mia Bearley
Legal Enforcement Program
United States Environmental
Protection Agency
Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Re: Richardson Flat Site, Operable Unit 3
Settlement Communication/Inadmissible under FRE 408

Dear Mia:

Thank you for your letter dated September 28, 2010, regarding the multi-party negotiation of a possible Richardson Flat Site, Operable Unit 3 ("OU3"). Park City Municipal Corporation ("PCMC") has reviewed the "Anticipated OU3 Site Activities" document included with your September 28 letter ("Activities List"). Kaplan Kirsch & Rockwell ("KKR") is providing the following comments and the attached list representing PCMC's interests at this site on behalf of PCMC as its outside environmental legal counsel. KKR and PCMC understand that EPA has agreed to treat this letter and other communications associated with these negotiations in accordance with Federal Rules of Evidence, Rule 408.

It appears from the contents of the Activities List that EPA contemplates an extensive removal action in middle and lower Silver Creek. From our initial conversations with EPA, we understand the boundaries of OU3, the scope and nature of the investigations, and the scope of eventual removal action is "open for discussion." PCMC appreciates EPA's willingness to reevaluate the proposed OU3 boundaries and site activities in the negotiations and is providing its more general comments in this letter. PCMC reserves the right to make detailed comments on the proposal as it evolves throughout the negotiations.

As an initial comment, a preliminary review of PCMC's files indicates that PCMC's overall allocable share of responsibility for the remaining cleanup in the watershed should be minimal based on standard factors applied in allocating CERCLA liability. PCMC owns little of the remaining mine waste impacted acreage in the watershed, had no role in disposing of mine

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wastes, and is not exacerbating any releases of hazardous substances on these sites. PCMC has been actively involved in remediating and mitigating mine waste impacts through its soils ordinance, its remediation of City properties, and its management of mine waste related voluntary cleanups in its own development permitting processes. Similarly, with respect to the Prospector Drain, PCMC has taken a role in managing the discharge points and constructing a treatment biocell. However, the source of contamination in those discharge points likewise is historical mine waste of which PCMC had no role in disposal. Nor is PCMC exacerbating any releases from these sources to its knowledge.

It also is important both that other public property owners within the proposed OU3 shoulder PRP responsibilities on the same terms that the PCMC is asked to do and that the private responsible parties responsible for the generation and disposal of the waste bear the substantial burden of the cost of the proposed approach. PCMC favors a broad, protective remedy for the benefit of its residents, businesses, and visitors. However, as a public entity, PCMC has an obligation to attempt to negotiate responsibility for OU3 activities consistent with a legally appropriate allocation of liability under CERCLA or to an extent that results in additional benefit to these constituencies.

With respect to the December 2010 timeline referenced in your letter, PCMC appreciates and supports the goal of maintaining this timeline. This timeline will keep the parties on track to meet the milestones in Regional Administrator Jim Martin's June 14, 2010 letter to Mayor Williams and ensure adequate repository capacity for critical PCMC public infrastructure as well as other projects. The June 14 letter provided that "[a]n administrative agreement between PCMC and EPA will be necessary to memorialize how and by whom such controls will be implemented. This agreement, as well as the workplan, needs to be completed by December 2010."

PCMC is concerned, however, that the scope of the activities contemplated and the number of involved parties have both been increased since Mr. Martin wrote that letter. The June 14 letter required development of a work plan by PCMC, alone, for a repository. The June 14 letter, and the December 2010 timeline, did not contemplate other activities in a site as extensive as that proposed for OU3. The letter provided as follows:

> This authorization is contingent upon your acceptance of this proposal and EPA's receipt of a written commitment from Park City within one week of this letter that it will site and develop an additional repository. After we receive this letter, you have permission to send 15,000 cubic yards of waste to the repository. ... Material in excess of the 15,000 cubic yards, up to an additional 35,000 cubic yards, may be taken to the repository once Park City has submitted, and EPA approved, a workplan to site and develop an additional repository.

In sum, PCMC believes there is now a disconnect between the original schedule and scope and the current ones. PCMC would like to reach a multi-party resolution according to the original schedule, but requests that EPA remain open to interim or alternative approaches in the event that a multi-party approach proves too ambitious to achieve in the originally anticipated time frame.

With respect to the specific scope of activities proposed, PCMC agrees that all activities must be consistent with the National Contingency Plan ("NCP"). To this end, the final agreed-upon scope should include a complete list of activities contemplated by the NCP and EPA guidance, including the consideration of a range of remedial alternatives. In particular, PCMC believes large-scale stream reconstruction seems extreme and should be evaluated carefully in the context of a range of remedial alternatives. PCMC recognizes the high value of the existing riparian areas and wetlands. However, PCMC believes it is necessary for the parties to be creative, pragmatic, and think holistically in the planning and execution of this removal action in order to maximize environmental benefit and minimize costs and disruption to its taxpayers.

Additionally, although this Activities List "does not anticipate activities related to ... NPDES," PCMC believes strongly that the parties must recognize that NPDES permitting and compliance interrelates directly with the proposed removal action and is a priority interest for PCMC in these negotiations. PCMC expects flexibility to work with the Utah Department of Environmental Quality to consider the range of alternatives available under the Utah Pollutant Discharge Elimination System program ("UPDES"), including development of site-specific standards, as appropriate. As a corollary, EPA has included activities related to the Silver Creek Tailings (Prospector Square) area. We assume the reason for its inclusion is to address any potential contaminant load coming from the Silver Creek Tailings. Consistent with PCMC's interests related to NPDES for the Prospector Drain, we agree the impact of Silver Creek Tailings on water quality (both point and non-point source) ought to be considered in these negotiations. However, PCMC would caution the parties to be mindful of the historic stakeholder sentiment and community concern that their properties not be adversely affected or stigmatized by any CERCLA cleanup activity and be sure that community relations activities address these concerns from the outset.

In your letter, you indicated EPA's hope "to begin negotiations with each interested party reviewing this list to consider which site activities would be most closely aligned with its capacities, knowledge, skills and available resources." In considering the Activities List, PCMC is confused by EPA's following statement: "we anticipate that each Work Category represents a distinct project to be performed by one party." We look forward to further discussion on this point and defer any response regarding activities to which PCMC might be best suited and willing to undertake until a later point in the negotiations.

We anticipate raising further questions and comments on both the Activities List and the proposed OU3 map as the negotiation progresses. We trust these comments and the enclosed list of PCMC interests will assist the parties and inform future discussion among the parties.

Sincerely,

Polly Jessen

Enclosure

cc: Joan Card
Tom Daley, Esq.
Diane Foster
Jason Christensen

Park City Interests in Operable Unit 3 Negotiations[1]
Settlement Communication - Inadmissible under FRE 408
October 5, 2010

Good working relationship with EPA and the other participants

Effective community involvement plan, including an agreed-upon approach for individual landowners and Park City residents and businesses

Clear road map to address the overall Silver Creek watershed to protect the long-term health of the community and environment, including, for example:

- Complete investigation, disclosure of information regarding, and, as necessary, remediation of mine sites in or near the Empire Canyon CERCLIS boundary, including Quincy, Little Bell, Flagstaff, Anchor Mine, and Alliance Mine dumps
- Complete investigation, disclosure of information regarding, and, as necessary, remediation of sites within or near the Park City municipal boundary and outside of current CERCLIS boundaries, including the Treasure Hollow, California Comstock, Silver King Mine/Mill, and Ontario Mill and Mine sites

Willingness to examine creative solutions to soil and sediment remediation and achievement of water quality standards

Minimizing Park City taxpayer liability by holding other responsible parties accountable for their share of liability for the OU3 remedy and other sites in the watershed, including use of ASARCO settlement funds for OU3 and other remedial projects in the watershed

"Exit ramps" in the negotiated agreement if an unspecified removal action or objective ultimately is inconsistent with Park City's interests

Assured access to sufficient, low cost, environmentally-protective repository space for future disposal of Bevill-exempt mine waste originating from projects constructed or designated by Park City, including, as necessary, additional mine waste disposal space in the OU1 (Richardson Flat) mine waste repository in the near term and for the remaining operational "life" of the OU1 repository

Liability/contribution protection

An understanding of EPA's intentions for ASARCO settlement funds not used in OU3

Cooperation, disclosure, and financial assistance from UPCM (and any other responsible parties) in preparation of and compliance with UPDES permits for Judge Tunnel, Spiro Tunnel, and the Prospector Drain and Biocell and any other unpermitted point sources

Finalization of the Judge pipeline EA on its own schedule and not the schedule established by UDEQ for the UPDES permits

[1] Park City reserves the right to amend this list, as appropriate.

Access to EPA's records supporting identification of PRPs in the watershed

Complete investigation and abatement of physical mine hazards that may present a threat to the health and safety of the public in Park City

Financial assurances from private parties sufficient to assure they meet their remedial obligations in the watershed

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