UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

April 19, 2017

Greg Lovato
Administrator
Nevada Division of Environmental Protection
901 South Stewart Street, Suite 4001
Carson City, NV 89701

Re: Criteria for Deferral of Final NPL Listing of the Anaconda Mine Site

Dear Mr. Lovato:

On February 13, 2017 the U.S. Environmental Protection Agency, Region 9, received for review and comment a draft document from the Nevada Division of Environmental Protection entitled "U.S. Environmental Protection Agency and Nevada Division of Environmental Protection National Priorities List Deferral Agreement Anaconda Mine Site, Lyon County, Nevada."

As background, EPA had proposed the Anaconda Mine Site for inclusion on the Superfund National Priorities List in September, 2016. This action was supported by Governor Sandoval in a letter dated March 29, 2016. In his letter, Governor Sandoval stated as an understanding accompanying his concurrence that deferral to a State-led public/private funding solution remain available for exploration as an alternative to final NPL listing of the Site. In February 2017, EPA postponed its decision on final listing of the Site until June 2017 to allow time for evaluation of deferral as an alternative to final listing.

The draft Deferral Agreement references EPA's May, 1995 *Guidance on Deferral of NPL Listing Determinations while States Oversee Response Actions* (1995 Guidance), which contains the basic framework for an acceptable deferral. The draft Deferral Agreement proposes Atlantic Richfield Corporation as the "viable and cooperative PRP" willing to conduct all necessary response actions at the Site, as required by the 1995 Guidance.

This letter provides NDEP additional detail and clarification on a few of the key criteria that will be considered by EPA in determining whether a deferral to Site cleanup by ARC under NDEP oversight is appropriate. By separate communication, EPA's attorneys will provide specific comments on the draft Deferral Agreement.

A final NDEP/EPA deferral agreement and related NDEP/ARC agreements should contain at a minimum the following assurances, as required by CERCLA, the National Contingency Plan, and the 1995 Guidance:

1. **Assurance that a CERCLA equivalent Remedial Investigation and Feasibility Study will be conducted at the Site.**

The RI/FS should define the severity and areal extent of contamination both on the mine property and in soils and groundwater off the mine property. The boundaries of the Site will be determined with consideration of contaminant migration from the mine property as well as on-property contamination. The RI/FS scope of work must address the entire Site.

A CERCLA-equivalent RI/FS should determine applicable or relevant and appropriate requirements, assess associated human health risks, and ecological risks, and evaluate remedial alternatives, including consideration of remedial technologies that when implemented are (1) protective of human health and the environment; (2) meet ARARs under federal and NDEP's state authorities; (3) treat/remove sources or otherwise contain sources; and (4) are reliable over the long term. See, CERCLA sections 121(b) and (d), 42 U.S.C §§ 9621(b) and(d); NCP at 40 C.F.R. §300.430(f); 1995 Guidance, p.7.

A sampling and analysis plan, quality assurance/quality control plan and health and safety plan should be prepared, consistent with the NCP at 40 C.F.R. §§ 300.430(b)(6) and (8).

2. **Assurance that the remedy selected for implementation at the site will be a CERCLA-protective cleanup and will be substantially similar to a CERCLA response.**

To clarify the standard "substantially similar to a CERCLA response," EPA expects that:

- NDEP will select a response action protective of human health and the environment, as generally defined by a 10-4 to a 10-6 risk range for carcinogens and a hazard index of 1 or less for non-carcinogens consistent with the NCP at 40 C.F.R. § 300.430(e)(2)(i)(A); See, 1995 Guidance, p.7.

- NDEP will ensure that the remedy selected at the Site (1) complies with all federal ARARs and more stringent state ARARs under NDEP's state authorities, unless an ARARs waiver is justified consistent with CERCLA's requirements, (2) controls or eliminates sources, and (3) is effective and reliable, consistent with CERCLA sections 121(b) and (d), 42 U.S.C. §§ 9621 (b) and (d).

- NDEP will ensure that groundwater is restored to its beneficial use, consistent with the NCP, 40 C.F.R. § 300.430(a)(1)(iii)(F), unless an ARARs waiver is justified consistent with the requirements of CERCLA section 121(d)(4)(c), 42 U.S.C. § 9621(d)(4)(c). Since the impacted aquifer has been and is used for drinking water, the attainment of MCLs for groundwater established under the

Safe Drinking Water Act, 42 U.S.C. § 300f et seq., incorporated by section 121(d)(2)(A)(i) of CERCLA, will be relevant and appropriate requirements. 42 U.S.C. § 9621(d)(2)(A)(i).

When the remedy has been completed, if NDEP determines that it meets the criteria for a CERCLA protective cleanup, then NDEP will certify to the EPA Region and the affected community that the remedy meets the standards of a CERCLA-protective cleanup. As part of this certification, the NDEP will submit to EPA remedial action completion documentation substantially similar to EPA's "Remedial Action Report" (OSWER Directive 9355.0-39FS).

3. Assurance that appropriate enforcement mechanisms will be in place during the response activities at the site.

All Site response actions should be completed without requiring federal Superfund program enforcement or funding. Enforceable agreement(s) between NDEP and ARC to conduct all site response actions should be executed prior to a final deferral agreement between NDEP and EPA. Specifically, EPA expects to be assured that the enforceable agreement(s) provide for the following:

a. All investigative work necessary to characterize the full nature and extent of contamination will be completed in a timely manner.

b. The RI and FS will result in timely preparation of proposed plan(s) and record(s) of decision.

c. Final cleanup decision-making authority will be exercised by NDEP.

d. ARC will conduct the remedies selected and will conduct future operation and maintenance of the remedy(ies).

4. Preservation of the rights of the federal Natural Resource Trustees

EPA understands that NDEP has notified the Natural Resource Trustees of negotiations for deferral of final listing to State authorities and will ensure the Trustees' continued involvement in the cleanup process, as appropriate. EPA also understands that the Trustees and ARC are addressing any Natural Resource Damage claims directly between themselves.

5. Assurance of support for Tribal involvement

EPA has both a federal trust responsibility to Tribes and a government-to-government relationship with Tribes. To preserve tribal rights of consultation in any EPA activity which would significantly affect tribal interests, NDEP will develop a Memorandum of Understanding, or amend an existing MOU, with any tribe affected by the Anaconda mine site describing the affected tribe or tribes' role in the planning, investigation and cleanup process, including, as appropriate, funding to the affected tribes

to ensure their ability to participate fully in the process. EPA will continue to consult directly with affected Tribes in conjunction with EPA's periodic review of progress and protectiveness of the Site cleanup by ARC under NDEP oversight.

6. Assurance of support for community involvement

CERCLA requires that the community affected by potential NPL sites be provided opportunity for meaningful engagement in the site cleanup process. NDEP will develop and implement a community involvement plan and, as appropriate, ensure the availability of funding for community technical assistance similar to EPA's Technical Assistance Grants.

I hope that this letter clarifies these criteria that EPA will apply in its evaluation of the potential deferral of NPL listing of the Anaconda Mine Site to NDEP response authorities. Please note that the enumeration of certain criteria for deferral does not in any way constitute a waiver of other EPA retained authorities or rights under CERCLA, the National Contingency Plan or relevant EPA guidance. Please also note that EPA may pursue recovery under its own authorities of the costs it has incurred related to the Site.

If you have any questions or comments, please feel free to contact me at any time.

Sincerely,

Enrique Manzanilla
Director, Superfund Division

cc: Brian Amme, Bureau of Land Management
Laurie A. Thom, Yerington Paiute Tribe
Amber Torres, Walker River Paiute Tribe
Jeffrey Page, Lyon County
Dan Newell, City of Yerington