

STATE OF COLORADO

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Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department
of Public Health
and Environment

March 1, 2010

Mr. Caoimhin P. Connell
Forensic Applications Consulting Technologies, Inc.
185 Bounty Hunter's Lane
Bailey, Colorado 80421

RE: Response to Critical Review
4690 West 76th Avenue
Westminster, Colorado

Dear Mr. Connell:

The Hazardous Materials and Waste Management Division of the Colorado Department of Public Health and Environment (the Department) has reviewed your "critical review" (the Critical Review) for the property located at 4690 West 76th Avenue, Westminster, Colorado (the subject property), transmitted to the Department via correspondence dated February 11, 2010. The Critical Review provides your opinions regarding a preliminary assessment (the Preliminary Assessment) for the subject property, conducted by Gobbell Hays Partners, Inc. in August 2007, and also briefly mentions review of a report by a home inspection company, Inspection Perfection.

Before addressing your specific comments regarding the two reports, the Department would like to point out that the subject property was remediated between November 2007 and January 2008. Initial clearance sampling was conducted in December 2007, with follow-up sampling, after additional cleaning, conducted in February 2008. A final report documenting property remediation was issued on February 28, 2008. Therefore, your conclusions regarding the state of the subject property based on the August 2007 Preliminary Assessment are neither accurate nor relevant. Further, you are neither an attorney nor are you representing a regulatory agency with authority over the subject property; therefore, you are not in a position to provide legal or regulatory opinions regarding work conducted at the subject property. As the regulatory agency responsible for establishing the cleanup requirements set forth in 6 CCR 1014-3 (the Cleanup Regulation), the Department is given broad deference regarding its interpretation and application of the Cleanup Regulation and the authorizing statute set forth in Section 25-18.5-101, C.R.S., et. seq. (the Cleanup Statute). To the extent that our opinions and interpretations are in conflict with yours, we believe that our opinions and interpretations would prevail if legally challenged.

As a matter of background, the subject property was the location of a drug related arrest in August 2003. The police report documents drug possession, but drug manufacturing was not observed by the arresting officers. The date of the police report is significant in relation to the applicability of the Cleanup Statute, which became effective in April 2004, and the Cleanup Regulation, which became effective in March 2005. Neither of these are retroactive. Therefore, the drug related arrest that took place in 2003 did not trigger a statutory or regulatory

cleanup requirement. There is no information available that would suggest that drug activity took place at the subject property after the Cleanup Statute or the Cleanup Regulation became effective. Therefore, this property was not designated an illegal drug laboratory under the Cleanup Statute, and the Cleanup Regulation was not triggered. It should be noted that under the Real Estate disclosure statute for meth labs, Section 38-35.7-103, C.R.S., a cleanup requirement is triggered during the sale of any residential property contaminated with methamphetamine (meth) that has not been remediated, regardless of when the drug activity took place.

The Department encourages property owners to clean up meth labs that pre-date the cleanup requirements as they are still a public health concern. In addition, the Department has offered assistance to property owners who unknowingly purchased properties contaminated with methamphetamine. The subject property was identified as methamphetamine contaminated by a property owner that had purchased the property after the 2003 drug related arrest, and who was unaware of the past drug related activity at the property at the time of the purchase. This individual contacted the Department for assistance, which was provided through our Brownfields Program.

The Preliminary Assessment, property decontamination, clearance sampling and reporting were conducted on behalf of the Department. The Department is familiar with the qualifications and experience of Mr. Peter Cappell of Gobbell Hays Partners, and has determined the Mr. Cappell is an industrial hygienist qualified to perform work under the Cleanup Regulations. Further, Mr. Cappell was involved in the stakeholder process leading to the Department's rulemaking that resulted in the Cleanup Regulation. Mr. Cappell has demonstrated to the Department, and to several local oversight agencies, that he is a qualified industrial hygienist, familiar with the regulatory and statutory requirements governing meth lab cleanup in Colorado.

Review of Preliminary Assessment by Gobbell Hayes Partners, Inc.

The discussion provided below presents the Department's position regarding the regulatory and statutory requirements that apply to the subject property. The discussion further addresses areas in your Critical Review that present erroneous information, inaccurate regulatory or statutory citations or interpretations, or unsupported statements or opinions. The following discussion does not address every false or erroneous statement included in the Critical Review, or may only address such statements to the extent that they apply to the subject property.

1. As discussed above, the only known drug activity at the subject property took place before the Cleanup Statute and Cleanup Regulation were enacted; therefore, the property was not an illegal drug laboratory under the Cleanup Statute, and the requirements of the Cleanup Regulation were not triggered. Although not specifically required, the Preliminary Assessment, remediation, and clearance sampling conducted at the subject property followed the process set forth in the Cleanup Regulation.
2. The term "drug laboratory" and the associated statutory definition cited in the Critical Review have been revised, effective June 9, 2009. The term "drug laboratory" in Section 25-18.5-101, C.R.S., was replaced by "illegal drug laboratory" and the definition was revised to include areas that controlled substances were "used" and areas contaminated by controlled substance "use."
3. The term "illegal drug laboratory" and its associated definition, is exclusive to the Cleanup Statute (Section 25-18.5-101, C.R.S., et. seq.) and the real Estate disclosure requirement for methamphetamine, set forth in Section 38-35.7-103, C.R.S. The term "illegal drug laboratory" is not a defined term under the criminal codes set for in Title 16 of the Colorado Revised Statutes cited in the Critical Review, and in turn, the criminal codes do not dictate cleanup requirements for illegal drug laboratories. Further, it is up to the enforcement discretion of the local authorities to determine whether or not to bring criminal nuisance charges at a property. This is not the role of an industrial hygienist.

4. There is no requirement in the Cleanup Regulation that a preliminary assessment *document* be generated. Section 4.0 of the Cleanup Regulation sets forth specific information to be collected during a preliminary assessment; however, the only reporting requirement is that specified in Section 8.0. Therefore, your assertion that the Preliminary Assessment for the subject property was fatally flawed, based on a non-existent “mandatory” requirement that a preliminary assessment *document* contain certain information, is in itself fatally flawed. Further, you erroneously include information required under Section 8.0 of the Cleanup Regulation in the list of “mandatory” information required for a preliminary assessment. The requirements of Section 8.0 apply to the final report, not the preliminary assessment, unless the preliminary assessment is being used as a final report, and complies with the clearance sampling requirements of Section 6.0 and the Cleanup Levels set forth in Section 7.0.
5. Throughout the Critical Review, you use the term “authorized Industrial Hygienist.” This is not a defined term in the Cleanup Regulation nor the Cleanup Statute. There is no program in place to “authorize” an industrial hygienist to perform work under the Cleanup Regulation. The Cleanup Regulation merely requires that a person filling the role of “Consultant” as defined in Section 3.0 of the Cleanup Regulation, be either a Certified Industrial Hygienist, certified by the American Board of Industrial Hygiene, or be an industrial hygienist as defined in Section 24-30-1402, C.R.S. The Cleanup Regulation requires the industrial hygienist to provide a statement of qualifications with the final report, but there is no such requirement for a preliminary assessment *document* since there is no requirement for such a document unless it is also being used as the final report. Mr. Cappell included the required statement of qualifications in the final report, and the Department has determined that Mr. Cappell is an industrial hygienist qualified to fill the role of Consultant under the Cleanup Regulation.
6. In your Critical Review, you discuss the requirements of the Cleanup Regulation as if they are indivisible, as if the failure to meet, or fully meet, a requirement nullifies all information presented. This is not the case. The Department understands that there are instances in which information requested Sections 4.0 and 8.0 of the Cleanup Regulation is not available. Further, in the case of methamphetamine use, in the absence of manufacturing, evaluation of manufacturing related information, such as method of manufacturing and identification of cooking areas, chemical storage areas or waste disposal areas, are not applicable. Further, at properties such as the subject property where the drug activity took place years before the Preliminary Assessment was conducted, there are often no observable signs of contamination or evidence of manufacturing. The purpose of a preliminary assessment is to provide information that forms the basis for property decontamination and clearance sampling. To the extent that information obtained during the Preliminary Assessment is incomplete, due to the information being unavailable, not applicable, or erroneously omitted, the remaining information should not be categorically dismissed. If the Department, or the local oversight agencies, applied such an inflexible standard when reviewing work conducted under the Cleanup Regulations, very few documents would be accepted, including documents that you have generated.
7. The Department disagrees with your characterization of the sampling conducted during the Preliminary Assessment as “wonton and apparently misguided and unnecessary.” Further, your statement that “[n]owhere in the State regulation is sampling required during a Preliminary Assessment” is false. As cited on page 14 of the Critical Review, Section 4.6 of the Cleanup Regulation states that “the consultant may determine that assessment sampling is necessary to verify the presence or absence of contamination” and Section 6.0.1 states: “Except as provided in 6.0.2, assessment sampling shall be conducted as part of the preliminary assessment to characterize the nature and extent of contamination.” Section 6.0.2 states: “As provided in Appendix A of these regulations, the consultant may determine that some areas should be deemed contaminated based on data other than assessment sampling.” There were no visible signs of contamination at the subject property, no documented meth manufacturing, and contrary to your assertion, the subject property was not “already otherwise known to be contaminated.”

Therefore, assessment sampling was appropriately conducted to verify contamination, and to determine the nature and extent of contamination to aid in the development of a decontamination plan.

8. The Department disagrees with your statement, on page 15 of the Critical Review, that “[c]ontrary to popular belief among poorly trained consultants, the mere value of ‘0.5 µg/100cm²’ is not the State of Colorado cleanup level, but rather the value upon which final clearance level is based and which is described in the mandatory Appendix A of the State regulations.” This statement is false, and demonstrates your lack of understanding of the relationship between the Cleanup Levels set forth in Section 7.0 of the Cleanup Regulation, and the Composite Decision Level for composite sampling set forth in Appendix A. Contrary to your statement, the cleanup level of 0.5 µg/100 cm² does not change for composite samples; rather the Composite Decision Level is used to detect hot spots and “determine if one or more of the individual samples making up the composite could exceed the cleanup level, but remain undetected due to ‘dilution’ that results from the compositing process” (6 CCR 1014-3, Appendix A). The underlying cleanup level remains unchanged at 0.5 µg/100 cm², and only the value of the Composite Decision Level may vary based on the number of individual samples that make up the composite sample.
9. The Department disagrees with your statements and opinions, provided on page 15 of the Critical Review, regarding sampling conducted during preliminary assessments. Samples collected during a preliminary assessment can be used to demonstrate that a property is not contaminated above Cleanup Levels as long as sample collection complies with the clearance sampling requirements set forth in Section 6.0 and Appendix A of the Cleanup Regulations. It was to address this specific scenario that the Department included the following certification statement in Section 8.23 of the Cleanup Regulation:

“I do hereby certify that I conducted a preliminary assessment of the subject property in accordance with 6 CCR 1014-3, § 4. I further certify that the cleanup standards established by 6 CCR 1014-3, § 7 have been met as evidenced by testing I conducted.”

This certification is often misused by industrial hygienists for properties that have in fact been decontaminated, but at which the industrial hygienist does not want to certify the work of the cleanup contractor. The Department intended that this certification statement be limited to use at properties where decontamination is not required.
10. The Department strongly disagrees with your erroneous statement, on page 15 of the Critical Review, that “depending on the manufacturing method used, (which was never identified by GHP as required), the concentration of methamphetamine may be entirely unimportant...” The potential presence of other contaminants, in addition to methamphetamine, does not override the requirement to meet the Cleanup Level for methamphetamine. The Cleanup Level for methamphetamine **applies in all situations and for all manufacturing methods**. The Cleanup Levels for other contaminants **may** also apply, depending on the manufacturing method.
11. The Department disagrees with your assertions and opinions regarding the identification of manufacturing methods, chemicals used, areas of contamination, chemical storage areas and waste disposal areas. As previously stated, the subject property was the location of an arrest for drug possession, with no indications of manufacturing. Further, there are no meth lab seizure reports available from the North Metro Drug Task Force that would indicate manufacturing took place at the subject property. Since there were no signs of meth manufacturing, there was no way to determine possible manufacturing methods or chemical use, or whether there were cooking areas, chemical storage areas or disposal areas. To suggest that Gobbell Hays Partners failed to comply with regulatory requirements due to this lack of available information is unreasonable.

12. In several places in the Critical Review, you make reference to an aerial photograph that shows “areas of stressed vegetation on the property” that in your opinion “could indicate contamination migration from the property onto adjacent properties.” The Department viewed a recent aerial photo of the subject property and disagrees with your characterization of areas lacking vegetation as having “stressed vegetation.” The aerial photo does not provide the level of detail necessary to make such a determination. Further, the Department was in communication with Mr. Cappell of Gobbell Hays Partners during all assessment and cleanup activities, and is aware of the fact that Mr. Cappell evaluated the exterior portions of the subject property and observed no visible signs of contamination or waste disposal.
13. Contrary to your assertion in the Critical Review, photographs were taken as part of the Preliminary Assessment, and provided in Appendix D. While you may not have been provided with a complete copy of the Preliminary Assessment for review, the Table of Contents clearly indicates that a photo log is provided as Appendix D.
14. Your discussion, assertions and opinions regarding Sections 8.7, 8.11, 8.12, 8.13, 8.14, 8.21, 8.22, 8.23 and 8.24 of the Cleanup Regulation are not relevant to the Preliminary Assessment since these requirements apply only to the final report. Your miss application of these requirements demonstrates your lack of understanding of the process set forth by the Cleanup Regulation.

Review of Report by Inspection Perfection

You make a statement that “[i]n performing the work, Inspection Perfection has not violated any work ethic, or any State statute and has similarly not violated any State regulation.” The Department has not been provided with a copy of the Inspection Perfection report for review; however, home inspectors are not qualified to perform methamphetamine testing under the Real Estate disclosure statute, Section 38-35.7-103, C.R.S., nor under the Cleanup Regulations. We are concerned that any home inspection company performing methamphetamine testing may be misrepresenting the usefulness and legal authority of tests they perform, and may be providing erroneous information that is subsequently relied on by their clients to make decisions regarding a property. Further, while you, as an industrial hygienist, may be qualified to provide technical opinions, you are not qualified to opine as to legal or regulatory compliance.

Summary

The Department has determined that, based on the information provided in the Preliminary Assessment and the final report, the subject property was adequately decontaminated, and does not pose a risk to individuals entering or occupying the property. To the extent that assessment or cleanup procedures may have deviated from the strict requirements of the Cleanup Regulation, the immunity afforded by Section 25-18.5-103(2), C.R.S. may not apply, and if sold the owner may not be exempt from the disclosure requirements set forth in Section 38-35.7-103, C.R.S. However, in the absence of information that demonstrates that residual contamination exists at the subject property at concentrations that pose an exposure risk, failure to meet immunity or disclosure requirements does not invalidate the adequacy of the cleanup.

Throughout the Critical Review, you make serious allegations regarding the qualifications and competence of Gobbell Hays Partners. Based on our review of your report, the Preliminary Assessment, and the final report documenting remediation of the subject property, the Department has determined that your allegations are unfounded and without merit. Further, based on the numerous erroneous statements in the Critical Review regarding the statutory and regulatory requirements of Colorado’s Cleanup Statute and Cleanup Regulation, it is clear that you do not fully understand these requirements.

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March 1, 2010

The Department requests that you refrain from providing legal and regulatory opinions or legal advice regarding the methamphetamine cleanup requirements set forth in the Cleanup Regulation and the Cleanup Statute. Your opinions should be limited to the technical issues in areas in which you have experience as an industrial hygienist.

If you have any questions concerning this letter, please contact me at (303) 692-3357.

Sincerely,

A handwritten signature in cursive script that reads "Colleen Brisnehan".

Colleen Brisnehan
Hazardous Waste Corrective Action Unit
Solid and Hazardous Waste Program

cc: Fonda Apostolopoulos - CDPHE/HMWMD
David Kreutzer - Colorado Attorney General's Office
Brian Hlavacek - Tri-County Health Department, Aurora Office
Deanne Kelly - Tri-County Health Department, Commerce City Office
Dave Horras - City of Westminster
Peter Cappell - Gobbell Hays Partners, Inc.
Sherry Dimick - Prime Properties Realty Real Estate
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