



August 20, 2014

Dear Water Resources Review Committee Member:

Please accept these written comments to supplement the oral testimony provided at the August 20, 2014 Water Resources Review Committee meeting in Snowmass Village, CO. We were asked to discuss the Proposed Voluntary Cleanup Plan ("VCUP") for the Historic Keystone Mine Site on Mt. Emmons in Gunnison County, Colorado ("HKM VCUP"). Late last week, U.S. Energy, the company proposing the HKM VCUP, withdrew its application. We believe that it is still relevant to discuss our experience over the past nine months as a case study to discuss what could be changed to make this process better, increase transparency, and ensure protect public health and the environment.

High Country Conservation Advocates, formerly known as High Country Citizens' Alliance, was founded in 1977 to protect the Upper Gunnison River Valley from a proposed molybdenum mine on Mt. Emmons. Thirty-seven years later we continue to protect the health and natural beauty of the land, rivers, and wildlife in and around Gunnison County now and for future generations.

## I. The Voluntary Cleanup and Redevelopment Act and Voluntary Cleanup Applications

In 1994, the General Assembly passed the Voluntary Cleanup and Redevelopment Act, which led to the creation and use of VCUPs. The Act was passed to "provide for the protection of human health and the environment and foster the transfer, redevelopment, and reuse of the facilities and sites that have been previously contaminated with hazardous substances or petroleum products." C.R.S. 25-16-302(1) (2013). The state agency in charge of this process is the Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and Environment (hereinafter "CDPHE"). In its "How-to Guide" it notes that the idea is to encourage VCUPs, as many as possible, while removing impediments property owners might have in coming forward to conduct a cleanup. HAZARDOUS MATERIALS AND WASTE MGMT. DIV. COLO. DEP'T OF PUB. HEALTH AND ENV'T, VOLUNTARY CLEANUP ROADMAP A HOW-TO GUIDE 1 (2008) (hereinafter "ROADMAP"). "Traditionally, such barriers have included fear of prosecution or being forced to do more cleanup than they wanted." *Id.* By coming forward to CDPHE prior to cleanup, the property owner can receive a stamp of approval from CDPHE providing certainty that CDPHE considers the cleanup adequate.

Receiving this approval puts a property owner on track to receive assurance from EPA that it does not plan or anticipate taking any action at the site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601, *et seq.* MEMORANDUM OF AGREEMENT BETWEEN THE COLO. DEP'T OF PUB. HEALTH AND ENV'T AND THE U.S. ENVTL. PROT. AGENCY, REGION VIII (hereinafter MOA). EPA reserves the option to take action under CERCLA in certain situations, such as if the site is an NPL caliber, poses imminent and substantial endangerment to public health, welfare or the environment, CDPHE's approval of a cleanup plan becomes void, or the applicant failed to complete or materially comply with the cleanup plan as approved by CDPHE. *Id.* A VCUP when done right can be a win-win—with protection of human health and the environment as well as the removal of potential CERCLA liability for the property owner.

The VCUP process is designed to be a one-time interaction with CDPHE. ROADMAP at 9. Within 45 days of receiving an application CDPHE is to approve or deny the application. *Id.* CDPHE may, in some situations, extend the deadline to a certain date upon agreement with the applicant and there is also variance should CDPHE receive more than eight applications in a month. *Id.*

Currently, there is no oversight, enforcement capability, or public participation for VCUPs. *Id.* at 11-12. The limited exception seems to be when a proposed VCUP site is NPL caliber. *See* MOA and ROADMAP at 7. Rather than CDPHE providing construction oversight or certification, the property owner is required to self-certify that the remediation was completed according plan. *Id.* at 11. CDPHE also has no enforcement authority under a VCUP. *Id.* As CDPHE stated in the Roadmap “we cannot make you perform cleanup you don’t want to do, and we cannot make you complete a cleanup you have proposed. The applicant can ‘walk away’ at any time, with the only consequence being that any approval received from the state would be void.” *Id.* There are no formal requirements for public participation or review of VCUP applications. *Id.* at 12. Applications are, however, public documents so they are available upon request. *Id.* CDPHE states that it “routinely contacts the local health departments to see if there is any knowledge or interest in the site and will make a copy of the application available for local review if requested.” *Id.* To receive EPA’s assurance, an applicant must provide public notice within 30 days of approval that CDPHE approved a VCUP or no further action determination. *Id.*

## II. A Case Study: The Historic Keystone Mine Proposed Voluntary Cleanup Plan

The Historic Keystone Mine is located on Mt Emmons, and is approximately two miles outside the Town of Crested Butte. It is directly west and uphill from town and provides the drinking water for the town as well as important groundwater sources that are used by residents with wells. If you are familiar with Crested Butte, you are aware of its amenity based economy and that it is in the headwaters of the Gunnison River—a world renowned fly-fishing destination. The HKM consists of 4 mine adits (mine entrances) that continuously leak contaminated water. The majority of contaminants in this water are cadmium, zinc, and lead. Currently, this water is treated at a wastewater treatment plant so the toxic metals are removed to acceptable standards. This water is then discharged under a state effluent permit into Coal Creek. Prior to the wastewater treatment plant, Coal Creek, which runs through the Town of Crested Butte, ran orange. The rocks were covered in thick orange deposits from the metals and the water was even orange itself. The water treatment plant came online in the late 1980s and within a few years the orange tint was no longer visible (although it undoubtedly went downstream). This part of Coal Creek was recently designated as a state water quality segment.

U.S. Energy proposed a VCUP that would purportedly address the continued discharge of contaminated water from the mine adits. The basics of the proposed HKM VCUP was to use bulkheads, essentially concrete plugs, to plug four existing mine adits that are continually leaking contaminated water. The goal of the plugs was to allow the contaminated water to back-up behind the plug, introduce large amounts of lime to remove contaminants, and then the water would slowly come through the concrete plug. Once the water oozed through the plug, it would be passively treated to remove excess manganese. Yet, no one, including CDPHE or U.S. Energy to our best knowledge, have information regarding the hydrology on Mt. Emmons, such as groundwater flow rates and directions and groundwater and surface water connectivity, such as seeps and springs. Understandably the community was concerned.

October 31, 2013 stakeholders obtained U.S. Energy’s proposed HKM VCUP. The VCUP had been submitted to CDPHE October 4, 2013 and approved October 22, 2013. The stakeholders, including HCCA, Red Lady Coalition (RLC), Coal Creek Watershed Coalition, the Town of Crested Butte, and Gunnison County, raised many concerns with CDPHE regarding the HKM VCUP, which resulted in CDPHE’s suspension of approval November 5, 2013. HCCA’s top four concerns were: (1) the lack of sufficient baseline hydrological data to determine water flows and pathways; (2) the sites close proximity to the Town of Crested Butte’s municipal watershed; (3) the site’s close proximity to domestic wells; and (4) the site’s eventual discharge into Coal Creek, a headwater of the Gunnison River and, ultimately the Colorado River.

The stakeholders requested CDPHE to allow them to provide comments and remain involved in the process as it would impact the Town of Crested Butte, clean drinking water, and potentially other surface and groundwater sources on Mt. Emmons. CDPHE honored this request and allowed stakeholders to remain involved in the process. In January 2014, CDPHE requested U.S. Energy to provide additional information.

On March 21, 2014, CDPHE determined that the site was eligible for a VCUP. In the letter CDPHE requested again that U.S. Energy provide additional information requesting that additional information such as a comprehensive monitoring plan, comprehensive contingency plan, detailed preliminary bulkhead design, clarification of other identified issues, and the termination of the Notice of Intent for baseline information and prospecting operations with the Division of Reclamation Mining and Safety be withdrawn. Based on conversations with CDPHE staff, we have reason to believe CDPHE would have issued yet another request for additional information had U.S. Energy not withdrawn the HKM VCUP last week.

The last iteration of the HKM VCUP was submitted to CDPHE June 2, 2014. Together HCCA and RLC hired an independent consulting firm to review and determine the sufficiency of the proposed monitoring and contingency plan as well as the engineering design. The take-away from this report and our own review was that still, U.S. Energy had not provided CDPHE with the requested information and that the proposal, as it stood put the community, drinking water, and environment at risk.

Throughout the process, CDPHE was relatively silent on our concerns, which although it made some community members uncomfortable, is understandable since they needed to ensure any decision they made would not look biased. Since the VCUP's been withdrawn, a CDPHE employee that worked intimately on the HKM VCUP was quoted in our local newspaper as saying that a VCUP "might not have been the appropriate tool. There were a lot of hurdles to overcome and a lot more information was needed for the VCUP route." It also seems like agency staff were concerned about that the lack of enforcement provisions in the VCUP and about the unknowns regarding the hydrologic flow. This same employee was also quoted saying "If something went wrong with the VCUP proposal, water quality would be degraded and there would be a lag time to correct that situation. That could result in a risk to public health and the environment and that was a major concern." In short, CDPHE seemed to have shared stakeholders concern about the HKM VCUP although they were never expressed until after the withdrawal.

### III. How Can It Be Made Better? Potential Legislative Solutions

For a detailed legislative proposal it is necessary to sit down with CDPHE as well as other stakeholders and see what they would like changed. It would be interesting to know whether CDPHE believes the VCUP may not be appropriate for other sites than those listed specifically in the statute that are ineligible. It would also be interesting to learn whether what CDPHE believes could be improved. There are some issues, however, that our experience with the HKM VCUP raised that could be addressed and make the process better. Addressing these issues would help ensure VCUPs meet the stated purpose of the Act—to provide *protection* of human health and the environment as well as breathe new life into contaminated sites.

One suggestion would be to create two tracks for VCUP proposals. One track for the more typical brownfield cleanups that we generally think of, such as old gas stations, and another for complicated cleanups, such as old mine sites that have multiple points of contamination or have activities within different agency jurisdictions. From our experience, it seems like CDPHE is not equipped as the Act currently stands to handle such complicated cleanups. Providing a second track with additional parameters and perhaps even some mandatory measures for things that are particularly important (such proper baseline data) could greatly help CDPHE in ensuring the protection of human health and the environment. Cleanups are meant to be and need to be a win-win for communities and the environment as well as the property owner. Creating two tracks might be a way to continue encouraging and providing for

voluntary cleanups while being able to ensure that CDPHE has the tools necessary to adequately and sufficiently handle complicated cleanups and ensure protection of human health and the environment.

Another issue that became apparent with the HKM VCUP was the lack of public or stakeholder notice, as well as public or stakeholder participation. Under a second track, public notification could be easily added. Although application materials are public documents, how is the public to figure out about a VCUP if there is no notification requirement? In our experience, it does not seem sufficient for CDPHE to check-in with the local health department to determine if there is knowledge or interest in the site, as in our case that did not result in public notice and the HKM is of great interest to our community. The value in these documents being public is significantly decreased if the public does not know to ask about or for them. Accordingly, easy means of public notice could be added, such as posting a notice online and in local papers. The cost is minimal and this one additional step would go a long way to increasing state agency transparency.

With more complicated cleanups, it would also be advisable to explore public participation options, such as official commenting periods and/or meetings that would be held prior to CDPHE's decision on an application. This would likely require a longer review time for CDPHE's approval or denial than the current 45-day deadline. Communities have a right know that there may be cleanup activities taking place that could affect them. This seems especially necessary where, as here, there was a proposal that could substantially and negatively affect drinking water and water quality. Such process also increases transparency by removing the decisionmaking process from behind closed doors to the public arena. Such transparency is particularly helpful in legitimizing a final decision when there are many eyes watching.

In conclusion, we want to continue to encourage voluntary cleanups and it is essential for this programs success and the success of individual VCUPs that they are done well. This may require devising a second track so the VCUP process is less one-size fits all, providing CDPHE with tools to better handle complicated proposals while ensuring the safety of human health and the environment.

Sincerely,



Allison N. Melton  
Public Lands Director  
High Country Conservation Advocates  
PO Box 1066  
Crested Butte, CO 81224  
970.349.7104 ext.2  
[alli@hccaonline.org](mailto:alli@hccaonline.org)