UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

Noah Perch-Ahern
Glaser Weil Fink Howard Avchen & Shapiro LLP
10250 Constellation Blvd.
19th Floor
Los Angeles, CA 90067

November 14, 2016

Dear Mr. Perch-Ahern,

It has come to my attention that in the context of litigation between your client, Diamond X Ranch, and the Atlantic Richfield Company ("ARC") you have taken the position that certain oral communications from the staff of the Environmental Protection Agency ("EPA"), including myself, constitute EPA approval (or possibly implied approval) of response actions undertaken by Diamond X Ranch on its property, which is downstream from the Leviathan Mine Superfund Site ("Site"). Regardless of whether you have accurately quoted EPA staff, that position is incorrect as a matter of law on the basis of the facts you allege. EPA does not confirm the accuracy of your factual allegations.

The Site is listed on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). EPA is overseeing several removal actions and a remedial investigation and feasibility study ("RI/FS"). ARC is conducting the RI/FS under EPA oversight, pursuant to an Administrative Order under Section 104 of CERCLA. The area of investigation includes the watershed impacted by the Site, including Leviathan Creek and Bryant Creek. The Diamond X Ranch property was irrigated with water from Bryant Creek. Consequently, the RI/FS includes sampling of portions of the Diamond X Ranch.

CERCLA response actions such as at the Leviathan Mine are bound to follow the process established by statute and in the National Contingency Plan ("NCP") at 40 C.F.R. Part 300. EPA may authorize a property owner to conduct an RI/FS; however such an authorization requires that EPA determine that the party is qualified to conduct the RI/FS. *See*, Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1). The oral communications alleged would not suffice to provide EPA enough information or a record on which to make such a determination.

Section 300.400 of the NCP describes the process for conducting an RI/FS. It specifies many steps which the lead agency takes in conducting the RI/FS. EPA is the lead agency for the Site. The Diamond X Ranch's investigation has not been incorporated into the process described in Section 300.400. For example, EPA did not consider Diamond X Ranch's investigation when EPA:

- identified the type, quality, and quantity of the data that will be collected during the RI/FS to support decisions regarding remedial response activities;
- prepared site-specific health and safety plans; or
- developed sampling and analysis plans for obtaining data of sufficient quality and quantity to satisfy data needs.

See, 40 C.F.R. § 300.430(b). Similarly, the oral communications alleged did not approve sampling and analysis plans or data quality standards of Diamond X Ranch's investigation.

If there is more to discuss in this regard, please feel free to call me at (415) 972-3912.

Sincerely,

Joshua Wirtschafter
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
ORC-3
75 Hawthorne Street
San Francisco, CA 94105

cc: (by email only) Adam Cohen, Davis, Graham & Stubbs, LLP