July 19, 2010

CHAPTER 13

ESTABLISHING CHAPTER 13 OF THE EUREKA CITY, UTAH LAND USE ORDINANCE BY ADDING REGULATIONS AND PERMITTING PROCEDURES FOR EXCAVATIONS AND DEVELOPMENT IN THE EUREKA MILLS SUPERFUND SITE.

WHEREAS, the United States Environmental Protection Agency ("EPA") has identified and designated an area within the municipal limits of the City of Eureka ("City"), known as the Eureka Mills Superfund Site ("Site") (a map of the Site is attached hereto), as being contaminated with mining wastes containing high concentrations of lead and other metals and has consequently placed such Site on the EPA's National Priorities List for cleanup and remediation under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq.; and

WHEREAS, EPA's remedy for the Site recommends land use controls including restricting the movement, treatment, or disturbance of certain soil within the Site absent advance notice to and permission from the City and further requires information identifying the nature of the material to be moved or disturbed; the plans for handling, storing, or removing such materials; and any proposed or planned storage site for same; and

WHEREAS, EPA and the City agree that the purpose of land use controls restricting the movement, treatment or disturbance of contaminated soil within the Site is to protect the remedy that placed clean soil materials in the top 18inches to prevent exposure to lead contaminated soils within the Site; and

WHEREAS, the City wishes to extend the protection of land use restrictions to all areas of the City where Contaminated Soils have not been remediated by EPA and those areas of the City that may now or in the future fall outside the Site boundaries; and

WHEREAS, the implementation and enforcement of land use controls by the City regulating excavation and building activities within the Site, for which the City is willing to take responsibility and which could minimize the disturbance, transfer, inhalation, and ingestion of contaminated soils, thus lessening the health risks posed by the Site to public health and safety; and

WHEREAS, EPA and the City have conferred and agreed that the adoption and enforcement of this ordinance will provide the appropriate mechanism by which the review and permitting of excavation and building activities within the Site can be efficiently and appropriately carried out at the local level; and

WHEREAS, the City has determined that this chapter of the land use ordinance is necessary to further public health, safety, and welfare.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF

EUREKA, UTAH, AS FOLLOWS:

Section 1

That the Eureka City Land Use Ordinance of Eureka, Utah, is hereby amended by adding new Chapter 13, "SPECIAL REGULATIONS - EUREKA MILLS SUPERFUND SITE," to the Eureka City Land Use Ordinance, which shall read as follows:

Chapter 13 SPECIAL REGULATIONS - EUREKA MILLS SUPERFUND SITE.

(1) APPLICABILITY.

(A) These regulations shall apply to and govern any excavation, development, or other construction activity that may cause or contribute to the movement or disturbance of contaminated soil within the boundaries of the Eureka Mills Superfund Site ("Site") as those boundaries are identified and designated by the United States Environmental Protection Agency ("EPA") and within the City corporate limits. A map developed by EPA and incorporated into this ordinance, which depicts the boundaries of the Site and the current City corporate limits, shall be maintained in the City Hall. The map shall be available to the public during regular business hours.

(B) The provisions of this chapter may be amended from time to time to address changes at the Site and/or in State or Federal laws and regulations applicable thereto or changes to the City corporate limits. The City will inform EPA and the State before it amends this Chapter to allow for their review and consultation with the proposed changes.

(C) Nothing contained in this Chapter is intended or shall be construed to supersede or limit the authority vested in EPA or the Utah Department of Environmental Quality ("UDEQ") under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq., or any other Federal or State law, rule, or regulation.

(2) DEFINITIONS.

As used in this Section, the following terms shall have the meaning specified unless the context requires otherwise:

(A) "CERCLA" or "Superfund" means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq., as amended.

(B) "City" means the City of Eureka, Utah.

(C) "Cleanup" means the remedial action conducted by EPA in accordance with EPA's Record of Decision (ROD) for the Eureka Mills Superfund Site, Eureka, Utah, September, 2002 as it relates to residential cleanup and the Remedial Action Work Plan (2003, as amended). The Cleanup provides an 18 inch clean soil cover with the re-establishment of a vegetative cover, or an 18 inch clean rock cover or a paved surface (concrete or asphalt) or a permanent building with a floor. (In residential areas, EPA's Cleanup did not include the removal of contaminated material more than18 inches below the ground surface.)

(D) "Coarse-Grained Soils" means soils with more than 50 percent of its particles larger than 0.075 millimeters. Refer to ASTM D 2487 (Unified Soil Classification System). Coarse-Grained Soils also means roadbase or gravel.

(E) "Contaminated Soil" or "Contaminated Material" means soil or material containing lead concentrations of 231 parts per million (ppm) or greater for residential and commercial use areas and 735 ppm or greater for recreational use areas.

(F) "Drip Line" means area within the dripline of an established tree, i.e., the area of the circle that could be drawn on the soil around a tree, with a radius equal to the distance from the trunk to the tip of its outermost branch.

(G) "EPA" means the United States Environmental Protection Agency.

(H) "Exempted Activity" is any soil disturbing activity within the Site and within the City corporate limits that does not require a permit under this chapter of the Eureka City Land Use Ordinance but requires the property owner or other responsible party to adhere to the Performance Standards in subsection 7 of this chapter of the Land Use ordinance. Exempted Activities include but are not limited to the following: planting trees, digging holes for installation of fence posts, emergency repair of underground utility lines, i.e., sewer, water, or gas.

(I) "Fine-Grained Soils" means soils with less than 50 percent of its particles larger than 0.075 millimeters. Refer to ASTM D 2487 (Unified Soil Classification System).

(J) "Hard Surface Cover" means a non-permeable barrier a minimum of 2 inches thick overlaying the ground surface, such as paving (asphalt or concrete) and including buildings and other permanent structures.

(K) "Marker Barrier" – means a permeable geotextile fabric placed to delineate the presence of contaminated material below 18 inches, over which 18 inches of clean topsoil or clean roadbase material is placed.

(L) "Open Cell" means a repository (or landfill) at the Site designated by EPA specifically and solely for the disposal of Contaminated Soil generated within the Site or the City limits.

(M) "Permit Area" means the property or properties where Restricted Activities will take place pursuant to the requirements of the excavation permit issued by the City.

(N) "Person" means an individual, partnership, corporation, association, company, landowner, tenant, occupant, contractor, subcontractor, or any public body or political subdivision.

(O) "Protective Cap" shall mean a soil barrier placed over Contaminated Soil, to provide a protective barrier. The thickness of protective caps comprised of coarse-grained soil (gravel, roadbase, etc.) shall be 18 inches. The thickness of protective caps comprised of fine-grained soil (topsoil, clay, etc.) shall be 18 inches and have a vegetative cover. Soils comprising the protective cap shall have a lead concentration of 100 ppm or less.

(P) "Recreational Use" shall mean use of property for sports fields, motocross tracks, open space, or other uses not specified as Residential/Commercial use. Trails and paths are included in the definition of Recreational Use only if they are designated and recognized by the City for a specific purpose

(Q) "Residential/Commercial use" shall mean use of property for businesses, schools or residential homes, day care facilities, parks or play areas used by small children.

(R) "Restricted Activity" means any excavation or earth moving activity within the Site or within the City corporate limits that is not an Exempted Activity and that results in a disturbance of soil, or which may disturb the soil, below the 18-inch clean soil cover or which reduces the clean soil cover to less than 18 inches in depth. Some areas within the Site have not been cleaned up, pending future development, because existing vegetation in those areas limits exposure to contaminated soils. In areas of the Site that have not been cleaned up, and/or where there is no 18 inch clean soil cover, "Restricted Activity" means any excavation or earth moving of any depth or the removal of the vegetative cover that limits exposure to the Contaminated Soils.

(S) "Site" means those areas within the City that are within the boundaries of the Eureka Mills Superfund Site as designated by EPA in the September 2002 ROD pursuant to Superfund and as depicted on the official map maintained at City Hall.

(T) "Soil" means inert earthen material disturbed as the result of excavation or construction within the Site regardless of grain size.

(U) "State" means the State of Utah, Department of Environmental Quality.

(V) "Vegetative Cover" means plant life, including, but not limited to, grass, trees, shrubs, vines, and sod, planted or installed to ensure stabilization of a Protective Cap comprised of fine-grained soil and to prevent its erosion. Adequacy of the Vegetative Cover consisting of grass plants shall be evaluated when the grass plants are a minimum 1 inch high. A Vegetative Cover of grass plants is satisfactory if there are a minimum 100 grass plants per square foot, bare spots are a maximum 6 inches square, and the total area of bare spots does not exceed 2 percent of the seeded area. Vegetable or flower gardens provide adequate Vegetative Cover for that portion of the garden that is actively planted and maintained during the normal growing season.

(3) RESTRICTED ACTIVITY.

All persons undertaking a Restricted Activity within the Site or within the City corporate limits shall comply with the procedures and performance standards provided in this Chapter. This chapter does not apply to the EPA or the State or their employees and contractors conducting cleanup or operation and maintenance activities under CERCLA within the Eureka Mills Superfund Site.

(4) UTILITY INSTALLATION AND REPAIR.

All Contaminated Soils or soils with unknown lead concentrations removed from excavations for utility installation or repair within a public right-of-way or utility easement that are not replaced in the excavation must be disposed of in the Open Cell. Upon completion of backfilling the final surface of the excavation must be covered with a Hard Surface Cover a minimum of 2 inches thick or Protective Cap that is a minimum of 18 inches thick.

(5) PERMITS REQUIRED.

No person shall undertake or conduct any Restricted Activity without first obtaining a permit from the City. Any excavation or earth moving resulting from an "Exempted Activity" shall not require a permit under this Chapter but shall be subject to the requirements as set forth in Subsection 7 of this Chapter 13. The requirements of this section do not apply to the EPA, the State or its designees conducting a federal Superfund or State hazardous waste response action or Operation and Maintenance of the these actions. The requirements for obtaining a permit in this section do not apply to the City when conducting activities in the ordinary course of business; however, such activities shall otherwise comply with the Performance Standards of this Chapter.

(6) PERMIT PROCEDURES.

(A) *Application.* All permit applicants shall use a form provided by the City. A fee shall be assessed in accordance with a schedule adopted under Chapter 1 of the

Eureka City Land Use Ordinance. Each applicant shall, at a minimum, provide the following information, which may also be required for a building permit:

(i) The location and nature of the proposed activity, including the address and legal description of the property, and a legal property survey.

(ii) A site-plan drawing showing property boundaries, structures, other property improvements, and yard areas.

(iii) The estimated depth of any proposed excavation and estimated volume of material to be excavated or disturbed.

(iv) The estimated surface dimensions of all areas to be disturbed or affected by the proposed activity, including areas used for the stockpiling or handling of soils. Such area shall be defined as the "Permit Area."

(v) The estimated volume of material to be disposed in the Open Cell.

(vi) The applicant's plans for conserving the existing Protective Cap placed by EPA during the Cleanup. The area(s) where the Protective Cap material(s) will be stockpiled during the excavation and construction to prevent cross-contamination of material before it is re-laid over Contaminated Soil to a depth of 18 inches. The stockpile area must be adequately protected to ensure that recontamination does not occur during the excavation or construction activities.

(vii) The applicant's plans for conducting soil sampling (if necessary) or the results of sampling previously conducted, in accordance with the requirements for soil sampling in Appendix A.. Sampling shall be supervised by the City. The cost of soil sampling shall be borne by the property owner.

(viii) Such additional information as determined by the City to be reasonable and necessary to evaluate the safety of the proposed construction activity and its compliance with this Chapter.

(B) No excavation permit shall be issued before the application has been reviewed and approved by the City, utilizing the performance standards set forth in Subsection 7. Nor shall any excavation permit be issued until the City has inspected the property to determine if conditions on the property and the applicant's plans for the excavation activities comply with this Chapter. All permits issued must comply with this Chapter.

(C) The duration for the permit will be established in the terms of the permit.

(7) PERFORMANCE STANDARDS.

The following performance standards shall apply to all soil disturbing activities including Restricted and Exempted Activities within the Site and within the jurisdiction of the City.

(A) *Excavation and construction.*

(i) **Properties Previously Cleaned Up:** For properties that were part of EPA's Cleanup, excavated material must be transported to the Open Cell for disposal as it is excavated. Excavated materials include materials generated from Exempted Activities and Restricted Activities.

1. Where the property owner wishes to conserve clean Protective Cap material(s) for re-use after excavation and construction, plans for stockpiling the clean material(s) on the Permit Area to prevent the materials from being contaminated during excavation or construction must be provided to the City prior to commencing excavation. Protective Cap material(s) must be kept an adequate distance from excavation activities or must be shielded from excavation activities by such measures as berms, silt fencing, and tarping to avoid cross-contaminating clean materials.

2. During excavation, Contaminated Material, i.e., material removed below the 18 inch Protective Cap, must be transported to the Open Cell for disposal as it is excavated. Excavated materials include materials excavated by Exempted Activities and Restrictive Activities.

(ii) **Properties Not Previously Cleaned Up:** For properties that were not part of EPA's Cleanup, excavated materials: 1) can be transported to the Open Cell for disposal as the Permit Area is excavated; or 2) do not need to be transported to the Open Cell if it is determined through representative sampling and analysis pursuant to the requirements in Appendix A that the excavated materials are not Contaminated Soils; or 3) can be used as fill within the Permit Area below a Protection Cap or Hard Surface Cover; or 4) can be disposed of elsewhere in accordance with federal and state hazardous waste regulations.

(iii) Contaminated material can be stored on the Permit Area for up to 30 days on properties that have not been part of EPA's Cleanup. Any Contaminated Materials that are stored on the Permit Area, shall be securely contained on a durable non-permeable tarp and covered with a durable non-permeable tarp to prevent the transport of Contaminated Materials onto clean material. Alternatively, berms or other temporary diversion structures may be constructed to prevent stormwater runoff from leaving the Permit Area.

(iv) It is the responsibility of the property owner and the permit holder to prevent migration of any Contaminated Material off the Permit Area, including but not limited to sediment due to stormwater runoff, tracking of Contaminated Materials from vehicle and construction equipment traffic and from wind erosion. The property owner should make every effort to limit the duration that the Contaminated Material on the Permit Area is exposed without a Protective Cap or Hard Surface Cover. The installation of a Protective Cap or Hard Surface Cover within the Permit Area shall be a condition of Certification of Occupancy.

(v) The Open Cell is solely for the purpose of disposing of lead Contaminated Soils displaced during future development or the repair or installation of utilities within the City corporate limits. Disposal of other types of waste – household waste, used oil and other chemical waste, vegetation, building debris, large items such as vehicles, appliances, etc. is prohibited.

(B) *Driplines.* Within the dripline of established trees, removal of 18 inches of Contaminated Soil and replacement of 18 inches of clean soil is not feasible without severely compromising the viability of the tree. In such cases, less than 18 inches of clean soil is permissible; however, the applicant must excavate to the top of the tree roots place some clean soil over the roots and establish a Vegetative Cover within the dripline of the tree.

(C) *Removal of Contaminated Soil.* All excavated Contaminated Soils that are removed from the Permit Area must be transported to and disposed at the Open Cell. Contaminated Soil removed, placed, stored, transported, or disposed anywhere other than the Open Cell is subject to State and/or Federal transportation and disposal requirements.

(D) *Imported soil.* All imported soil used for a Protective Cap must have a lead concentration lower than the acceptable lead standard for the designated use as set forth in the definition above for Contaminated Soil or Contaminated Material and as determined in EPA's Record of Decision (2002). The exact location from where the imported soil is obtained must be identified in the permit application. The City may at its discretion require that the imported soil be tested according to the sampling and analysis procedures in Appendix A prior to the soil being brought into the Permit Area. Mine waste material is not an acceptable source of material for a Protective Cap.

(E) *Dust suppression.* All Restricted Activity shall be accompanied by dust suppression measures, such as the application of water or other soil surfactant, to minimize the creation and release of dust and other particulates into the air. Application rates shall be regulated to control dust during excavation and from stockpiled soils while minimizing saturated conditions that could produce surface

runoff or significant accumulation of Contaminated Materials on excavation or hauling equipment.

(F) *Marker Barrier*. Any Restricted Activity (i.e. requiring a permit) shall include the placement of a marker barrier after the final grading of sub-grade material and prior to placing the clean topsoil or roadbase material. A marker barrier is not necessary for areas that are capped with a "Hard Surface Cover" or where a permanent structure is constructed.

(G) *Vegetative Cover on Non-Remediated Areas.* For areas that have not been remediated by EPA because a heavy vegetative cover exists to limit exposure to Contaminated Soils, the property owner shall not clear the vegetation without an excavation permit that meets the Performance Standards of subsection (7) of this ordinance.

(8) SOILS TESTING.

A property owner may sample and analyze excavated soils at the owner's expense to determine the lead content of the excavated soils. Soil sampling shall be conducted by City staff or by a designated person (contractor) who has been approved by the City and has the appropriate experience and qualifications. All soil samples shall be analyzed by a laboratory accredited by the National Environmental Laboratory Accreditation Program that is qualified to conduct the appropriate soil analyses. All testing shall utilize and adhere to the protocols in Appendix A of this ordinance.

(9) NOTIFICATION OF COMPLETION.

Upon completion of any permitted activity or within 1 year from the commencement of excavation, which ever occurs first, the permit holder shall notify the City that the activity has been completed in conformance with the requirements of this Chapter and shall request a Certificate of Occupancy.

Prior to issuing a Certificate of Occupancy, the City shall inspect the Permit Area to determine whether the permit conditions have been met and whether the work conforms to the requirements of this Chapter.

(A) When the work complies with the permit and this Chapter, the City shall issue a Certificate of Completion.

(B) In the event that the work fails to comply with the permit or this Chapter, the City shall issue a Notice of Deficiency, which shall explain the deficiencies noted at the property. If the property owner fails to correct any such deficiencies, the City may take enforcement action in accordance with the Eureka City Plan, Chapter 7 and with this Chapter 13, Subsection 11.

(C) For a Certificate of Completion, the City shall conduct a final inspection to determine whether the work complies with the requirements of the permit and this Chapter. Establishment of a Vegetative Cover for all soil areas shall be a condition for determining that the work is complete.

(10) INSPECTION AND MAINTENANCE.

In addition to all other requirements set forth in this Chapter 13, the following requirements shall apply to the use and maintenance of all lands within the Site and the jurisdiction of the City, including, but not limited to, lawns, play areas, and parking lots.

(A) The City shall conduct periodic inspections of the permitted construction activity to ensure that the conditions of the permit are being adhered to.

(B) All properties within the City limits shall be subject to inspection by persons authorized or appointed by the City in order to enforce the provisions of this Chapter 13 regardless of whether or not a permit is required.

(C) All properties within the Site shall be maintained by the property owner with a Hard Surface Cover or Protective Cap.

(D) All properties within the Site shall be maintained by the property owner in a manner that will minimize erosion, including the control of drainage and surface water run-off in a manner that will prevent the formation of ditches or gullies.

(11) PENALTIES

(A) A violation of this Chapter 13 is punishable as a class B misdemeanor pursuant to the Eureka City Plan, Chapter 7; U.C.A. 76-3-204; and U.C.A. 76-3-301 or by imposition of a civil penalty pursuant to the Eureka City Plan, Chapter 7. Each provision of this Chapter 13 of the Eureka land use ordinance that is found to be not in compliance will constitute a separate violation.

(12) APPEALS.

(A) Any person adversely affected by a City decision administering or interpreting this Chapter may, within 10 calendar days of the decision, appeal that decision to the Board of Adjustment (BOA) by alleging that there is an unreasonable error in any order, requirement, decision or determination made by the City in the administration or interpretation of the land use ordinance, including issuance of a permit.

(B) No person may challenge in district court a City decision made under these ordinances until that person has exhausted the person's administrative remedies as provided for in Section 1, paragraph (12) of this Chapter 13, and UCA 10-9a-701 through 10-9a-708, as applicable.

Section 2

The City Clerk is directed to file and have recorded a certified signed copy of this Chapter, along with a certified copy of an official map depicting the boundaries of the Eureka Mills Superfund Site and the current City corporate limits, in the office of the Eureka City Recorder.

Section 3

This ordinance shall be effective upon recording in the office of the Eureka City Recorder.

Section 4

If any section, subsection, sentence, clause, phrase, or portion of this ordinance is for any reason held invalid or unconstitutional in a court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and shall not affect the validity of the remaining portions thereof.

Section 5

A public hearing on the ordinance shall be held on the 12 day of July, 2010, in the City Council Chambers, Eureka City Hall, Eureka, Utah.

INTRODUCED, READ, AND ORDERED PUBLISHED as provided by law by the City Council of the City of Eureka on the 11th day of October, 2010.

Milton Hanks, Mayor

ATTEST:

Patricia Bigler, City Clerk

ADOPTED, PASSED, AND APPROVED this 11TH day of October, 2010.

Milton Hanks, Mayor

ATTEST:

Patricia Bigler, City Clerk