

MEMORANDUM***CONFIDENTIAL & PRIVILEGED
ATTORNEY-CLIENT COMMUNICATION***

To:	Mayor Matthew Fenn; Vice Mayor Terry Nolan; Council Members Jason Chisholm, Michael Donovan, Tom Mallette, Denise Rogers and Jeremiah Barron; Dan Field, Town Manager; William J. Sims, Town Attorney
From:	James J. Hamula <i>Hast</i>
Date:	May 20, 2025
Subject	EPA's April 3, 2025 Letter

This Memorandum responds to Mr. Donovan's request made and consented to by the Town Council in its April 18, 2025 meeting for an identification and analysis of the inconsistencies between EPA's April 3, 2025, letter to Mayor Fenn and EPA's prior communications to the Town. Three statements made in EPA's letter are inconsistent with prior communications between EPA and the Town and/or well-established EPA policy and practice. Each is identified below, with explanation of the inconsistency.

1. ***Development of Repository Covers:*** "The great majority, if not all land uses, including construction of buildings or parks, would not be compatible with the evapo-transpirative type of cap that is anticipated in the ROD."
 - a. **Problem:** This statement is:
 - i. Wholly inconsistent with EPA policy and practice at other Superfund sites across the country
 - ii. Contradicts EPA's "Reuse Assessment Study" published in 2020 and cited in EPA's 2022 FS and 2023 ROD, and
 - iii. A reversal of EPA's prior acceptance of the Town's conceptual reuse/redevelopment plans for the IKM and HS sites
 - b. **EPA Superfund Policy and Practice**
 - i. On July 23, 1999, EPA announced the Superfund Redevelopment Initiative (SRI) to facilitate the return of Superfund sites to productive use. SRI resulted in a national effort to develop policies, procedures and practices to achieve this goal. See EPA website providing reuse/redevelopment resources to the public.
<https://www.epa.gov/superfund-redevelopment>
 - ii. Policy Document – Example: EPA regions "**are encouraged to consider reasonably anticipated future land use ... in a manner that support the reuse of sites.**" It is

EPA policy to “ensure that the [Superfund] remedy selected does **not create unnecessary barriers to site reuse.**” *Memo, “Considering Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-lead Superfund Sites”, EPA OSWER Directive 9355.7-19 (March 17, 2010);* <https://sempub.epa.gov/work/HQ/175563.pdf>

- iii. Practice Documents and Resources – Examples:
 - 1. “Reuse Opportunities at Capped Superfund Sites” (provides multiple examples of successful reuses on capped sites, including sites with “evapo-transpirative” caps); <https://sempub.epa.gov/work/HQ/196748.pdf>
 - 2. “Reusing Superfund Sites: Commercial Use Where Waste is Left on Site” (provides technical information useful in planning, designing, and implementing safe commercial reuse of sites with on-site containment remedies, including “evapo-transpirative” capped waste repositories); <https://sempub.epa.gov/work/HQ/174617.pdf>
 - 3. “Reusing Superfund Sites: Recreational Use of Land Above Hazardous Waste Containment Areas” (provides technical information on how sites with on-site waste containment remedies, including waste repositories with “evapo-transpirative” caps, have been safely reused for recreational purposes while ensuring that the integrity and protectiveness of the remedy are maintained); <https://sempub.epa.gov/work/HQ/174085.pdf>
 - 4. EPA’s Superfund Redevelopment Success Stories - Case Study Database; <https://www.epa.gov/superfund-redevelopment/superfund-redevelopment-success-stories-case-studies>

- c. EPA’s “Reuse Assessment Study”
 - i. EPA’s reuse assessment, conducted in 2018-19 and reported in 2020, was limited to the former HS site and anticipated that the final remedy would be a “waste repository” (i.e., “an enclosed, engineered disposal unit designed to safely store contaminated material”).
 - ii. The purpose of EPA’s assessment for the HS site was to:
 - 1. **“Confirm ... a list of appropriate uses for the property”;**
 - 2. “Explore how the design and location of a waste repository could inform reuse potential”; and
 - 3. **“Identify recommendations to preserve reuse options, to the extent feasible, during development of the cleanup options in EPA’s [forthcoming] feasibility study.”**
 - iii. EPA identified three “reuse themes” in the community, including “cultural heritage”, “recreation and open space”, and “mixed-use economic development.”
 - iv. EPA identified “community ideas for reuse”, including **trails, picnic areas, amphitheater or event space, museum, nature preserve, and markets and retail combined with park amenities to support multi-uses.**
 - v. EPA observed that **“many of the [foregoing] reuse ideas could likely be compatible with the cleanup remedy but would need to be configured ... based on the location of the waste repository.”**
 - vi. EPA further stated that if the waste repository is sited ...

1. In the “smelter tailings swale” area, the waste repository “could be used as a trailhead, gulch observation point and **parking area** for trail access”;
2. In the “northern portion of plateau near downtown”, the waste repository “**could support low-impact uses** such as parking, open space and lightweight structures”;
3. In the “southern portion of plateau”, the waste repository “**could support low-impact uses** such as parking, open space and lightweight structures.”

vii. EPA’s “Reuse Assessment Study” concluded with “**reuse examples ... from other communities similar to Dewey-Humboldt** that have returned a Superfund site to productive use”

viii. NOTE: While EPA’s “Reuse Assessment Study” focused on the HS site, the document’s considerations and examples are potentially relevant to the IKM site as well, where a similar capped waste repository is to be built.

d. Reversal of EPA’s Prior Communications to Town

- i. Background:
 1. Considering and using the foregoing policies and case studies, Town staff developed conceptual reuse/redevelopment plans for the IKM/HS sites in June, July, and August 2023.
 2. In a special meeting held on August 22, 2023, the Town Council specifically reviewed EPA’s Superfund reuse/redevelopment policy, a successful Superfund reuse case study, and possible reuse options for the IKM/HS sites. After discussion, the Town Council authorized revision of the 2009 General Plan to include the reuse/redevelopment of the IKM/HS sites, consistent with EPA’s anticipated waste repository remedy.
 3. In September 2023, the Town formally initiated the process of revising its 2009 General Plan to, among other things, include for the reuse/redevelopment of the IKM/HS sites consistent with open space (recreational) and light commercial uses. A draft of a revised General Plan with these ideas was presented to the General Plan Steering Committee (GPSC) for its review and consideration.
 4. On October 10, 2023, the Town Council, Planning and Zoning, and the GPSC met jointly in a study session to review potential reuse/redevelopment options for the IKM/HS sites and surrounding areas.
- ii. EPA-Town Communications
 1. On November 2, 2023, Town and EPA representatives met in Phoenix.
 - a. The Town presented, in part:
 - i. Town’s desire to reuse/redevelop the IKM/HS sites, consistent with EPA policy and practice
 - ii. Town identified its reuse/redevelopment intentions for the IKM/HS sites (i.e., open space/recreational and light commercial uses)
 - iii. Town expressed “strong opposition” to “cap-and-fence outcomes that leave large areas of the Town unusable and vacant in perpetuity”

- b. EPA's Mike Montgomery (Director, Superfund and Emergency Management Division):
 - i. Affirmed EPA's reuse/redevelopment policy,
 - ii. Affirmed EPA Region 9's intent to follow the policy and facilitate reuse at the IKM/HS Superfund site
 - iii. Expressed "no objection" to the Town's reuse/redevelopment intentions and concepts, and
 - iv. Committed to working with the Town in these regards
2. On November 7, 2023, the Town Council was advised of EPA's general acceptance of the Town's reuse/redevelopment intentions and concepts. Minutes of the meeting state: "EPA agreed with the Town's reuse plans ... Mr. Sims reported that both the EPA and ADEQ were willing to work with the Town on possible reuses."
3. On November 21, 2023, EPA's Mike Montgomery sent a letter to the Town, thanking the Town for meeting and clarifying a couple of unrelated issues.
NOTE: In clarifying issues, EPA's Mike Montgomery did NOT withdraw his expressed support for the Town's reuse/redevelopment plan. Rather, he stated: "**[W]e look forward to working with the Town**" on such matters.
4. On December 8, the Town sent a letter to EPA to memorialize, among other things, the Town's reuse/redevelopment presentation to EPA and the consensus between the parties on the Town's reuse/redevelopment intentions and concepts.
NOTE: Attached hereto as Attachment "A" is language from the Town's letter that provides relevant detail on the Town's expressed reuse/redevelopment intentions and concepts in the November 2, 2023 meeting.
5. On December 14, 2023, EPA's Angeles Herrera, Assistant Director, Superfund and Emergency Management Division (i.e., Mike Montgomery's lieutenant in the Superfund office) responded to the Town's December 8 letter: "**We appreciate the information that you provided regarding recreational and energy generation reuses at 'capped' repositories and recreational, energy generation, and light-commercial (i.e., agri-business and agri-tourism) reuses at 'non-capped aprons' contemplated under the revised General Plan.** As you revise the General Plan, we ask the Town to remain mindful of the reasonably anticipated future land uses ("RAFLUs") identified in the ROD (see Figure 4 and associated text). Any significant inconsistency between RAFLUs and the revised land-use framework for the Town may impact remedies identified in the ROD and lead to delays that may jeopardize funding available for remediation."

NOTE: EPA does NOT register concern for or opposition to the Town's reuse/redevelopment plans. EPA asks simply to be kept apprised, asks to see the General Plan when finished, and asks that Town remember

RAFLU. Indeed, EPA expressed no concern for or opposition to the Town's plans on November 2 or on December 14.

6. On August 29, 2024, the Town delivered to EPA and ADEQ an “agency review” draft of the Town’s General Plan (as prescribed by state law), which included the Town’s conceptual reuse/redevelopment plans and asked for comment within the prescribed 60-day time period.
 - a. EPA did not comment, suggesting no concern for or opposition to the Town’s reuse plans, consistent with prior communications.
 - b. By contrast, in a letter dated November 4, 2024, ADEQ provided minor comment, stating among other things the following: “The plan refers to the goal to transform the EPA Iron King Mine and Humboldt Smelter Superfund Site into mixed-use agribusiness, agritourism and/or recreational areas. ADEQ understands the community’s desire for future reuse of the EPA Superfund Site. The future use of the property must be suitable under the EPA’s Record of Decision. ADEQ requests adding clarifying language associated with the Town’s vision of future reuse that explains there may be limitations pursuant to restrictions for an EPA Superfund Site.”
 - c. On November 22, 2024, the Town responded to ADEQ stating it would address ADEQ’s comments as appropriate. And, the Town did so in the final General Plan document.

e. Concluding Observations:

- i. From the beginning of its internal considerations and its agency presentations on IKM/HS reuse, the Town has understood, accepted, and stated that there are engineering limitations to any reuse/redevelopment of the IKM/HS sites, and has calibrated its intentions and plans according to those limitations.
- ii. The Town Council has approved every IKM/HS reuse/redevelopment presentation to EPA since 2023. Since 2023, members of the Council that have been the same and approved all such discussions include Mayor Fenn, Denise Rogers, and Jeremiah Barron. (Vice Mayor Terry Nolan has been on the Council since 2023 as well but has consistently recused himself from reuse/redevelopment discussions).
- iii. Not until April 3, 2025, did EPA state: “The great majority, if not all land uses ... would not be compatible with the ... type of cap that is anticipated in the ROD,” suggesting agency concern with not only the Town’s reuse intentions and plans but ANY reuse of the capped repositories.
- iv. Town’s reuse/redevelopment intentions and concepts cannot reasonably be said to have been “oversold” to the Town in view of the Town’s receipt of the April 3 letter.
 1. Town’s reuse intentions and concepts were drawn from EPA policy and case studies
 2. Town Council was thoroughly apprised of EPA policy and case studies, was apprised of proposed reuses for the IKM/HS sites, specifically approved such reuses for consideration in the General Plan, and has approved the final General Plan with such reuses included.
 3. EPA accepted the Town’s reuse intentions without objection

- v. Further, the Town and EPA have consistently expressed for the past two years their mutual intentions to coordinate on the design of the waste repository. The whole premise for such coordination was reuse of the IKM/HS areas.
- 2. ***Soil Management:*** “[W]e [i.e., EPA] are not aware of [a soil management] ordinance being passed at any other Superfund site.”
 - a. Examples: There are many examples of soil management ordinances being adopted by former mining/smelting communities located in Superfund sites. Examples have been provided and discussed on several occasions with the Town Council, as recently as in a February 14, 2025 email and in a February 18, 2025 regular meeting of the Town Council. These examples included:
 - i. East Helena Superfund Site, East Helena, Lewis & Clark County, Montana
 - ii. Silver Bow Creek/Butte Area Superfund Site, Butte, Montana
 - iii. California Gulch Superfund Site, Leadville, Colorado
 - iv. Bunker Hill Mining & Metallurgical Complex (aka Coeur d'Alene Basin) Superfund Site, Shoshone County, Idaho
 - v. Midvale Slag/Sharon Steel Superfund Sites, Midvale, Salt Lake County, Utah
 - b. EPA Region 9:
 - i. It is possible that the EPA Region 9's project team (with Region 9 encompassing Arizona, California, Hawaii, Nevada, and the Pacific Islands) is “not aware” of soil management ordinances at other Superfund sites due to limited experience with cleanups in mining/smelting communities.
 - ii. Because the Town only recently (February 27, 2025) broached the subject of a soil management ordinance with EPA Region 9, Town representatives have not yet cited EPA Region 9 representatives to the above examples of soil management ordinances at Superfund sites.
 - c. Concluding Observations:
 - i. EPA Region 9's apparent inexperience with soil management ordinances at Superfund sites should not be construed as general EPA opposition to such ordinances (which clearly is not the case), or even EPA Region 9's opposition to such ordinances.
 - ii. The Town has the authority to adopt such an ordinance, if it wishes, using similar ordinances adopted elsewhere as guidance. The Town's plan has been to solicit EPA and ADEQ review and comment on such an ordinance to ensure alignment with EPA's remedy.
- 3. ***Notion of Partial Repository Covers:*** “The cap will completely cover the two waste repositories and, to ensure its integrity of purpose, **will not be designed or constructed to accommodate deposition of additional waste.**”
 - a. Background:
 - i. Upon the initial engagement of the Town's environmental team (March 2023), the team was advised that EPA had committed to the then-Mayor and other members of the Town Council in various settings that a place would be provided for deposition of additional IKM or HS waste found after final construction of the IKM/HS waste repositories and that such a place would be at or about the waste repositories.

- ii. This reported commitment is the basis of the environmental team's understanding regarding the issue. Such a commitment was presumed by the team to be true because of the designation of such deposition places at other Superfund sites in mining/smelting communities, as evidenced in their soil management ordinances.
- iii. Not until the February 27, 2025, meeting with EPA did the Town address the subject of a soil management ordinance, in the context of which the Town broached for the first time in two years the issue of an additional waste deposition location.

b. Observation:

- i. EPA Region 9's statement should be viewed as coming from a place of apparent inexperience with soil management ordinances at mining/smelting Superfund sites and initiating an obvious need for discussion on the community's reasonable need for an additional waste deposition location.
- ii. Even if the waste repositories' caps will not be designed or constructed to accommodate deposition of additional waste and even if the Town does not adopt a soil management ordinance, historic IKM and HS wastes will be found after completion of the IKM and HS waste repositories. Such waste will need to be managed and deposited somewhere. Therefore, post-remedy deposition of waste is a reasonable issue for discussion between EPA and the Town.

Attachment “A”

The following is language excerpted from the Town’s December 8, 2023 letter to EPA memorializing the Town/EPA’s November 2, 2023 meeting, to which EPA’s December 14, 2023 responds:

“As we indicated in the November 2 meeting, the Town Council has spent considerable time over the past six or more months developing a future land use vision for the IKM and HS areas. Attention to future reuses of the IKM and HS areas was jump started in March 2023 with EPA’s proposed remedial action plan, which current Town leadership realized would permanently affect large geographic areas of the Town. After the Town Council’s submission of its written comments on EPA’s proposed remedial action plan in May 2023, discussion of future reuses of the IKM and HS areas became more earnest and focused in June, July, and August 2023. The Town Council came to understand that the Town’s comprehensive land use plan (referred to in Arizona as a “General Plan”) had not been updated since 2009, that the Town’s current General Plan was essentially silent regarding EPA’s Superfund work and inevitable remediation of the IKM and HS sites, and that the Town was four years overdue in meeting a statutory mandate requiring municipal general plans to be reconsidered and updated every ten years.

“Currently, the Town Council, with input from Town residents, is actively working to update its General Plan and intends to have a revision of its General Plan completed early next year. The Town’s revised General Plan will acknowledge the history of the IKM and HS operations, the environmental legacy of those historic operations, EPA’s planned remediation of the IKM and HS areas, and the Town’s vision for reuse and redevelopment of these areas. When completed, the Town’s revised General Plan will be Dewey-Humboldt’s officially adopted, sanctioned, and authorized plan for future land use and development in Dewey-Humboldt, including the IKM and HS areas. When adopted, the Town’s revised General Plan will have an important legal effect in Dewey-Humboldt. Under Arizona law, “all zoning and rezoning ordinances or regulations … [must] be consistent with and conform to the adopted general plan of the municipality” (A.R.S. § 9-462.01.F).

“While discussing possible future uses of the IKM and HS areas in connection with the Town’s General Plan update, the Town Council learned of EPA’s Superfund Redevelopment Program and related policy directives, namely that **EPA regional offices are to “consider the interplay of land use (including reasonably anticipated future land use) with remedy implementation and the remedy itself” and to “consider reasonably anticipated future land use … in a manner that supports the reuse of sites.”** The Town Council learned how “[p]roductive reuse of a Superfund site can provide many benefits to a community,” including how “[a]ppropriate reuse of a site can support the long-term effectiveness of a remedial action by reducing the possibility that other, potentially non-protective land uses might occur.” And, the Town Council learned of EPA’s policy to “ensure that the [Superfund] remedy selected does not create unnecessary barriers to site reuse.”

“Against this background, the Town Council learned of technically implementable and EPA-approved options for reuse and redevelopment of capped Superfund sites throughout the U.S., including in EPA Region 9, and the Town Council reviewed and studied multiple cases of successful reuse and redevelopment of remediated, capped Superfund sites at former metal mining, milling, and smelting sites in EPA Regions 7, 8, and 10, including the Big River Mine Tailings/St. Joe Mineral Corp and other Superfund Sites in the former Lead Mining Belt of southeastern Missouri; the Silver Bow Creek/Butte Area Superfund Site in Butte, Montana; the Cherokee County Superfund Site in Cherokee County, Kansas; the California Gulch Superfund Site in Leadville, Colorado; the Bunker Hill Mining and

Metallurgical Complex Superfund Site in the Coeur d'Alene Basin of Idaho; and the Sharon Steel and Midvale Slag Superfund Sites in Midvale, Utah.

"After reviewing reuse and redevelopment case studies at similarly situated Superfund sites, particularly the Midvale, Utah case study, the Town Council has drawn conclusions about reuse and redevelopment options that are technically implementable and should be approvable at the IKM-HS Superfund site. **For the "capped" repositories at the IKM and HS sites, the Town Council envisions recreation reuses (e.g., athletic fields, parks, playgrounds, picnic pavilions, bike and foot paths, interpretive trails, habitat creation) and energy generation reuses (e.g., a utility-scale solar facility).** For the "non-capped" aprons around the repositories at the IKM and HS sites, the Town Council envisions accessory reuses to the recreation and energy generation reuses (e.g., roads, parking lots, concession stands, public restrooms, and maintenance and storage facilities), as well as light commercial reuses consistent with the Town's rural character, such as agri-business and agri-tourism reuses. All such reuses need further elaboration but are sufficiently conceptualized to be included in the Town's updated, soon-to-be issued General Plan.

"In our November 2 meeting, we were pleased to have you confirm EPA Region 9 's support of Superfund site redevelopment and reuse generally and of the Town Council's redevelopment and reuse plans for the IKM and HS areas in particular. From the Town's perspective, this was an enormously significant step in aligning the Town and EPA's respective goals for redeveloping and remediating the IKM-HS Superfund Site. On the Town's part, **we will be sending you and your staff the Town's revised General Plan upon its final issuance, and will look forward to engaging with EPA Region 9 staff (and/or contractors) regarding waste repository cap and contour issues to ensure maximum use of the IKM and HS repository areas and aprons for the Town's intended uses.** On EPA's part, we will look for notice from the agency on when and how we may engage effectively and efficiently on relevant repository cap and contour issues."