

Colorado's Institutional Controls

2018 DOE LM

Long-Term Stewardship Conference

August 22, 2018

Colorado Department of Public Health
and Environment

Hazardous Materials and Waste
Management Division

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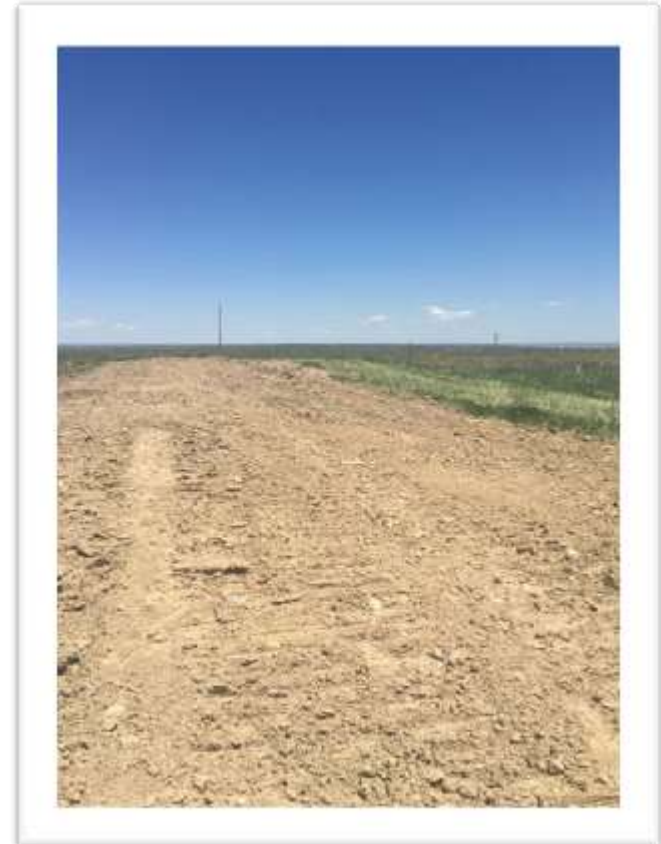
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COLORADO
Hazardous Materials
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Department of Public Health & Environment

Institutional Controls (“ICs”)

- Legal instruments
- Used to enforce land and water use restrictions
- Imposed as part of environmental cleanups
- Where there is contamination remaining that would prohibit unrestricted use



E.g. Rocky Flats COU, image of E. Trench 7



Colorado - basis in statute

- SB 145 and SB 139 created legally enforceable mechanisms for implementing ICs
- **C.R.S. §§ 25-15-101, et seq., Colorado Hazardous Waste Act**
- Required for cleanups conducted under many, but not all, state or federal authorities; so, know where you fit!



- ECs and RNs are also available *voluntarily*, even when not required by statute.



Types of institutional controls

Ordinance + intergovernmental agreement (IGA)	Environmental Covenant (EC)	Notice of Environmental Use Restriction (Restrictive Notice, RN)
City and county ordinances plus an IGA	Created pursuant to C.R.S. § 25-15-321	C.R.S. § 25-15-321.5
	Colorado's view is that it is based in police power	Explicitly based on state's police power (10 th Amendment - gives states rights and powers "not delegated to the United States")
Rarely used	Binding on current and subsequent owners of the land and likely on persons with prior recorded interests in the property	Binding on current and subsequent owners of the land AND persons with prior recorded interests in the property <u>Preferred for federal facilities</u>

Applies to what sites?

- Statute says applies to -
 - Resource Conservation and Recovery Act (RCRA)
 - Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
 - Uranium Mill Tailings Radiation Control Act (UMTRCA)
 - Colorado Hazardous Waste Act (CHWA)
 - Colorado Radiation Control Act (CRCA)
 - Colorado Solid Waste Disposal Act (CSWDA)



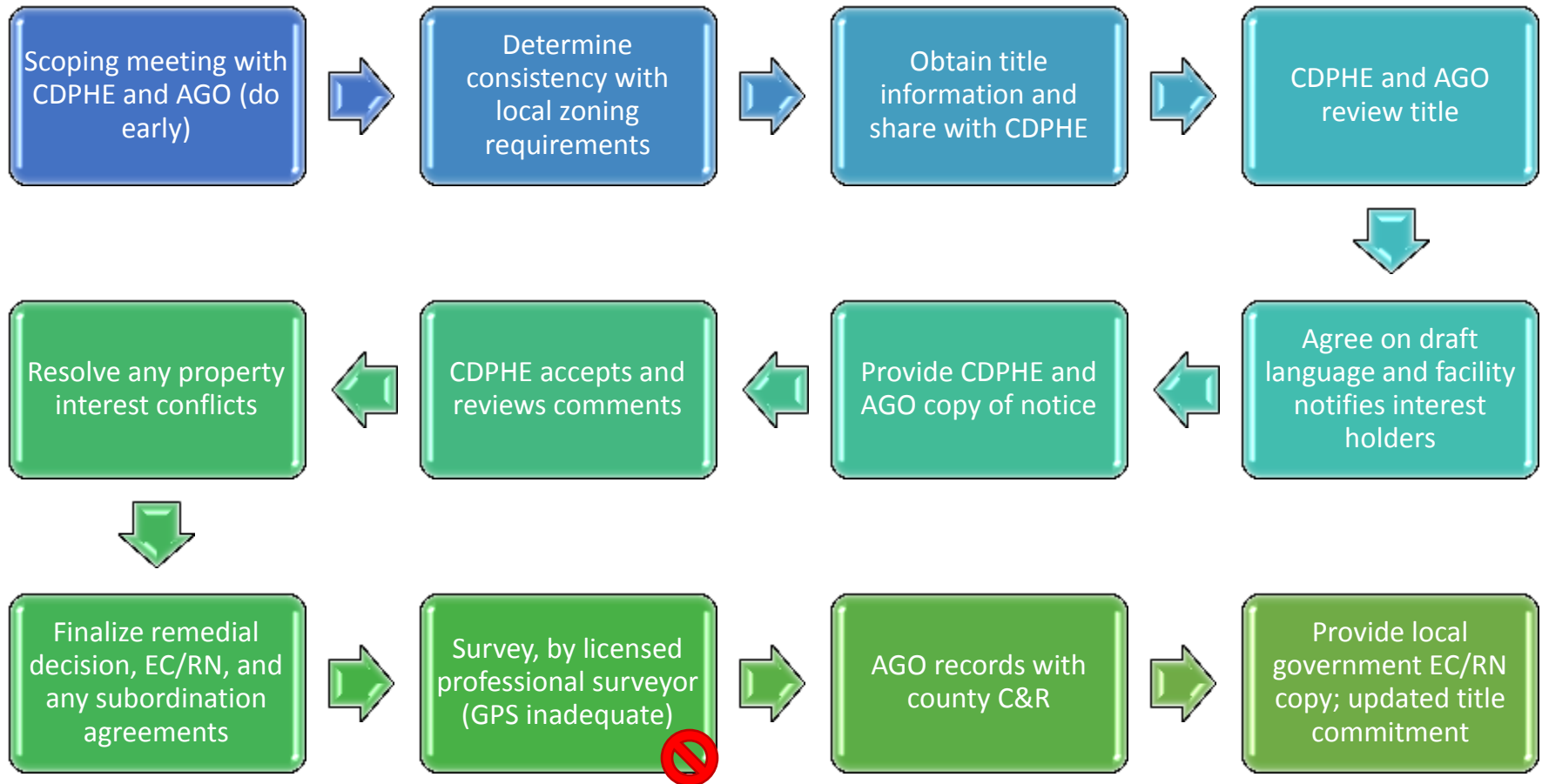
Rocky Flats Central Operable Unit, a CERCLA/RCRA site



Colorado sites with ECs, RNs, or IGAs



General steps to create an EC/RN



CDPHE approves and enforces

- CDPHE must approve an EC or RN, plus attorneys
- May later modify or terminate an EC or RN with CDPHE's approval
- Verifies institutional controls in place
- Conducts inspections to determine IC compliance
- May enforce and get an injunction
- Maintains database
- Collects fees



Rocky Flats Central Operable Unit, annual site walk-down

ECs vs. RNs: Colorado's take on the federal property issue

- Federal agencies opposed Colorado's environmental covenant law for legal reasons, i.e. ECs = “disposals of real property”
- **Argument: only the General Services Administration can dispose of surplus federal property**
- So, Colorado created the RN option, put in statute
- RNs are expressly state police power based instruments, not property based
- Therefore, avoids
 - (1) problem of property disposal by the United States, and
 - (2) question whether CDPHE has power over prior interests

Not all types of DOE LM sites are subject to ECs/RNs



Project Plowshare - Rulison Test Site

- State statutory ICs not required (AEA site only), but optional
- COGCC drilling permit conditions, AND
- Deed restriction (1976) - is essentially a DOE-held restrictive covenant, another way to protect human health and environment



What is a Deed Restriction?

Deed Restriction

- Also called a “restrictive covenant”
- Based in property law – it is a private real estate agreement
- Would be enforceable by DOE/agreement parties

Environmental Covenant

- Based in regulatory power/IC statute
- May be based in police power or property law (depends on who you ask)
- CDPHE involvement required and can enforce

Restrictive Notice

- Based in regulatory power/IC statute – state police power
- Prior interests bound, **preferred** for federal facilities and federal lands
- CDPHE involvement required and can enforce



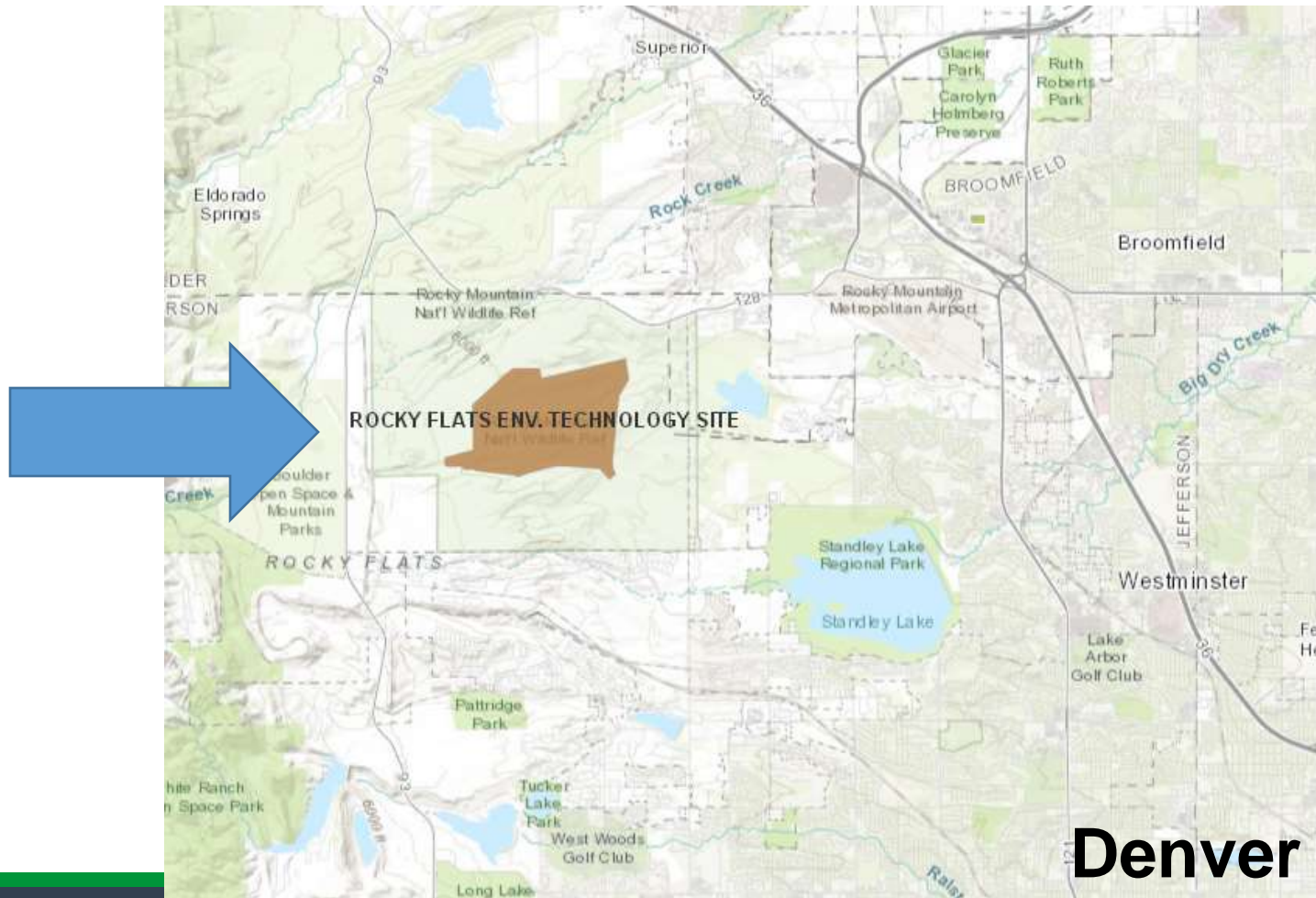
Why ICs are important long-term stewardship tools for DOE LM

- Long-lived and hard to remediate radionuclides
- Provide notice and a public record
- Provides legal mechanism for CDPHE to enforce conditions that allowed closure without removal of all contamination to a unrestricted use level and to protect human health by prohibiting certain uses
- Owners/responsible parties do not get to walk away
- Requires regular inspections; these sites stay on CDPHE's radar



E.g. Rocky Flats Central Operable Unit

Rocky Flats Central Operable Unit



Rocky Flats – ICs part of remedy

- Institutional controls are a required, major component of the CERCLA remedy for COU
- Helps ensure protection of human health and environment (COU not suitable for all uses)
- EC in 2006; modified in 2011
- EC changed to RN in 2017
- Annual site inspection



Rocky Flats RN - Use Restrictions

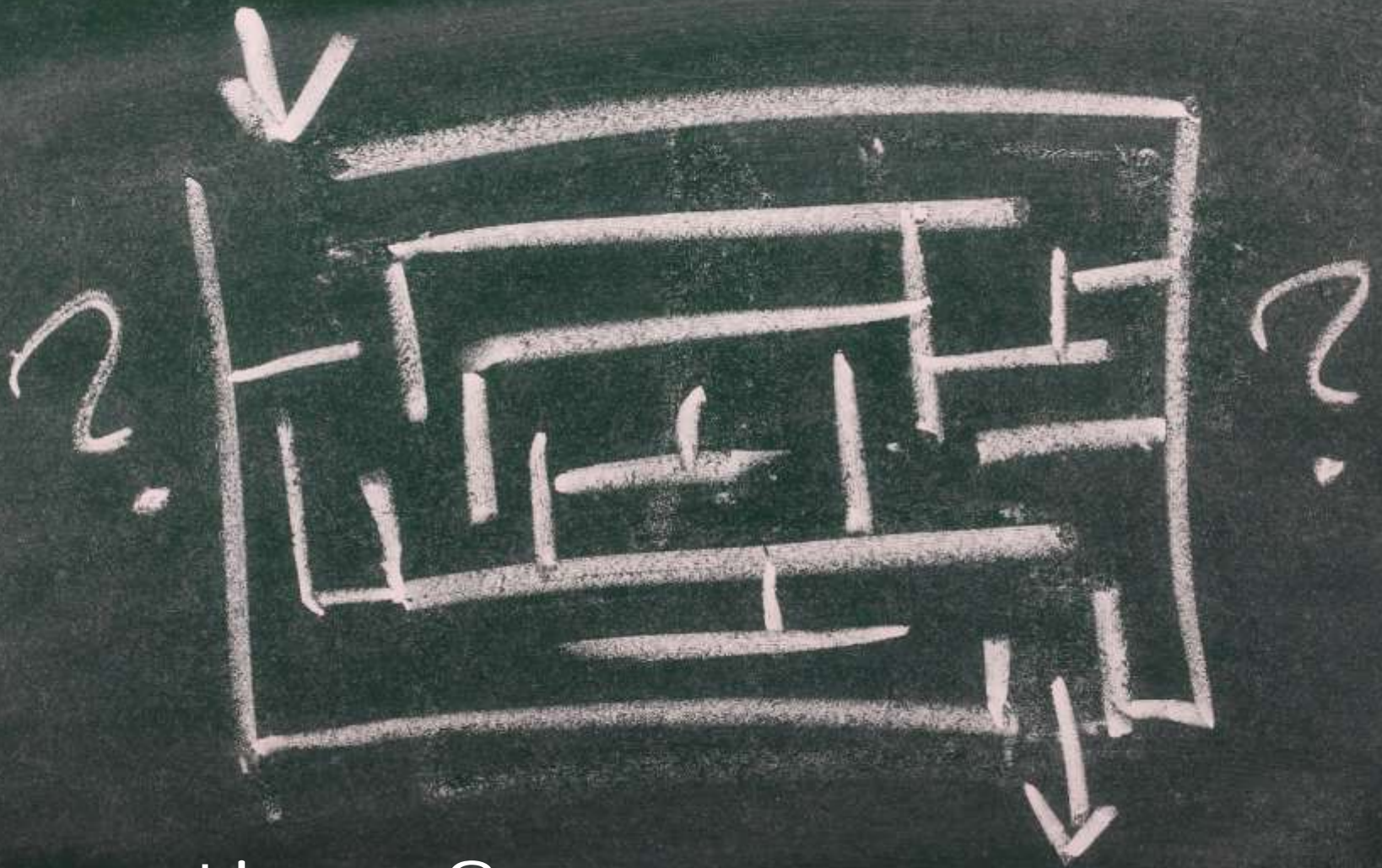
- Prohibit construction and use of buildings
- Excavation, drilling, and other intrusive activities >3' bgs are prohibited
- No grading, excavation, digging, tilling, or other disturbance of surface soils is permitted
- Surface water cannot be used for drinking or agricultural purposes; no groundwater wells
- Landfill and engineered component restrictions
- ***EXCEPT where prior regulatory review and approval - ICs do not necessarily prohibit O&M, more wells, etc.***



Resources and further research

- CDPHE guidance, policy, and model language:
<https://www.colorado.gov/pacific/cdphe/hmcovenants>
- Sites with environmental covenants and use restrictions:
<https://www.colorado.gov/pacific/cdphe/sites-environmental-covenants-and-use-restriction>
- GIS maps: <https://www.colorado.gov/pacific/cdphe/hm-gis-data>





Questions?



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