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Montana Department of
ENVIRONMENTAL QUALITY

Steve Bullock, Governor
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August 21, 2013

Bill Murray
Superfund Remedial Program Director
U.S. Environmental Protection Agency
1595 Wynkoop Street
Denver, Colorado 80202-1129

Re: Libby Asbestos NPL Site, OU2 Operational and Functional Determination

Dear Bill,

This letter is in response to your letter dated July 24, 2013, in which you state that EPA has determined that Operable Unit 2 (OU2) of the Libby Asbestos NPL site is operational and functional (O&F) and is now transitioning into operation and maintenance (O&M).

As you know, DEQ disagrees that the OU2 remedy is O&F. DEQ does not believe that the final remedy in the 2010 Record of Decision (ROD) is complete, nor has DEQ agreed that the remedy is O&F, as required by the NCP. DEQ's paramount concern is that EPA has not fully characterized the remaining risks at all properties within OU2, nor has EPA implemented adequate protective measures to mitigate those remaining risks.

The ROD makes it very clear that the site-wide risk assessment, after the toxicity data becomes available, is part of the remedy. (In the description of the remedy, the ROD states: "EPA will also conduct a risk assessment at OU2, once toxicity factors are available, to confirm effectiveness of the remedy.") In the May 2012 OU2 Remedial Action Report, EPA acknowledged that an O&F determination was not appropriate until after the toxicity data was finalized. EPA had included similar language in the March 2013 draft of the OU2 O&M Plan. Although EPA has conducted a post construction risk assessment at OU2, DEQ has noted that the post construction risk assessment is premature without final toxicity data.

Additionally, O&M is not appropriate because the remedy has not achieved the remedial action objectives and remediation goals in the ROD. *See* 40 CFR § 300.435(f)(1); Section 8 of OU2 ROD (May 2010).

However, DEQ understands EPA's desire to take actions to ensure that the initial remedy at OU2 is protected. DEQ also recognizes that EPA does not want to wait until completion of the site-wide risk assessment to begin conducting this work. In order to address EPA's concerns, DEQ continues to be willing to conduct site visits/inspections of OU1 and OU2 through an amendment to the Cooperative Agreement.

I also want to clarify all of the items that must occur before DEQ will enter into a State Superfund Contract (SSC) and take over implementation of O&M at OU2 (or OU1).

- The Libby asbestos toxicity values must be finalized.
- The site-wide risk assessment must be completed to DEQ's satisfaction (including the excavation worker scenario for asbestos up to 10 feet below ground surface and sampling on the Parker property).
- A review to evaluate the effectiveness of the remedy must be conducted.
- All necessary post-ROD changes to the final remedy must be documented, with DEQ concurrence.
- DEQ and EPA must agree, in writing, upon which Institutional Controls (ICs) are part of O&M for the final remedy at the site. DEQ does not intend to take over optional controls that the city or county have implemented. Additionally, any ICs that are actually carrying out part of the final remedy (e.g., ICs that require asbestos contamination to be cleaned up as it is exposed), are not part of O&M, but are instead part of the final remedy that needs to be implemented, and funded, by EPA before entering O&M.
- DEQ and EPA will need to agree on the final O&M plans prior to DEQ and EPA negotiating the SSC for OU1 and OU2 (as well as the rest of the Libby Asbestos Site). As you know, DEQ informed EPA via a March 20, 2013, letter that an O&M plan for OU1 or OU2 was premature because of the reasons stated in this letter, and requested that EPA wait to finalize the O&M plans. Despite DEQ's request, EPA finalized the OU2 O&M plan. Any changes to the final remedy will likely require changes to the O&M Plan.

Only after all of the above items have been completed will DEQ negotiate a SSC with EPA to provide DEQ's assurances, as required by 40 CFR § 300.510.

In our previous conversations on this issue, you have stated that EPA does not intend to use the $11 million plus interest from the W.R. Grace bankruptcy settlement on EPA's O&M at the site. Instead, EPA has committed to saving that $11 million plus interest to be used by the State for future O&M obligations at the site, after entry into a SSC. It is clear that the $11 million plus interest must be set aside for the State, because EPA asserted during the W.R. Grace bankruptcy that the $250 million included the State's cost share.

I look forward to working with you further on the Libby Asbestos NPL site.

Sincerely,

Jenny Chambers
Remediation Division Administrator

cc: Carolyn Rutland
Larry Scusa
Katherine Haque-Hausrath