



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

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Exhibit 6

*Sent via electronic mail.
July 1, 2024*

Ms. Michelle Metteer
Minturn Town Manager
301 Boulder Street, #309
Minturn, CO 81645

RE: Bona Fide Prospective Purchaser Considerations
Eagle Mine Superfund Site, Eagle County, Colorado

Dear Ms. Metteer,

Thank you for contacting the U.S. Environmental Protection Agency (the EPA or the Agency) about the Town of Minturn's (Minturn) plans concerning the property referenced below (the Property). Minturn has expressed an interest in acquiring, *i.e.*, purchasing, leasing, or obtaining easements, over eight parcels located within or around Operable Unit 3 (OU3) of the Eagle Mine Superfund Site (the Site) for several potential uses, further discussed below. As such, Minturn requested that the EPA provide a Superfund comfort/status letter.

The purpose of this comfort/status letter is to provide Minturn with information that may be relevant to the potential Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability concerns at the Property and summarize the relevant information available to the EPA about the Site as of the date of this letter. We hope this information will enable Minturn to make informed decisions as it moves forward with its plans regarding the Property.

Under CERCLA (commonly referred to as Superfund),¹ the Agency's mission is to protect human health and the environment from risks posed by exposure to contaminated or potentially contaminated land, water, and other media. A Superfund cleanup can help return properties to productive reuse. We are providing this letter consistent with the Agency's 2019 Comfort/Status letter policy.²

¹ 42 U.S.C. §§ 9601, *et seq.*

² See *2019 Policy on the Issuance of Superfund Comfort/Status Letters* (Aug. 21, 2019), available on the Agency's website at <https://www.epa.gov/enforcement/comfortstatus-letters-guidance>.

History and Status of the Site

The 235-acre Site (CERCLIS ID Number: COD081961518) is an abandoned mining and milling facility located along the banks of the Eagle River near Minturn, Eagle County, Colorado. The area is impacted by heavy metal contamination from past mining activities. Contaminants include arsenic, cadmium, copper, lead, and zinc in the soils, structures, surface water, sediments, and groundwater across the Site.

The State of Colorado (State) conducted a remedial investigation/feasibility study (RI/FS) in 1985, and the EPA listed the Site on the National Priorities List (NPL) in 1986. Cleanup at the Site began in 1988 under a Consent Decree/Remedial Action Plan (CD/RAP) between the State and a predecessor to the current potentially responsible party (PRP), Paramount Global.

The Site consists of three OUs, the definitions of which have evolved over time. OU1 was established to control the transport of toxic metals from the principal sources of mine waste pollution that are impacting the Eagle River and groundwater resources. OU1 now contains only the engineered features designed to capture and treat mine waste in surface water and groundwater. OU2 is geographically based and focuses on contaminated soils in the former town of Gilman. The EPA issued the Record of Decision (ROD) for OU3 in 2017. OU3 was established to mirror the boundaries of a proposed private residential development, which would require additional cleanup actions beyond those selected in the OU1 ROD. OU3 is media-based and focuses on the protection of human health for residential use through reduction of exposures to surface soil should a change in land use from recreational and potential trespasser (*i.e.*, unauthorized incidental users) to residential occur. Geographically, OU3 and OU1 overlap except for the area of Belden, which is in OU1 only.

The 116-acre OU3 is located within a tract of land known as the North Property, which is privately held by the Bona Fide Prospective Purchaser (BFPP), Battle North, LLC (Battle North). The OU3 remedy addresses potential land use changes by selecting additional remedial action to protect human health if the land is developed for residential use (hereinafter, "Remedial Work"). To that end, the OU3 ROD identified two remedial action objectives (RAOs): (1) Prevent exposure to contaminants in surface soils within OU3 above levels that are acceptable for current and future land use, and (2) Avoid or minimize adverse impacts to the existing engineered remedial features within OU3. Pursuant to an administrative settlement agreement and order on consent (ASAOC) with Battle North, the EPA, with the opportunity for review and comment by the Colorado Department of Public Health and the Environment (CDPHE), required implementation of institutional controls designed to address the RAOs under current land use conditions and, prior to any change in land use to residential use, must approve any work plans to ensure that the OU3 remedy is implemented and that OU3 is protective of human health and the environment. The ASAOC is attached as Exhibit 1.

The OU3 remedy currently consists of institutional controls called restrictive notices (RNs). The objective of the RNs is to prevent exposure to contaminants left in place and require that risks to human health and the environment are addressed if land use changes. Six separate RNs have been recorded within OU3 at: the old tailings pile (OTP) (Exhibit 3); the consolidated tailings pile (CTP) (Exhibit 4); Maloit Park (Exhibit 5); Rex Flats; roaster pile #5; and the Trestle Area.

Rex Flats, roaster pile #5, and the Trestle Area are currently not considered for purchase or lease and as such, their RNs are not included as exhibits to this letter.

Battle North has elected to change land use and implemented portions of the selected remedy for OU3, specifically for 5.31 acres of soils in the Trestle Area. Battle North, with EPA and State oversight, excavated approximately 486 cubic yards of soils in the Trestle Area, including 52 cubic yards of contaminated soils, driven primarily by arsenic concentrations. All soils with arsenic concentrations above the residential remedial goal of 40 mg/kg in the Trestle Area have been removed. Use restrictions are no longer needed for soil in the Trestle Area as all other OU3 contaminants of concern were addressed in the initial cleanup of OU1. Battle North is currently working with the State on modifying the RN that covers the soils in the Trestle Area. The groundwater use restrictions in the Trestle Area will remain in effect. All response activities at the OU3 Trestle Area are complete, and the Trestle Area soils pose no unacceptable risk to human health or the environment under the current land use, which consists of recreational users and, potential trespassers (*i.e.*, unauthorized incidental users), and potential future residential land use. The EPA has determined that no further response is necessary at the OU3 Trestle Area and partially deleted the OU3 Trestle Area from the NPL in September 2023. The rest of OU3 remains on the NPL.

Property Status

Interested parties can find information on sites that are, or potentially are, contaminated and may warrant action under Superfund, including site-specific documents and fact sheets, in the Superfund Enterprise Management System (SEMS).³

The EPA understands the Property to include the parcels and respective property interests listed below. The Property is also depicted on the “Bolts Lake Zoning and RC Info” Map attached as Exhibit 2.

Parcels, Proposed Potential Uses, Scope of Rights to be Acquired, Timing of Acquisitions and Remedy Compatibility | Outside of the Site

1. Highlands Area (zoning parcels 1 and 2 on map): Proposed potential uses include “residential, recreation, open space,” with fee title to be acquired at closing. The Highlands Area is located outside the Site and does not have an RN.
2. Reservoir South Area (zoning parcel 5 on map): Proposed potential uses include “public reservoir access, recreation,” with fee title to be acquired at closing. The Reservoir South Area is located outside the Site and does not have an RN.
3. Highway 24 Parcels (zoning parcels 6 and 8 on map): Proposed potential uses include “recreation, river access,” with fee title to be acquired at closing. The Highway 24 Parcels are located outside the Site and do not have an RN.

³ SEMS is available at: <https://cumulis.epa.gov/supercpad/cursites/srchsites.cfm>.

Parcels, Proposed Potential Uses, Scope of Rights to be Acquired, Timing of Acquisitions and Remedy Compatibility | Within the Site

1. Rec Center Parcel (zoning parcel 11 on map): Proposed potential uses include “community and recreational uses,” that may include the construction of buildings and other structures, with an option to purchase following completion of remediation and delisting from the Site. The Rec Center Parcel is part of the Maloit Park area and is located within the Site. The Rec Center Parcel currently has an RN prohibiting all potential uses (RN # 201919763, attached as Exhibit 5). However, after Remedial Work is completed and the RN is modified, Minturn’s proposed potential uses for “community and recreational uses” that may include the construction of buildings and other structures, are not incompatible with the anticipated future use restrictions for the Rec Center Parcel.
2. Old Tailings Pile (OTP) (zoning parcel 3 on map): Proposed potential uses include “recreational open space, housing,” with an option to purchase or lease after Remedial Work is completed. Proposed easements are for “access to the Highlands Parcel, recreational hiking and Nordic ski use, and associated trail construction, maintenance, and Nordic trail grooming.” With the exception of the access easement to the Highlands Parcel, easements or transfer of fee title will be granted after Remedial Work is completed. The OTP is located within the Site and currently has an RN prohibiting all proposed potential uses (RN # 202112199, attached as Exhibit 3). The locations where the access easements to the Highlands Parcel are proposed (see Exhibit 6), appear to be located outside areas of historical contamination within the OTP. The EPA understands that Minturn proposes developing a road across the OTP. An environmental sampling plan confirming the condition of the easement locations must be submitted for CDPHE and EPA approval prior to modifying the OTP RN for road construction. If the roadwork requires any surface disturbance, a materials management plan (MMP) or environmental sampling plan must be approved by CDPHE and EPA. After Remedial Work is completed and the RN is modified again, Minturn’s proposed potential uses for “recreational open space” and “housing” are not incompatible with the anticipated future use restrictions on the OTP Parcel, as long as they still comply with the anticipated remaining groundwater use restrictions.
3. Processing Area (zoning parcel 4 on map): Proposed potential uses include “reservoir access, dock, pavilion, parking, day-use area for public,” with an option to purchase after work is completed. Proposed easements are for “recreational hiking and Nordic skiing use, and associated trail construction, maintenance, and Nordic trail grooming,” with easements granted at closing. The Processing Area is located within the Site but does not have an RN.
4. Consolidated Tailings Pile (CTP) (zoning parcel 10 on map): Proposed potential uses include “solar, recreation (sports fields, hiking and Nordic skiing use along with associated trail construction), light industrial or transmission,” with an option to lease at closing. Proposed easements are for “recreational hiking and Nordic skiing use and associated trail construction, maintenance, and Nordic trail grooming,” with easements granted at closing. The CTP is located within the Site and currently has an RN (RN #

201919761, attached as Exhibit 4). The RN allows for recreational use authorized by owner in consultation with CDPHE (referred to as “Department” in the RNs), with the exception of activities that may damage the CTP cover such as use as an athletic field, unless authorized in a future Agency decision document or in an Agency-approved MMP or environmental sampling plan. The RN also allows for “solar arrays placed on the cover” in accordance with the following conditions:

- a. The Department must review and approve final design plans, including postconstruction monitoring and maintenance plan, before any ground disturbance commences.
- b. All structures must be above grade, unless otherwise approved by the Department.
- c. Structures must be designed and constructed to prevent ponding on, or erosion of the CTP cover. Positive drainage must be maintained for the CTP top deck both during and after construction of the solar arrays.
- d. Owner must inspect the solar arrays annually for signs of damage to the CTP cover. Owner must report inspection results to the Department within 2 weeks of the date of the inspection. Owner must repair any damage within 30 days of the inspection.

Minturn’s proposed potential use of “light industrial, transmission” and “trail construction” appears incompatible with the current RN, assuming that any construction associated with these uses would damage the CTP cover, including grading or excavation. These uses could be acceptable, however, if authorized in a future Agency decision document or in an Agency-approved MMP or environmental sampling plan. If trails are to be excavated, appropriate cover material also must be used on the trails to ensure the CTP cap remains protective and intact. Finally, this comfort letter documents consultation with the Department with respect to allowing winter recreational hiking and Nordic skiing use and trail grooming and confirms that these uses are not incompatible so long as the CTP cover is not damaged.

5. Maloit Park Wetlands Area (zoning parcel 12 on map): Proposed potential uses include “recreational fishing, hiking and Nordic skiing use and associated trail construction, maintenance and grooming,” with an option to purchase at closing. Proposed easements are for “recreational fishing, hiking and Nordic skiing use and associated trail construction, maintenance, and grooming” with easements granted at closing. Maloit Park Wetlands area is located within the Site and is a subpart of the larger Maloit Park area. The Maloit Park Wetlands area has an RN prohibiting all proposed potential uses (RN # 201919763, attached as Exhibit 5). Historically, the Agencies have approved winter recreational hiking and Nordic skiing and associated Nordic trail grooming in the Maloit Park Wetlands when the area is covered by snow. The Agencies would like to memorialize this approval in the future with a modification to the RN. Minturn’s proposed potential uses for “recreational fishing, summer hiking and associated trail construction” are incompatible with the anticipated future use restrictions for the Maloit

Park Wetlands area. These uses could be acceptable, however, if authorized in a future Agency decision document or in an Agency-approved MMP or environmental sampling plan.

Reuse of the Property

To ensure the remedy remains protective of human health and the environment, any development must be compatible with the EPA and State cleanup actions and institutional controls designed to protect the remedy and prevent unacceptable exposure to residual contamination. As such, Minturn should not conduct any activities or construct any structures that would interfere with the EPA's or State's investigation or cleanup or be inconsistent with the underlying land use assumptions used to design and implement the cleanup. As of the date of this letter, we have identified several incompatibilities between your proposed use of the Property as you have described it to us and EPA's and the State's selected cleanup option.

The following is a list of uses proposed by Minturn that currently are prohibited. The list does not include any parcels that are outside of the Site.

- Rec Center Parcel: community and recreational uses that may include the construction of buildings and other structures are prohibited.
- OTP: access to the Highlands parcel, open-space (not including winter recreational hiking, Nordic skiing, and associated trail construction, maintenance, and Nordic trail grooming), and housing uses are prohibited.
- Processing Area: reservoir access, dock, pavilion, parking, and day-use area for public are prohibited.
- CTP: recreational uses that would damage the CTP cover, including trail construction, and light industrial and transmission uses are prohibited.
- Maloit Park Wetlands: recreational fishing and summer hiking uses, and associated trail construction are prohibited.

The following is a list of future proposed uses prohibited once Remedial Work is performed at the associated parcel or parcels. The list does not include any parcels that are outside of the Site.

- CTP: RN will not be modified to permit recreational uses that would damage the CTP cover or for light industrial and transmission uses that would damage the CTP cover.
- Maloit Park Wetlands: RN will not be modified to permit recreational fishing and summer hiking uses, and associated trail construction.

Notwithstanding these prohibitions, it is possible that these and other uses could be compatible if authorized in a future Agency decision document or in an EPA and CDPHE-approved MMP or environmental sampling plan.

CERCLA's Bona Fide Prospective Purchaser Liability Protection

The EPA is providing you with information regarding the BFPP provision of CERCLA. Congress amended CERCLA in 2002 to exempt certain parties who acquire contaminated or potentially contaminated properties from CERCLA liability if they qualify as BFPPs. The BFPP provision provides that a person who meets the criteria of CERCLA §§ 101(40) and 107(r)(1),

and who acquires the property after January 11, 2002, will not be liable as an owner or operator under CERCLA. A court, rather than the EPA, ultimately determines liability under CERCLA. Thus, the EPA recommends that you consult with your legal counsel to assess whether you meet the definition of an owner or operator with regard to property and/or property rights you acquire at the Site.

A key advantage of the BFPP provision is that it is self-implementing; therefore, the Agency is not involved in determining whether a party qualifies for BFPP status. A party, on its own, can achieve and maintain status as a BFPP, which provides statutory protection from CERCLA liability, without entering into an agreement with EPA, so long as that party meets the threshold criteria and continuing obligations identified in the statute.⁴ Based upon your representation of your situation, the BFPP provision may apply. Note that a court, rather than the EPA, ultimately determines whether a landowner has met the criteria for BFPP status. Thus, the EPA recommends that you consult with your legal counsel to assess whether you satisfy each of the statutory requirements necessary to achieve and maintain BFPP status.

Among other criteria outlined in CERCLA, a BFPP must take “reasonable steps” to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substances as required by CERCLA § 101(40)(B)(iv). This requirement is explored further in the Common Elements Guidance.⁵ By making the BFPP Exemption subject to the obligation to take “reasonable steps,” the EPA believes Congress intended to protect certain landowners from CERCLA liability while at the same time recognizing that these landowners should act reasonably, in conjunction with other authorized parties, in protecting human health and the environment. As described above, the OU3 remedy currently consists of institutional controls called RNs. The objective of the RNs is to prevent exposure to contaminants left in place and require that risks to human health and the environment are addressed if land use changes.

Based on the information we have evaluated we believe that the following may be reasonable steps related to the hazardous substance contamination found at the Site. These requirements relate to the Property as described above:

1. Verifying remediated areas are protective and remain protective of appropriate exposure scenarios.
2. To the extent any structures or facilities, including access roads or hiking trails, are constructed within the CTP:
 - a. Submitting for CDPHE review and approval all final design plans, including post-construction monitoring and maintenance plans, before any ground disturbing activities commence;
 - b. Constructing all structures above grade, unless otherwise approved by CDPHE;

⁴ See EPA’s *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* (“Common Elements Guidance”) (Office of Enforcement and Compliance Assurance, July 29, 2019) available on the Agency’s website at <https://www.epa.gov/enforcement/common-elements-guidance>.

⁵ *Id.*

- c. Designing and constructing all structures to prevent ponding on, or erosion of, the engineered cover or areas requiring Remedial Work, in particular, maintaining positive drainage for the CTP top deck both during and after construction;
 - d. Inspecting structures and facilities annually for signs of damage to the engineered cover and reporting inspection results to CDPHE within two weeks of the date of the inspections, and repairing any damage within 30 days of the inspection;
 - e. Refraining from excavating below the groundwater level and installing groundwater wells or structures below the groundwater level which may expose groundwater or alter the groundwater flow; and
 - f. Implementing stormwater management and erosion controls as necessary to ensure that construction does not result in the discharge of additional stormwater to the Site.
3. Preventing public exposure and damage to the remedy, as necessary, by restricting Site access through appropriate physical barriers and signage to all or portions of the Property prior to completion of the Remedial Work, such as areas outside the OTP access roads, or where no Remedial Work is anticipated, such as the Maloit Wetlands during times when snow cover is less than 12 inches.
 4. Ensuring no actions are taken that would interrupt or interfere with effective, continuous operation of remedial features at the Site, including, but not limited to: the water treatment plant run-on/run-off control features, pipelines, conveyances, groundwater collection structures, or other engineered features;
 5. Timely mitigating newly discovered releases and addressing environmental conditions, *e.g.*, if soils are discovered to be contaminated, notifying EPA and CDPHE and managing soils appropriately by assessing and inspecting the extent of contamination upon discovery, providing agencies with a proposed materials management plan to be approved by EPA and CDPHE, and managing soils in accordance with the approved materials management plan;
 6. Ensuring that any contractors follow all reasonable steps.

Any reasonable steps suggested by the EPA above are based on the nature and extent of contamination currently known to the Agency and are provided as a guide to help you as you seek to reuse the Property. Because a final determination about which steps are reasonable would be made by a court rather than the EPA, and because additional reasonable steps may later be necessary based on Site conditions, this list of reasonable steps is not exhaustive. You should continue to identify reasonable steps based on your observation and judgment and take appropriate action to implement any reasonable steps whether EPA regional staff has identified any such steps.⁶

⁶ CERCLA § 101(40)(B)(iv) provides that “The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future releases; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”

Separately, the EPA, CDPHE, and Minturn have entered into an agreement extending the rights and responsibilities of the OU3 ASAOC to Minturn upon acquisition of title to the above referenced properties within the Site. Compliance with the requirements of the ASAOC and the protections of the ASAOC shall apply according to their terms and may also constitute “reasonable steps.”

In addition, other requirements, called “continuing obligations,” outlined in CERCLA to maintain BFPP status after property lease or acquisition also must be met and include, but may not be limited to:

1. Providing all legally required notices with respect to the discovery or release of any hazardous substances at the facility;
2. Stopping any continuing release and preventing any threatened future release;
3. Preventing or limiting human, environmental, or natural resource exposure to any previously released hazardous substance;
4. Providing full cooperations, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration (*e.g.*, EPA, CDPHE, Paramount Global, and Battle North), in particular, the EPA and CDPHE will require continuing access to the property for the purpose of performing the Remedial Work, groundwater monitoring, five-year reviews, and monitoring compliance with land use restrictions;
5. Complying with any land use restrictions established or relied on in connection with the response action and not impeding the effectiveness or integrity or any institutional controls, including RNs; and
6. Complying with any request for information or administrative subpoena.

State Actions

We can only provide you with information about federal Superfund actions at the Site, federal law and regulations, and EPA guidance. For information about potential state actions and liability issues, please see the attached letter from CDPHE and, in the event you have additional questions or wish to discuss the information in the attached letter further, you may contact Sarah Graves, State Project Manager (sarah.graves@state.co.us) or Jason King, Senior Assistant Attorney General (jason.king@coag.gov).

Conclusion

The EPA remains dedicated to facilitating the cleanup and beneficial reuse of contaminated properties and hopes the information contained in this letter is useful to you. You may find it helpful to consult with your own environmental professional, legal counsel, and your state, tribal, or local environmental protection agency before taking any action to acquire, clean up, or redevelop the Property. These consultations may help you obtain a greater level of comfort about

the compatibility of the proposed use and ensure compliance with any applicable federal, state, local, and/or tribal laws or requirements. If you have any additional questions or wish to discuss this information further, please contact me, (chan.sydney@epa.gov or (303) 241-9767) or Kayleen Castelli, Site Attorney (castelli.kayleen@epa.gov or (303) 312-6174).

Sincerely,

Sydney Chan
EPA Remedial Project Manager

Exhibit 1: OU3 Administrative Settlement Agreement and Order on Consent

Exhibit 2: "Bolts Lake Zoning and RC Info" Map

Exhibit 3: OTP RN, RN # 201919762

Exhibit 4: CTP RN, RN # 201919761

Exhibit 5: Maloit Park RN, RN # 201919763

Exhibit 6: Highlands Parcel Access Easements Map

cc: Polly B. Jessen, Kaplan Kirsch & Rockwell LLP
Kayleen Castelli, EPA Region 8, Site Attorney
Benjamin Mathieu, EPA Region 8, Site Attorney
Erin Agee, EPA Region 8 CERCLA Enforcement Section Supervisor
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Sarah Graves, Colorado Department of Public Health and Environment
Elisabeth Freed, EPA HQ, OSRE
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