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

November 9, 2017

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

Re: Deferral of NPL Listing of the Anaconda Mine Site

Dear Mr. Lovato:

Thank you for your continued engagement on the request by the Nevada Division of Environmental Protection (NDEP) for the U.S. Environmental Protection Agency (EPA) to defer the Anaconda Mine Site to NDEP instead of listing the Site on the National Priorities List (NPL). EPA evaluated NDEP's October 24 and October 31, 2017 emails responding to EPA's latest comments on the Deferral Agreement, the draft Interim Administrative Order on Consent (IAOC) and Remedial Investigation/Feasibility Study (RI/FS), as well as the Tribal Memorandums of Understanding (MOUs). I wanted to take this opportunity to address the remaining issues that need to be resolved before EPA can make a final decision on deferral.

As noted in my April 19, 2017 letter to you ("Criteria Letter"), EPA identified six criteria that NDEP must address for EPA to defer the Site pursuant to CERCLA, the National Contingency Plan (NCP), and EPA's May 1995 *Guidance on Deferral of NPL Listing Determinations while States Oversee Response Actions* (1995 Guidance). These criteria include the following: 1) assurance that a CERCLA equivalent Remedial Investigation and Feasibility Study (RI/FS) will be conducted at the Site; 2) assurance that the remedy selected will be a CERCLA-protective cleanup and will be substantially similar to a CERCLA response; and 3) assurance of support for Tribal involvement. In addition to these criteria, EPA and NDEP have agreed throughout these discussions upon the need to ensure that Site cleanup is not delayed by deferral. The need to expedite Site cleanup is consistent with EPA's May 2017 Superfund Task Force Recommendations which highlight the need to accelerate cleanups and take early response actions for certain portions of sites when warranted.

EPA appreciates the changes that NDEP has made to the Deferral Agreement to address EPA's concerns, but remains concerned about the schedule proposed in the Deferral Agreement, particularly with respect to groundwater. EPA is also concerned about statements in the IAOC and Framework Agreement that suggest that NDEP may not require Atlantic Richfield Corporation (ARC) to perform a CERCLA equivalent RI/FS and risk assessment for certain OUs. Pursuant to your request for the rationale for EPA's proposed changes, I will provide them

for the most significant issues. For the other issues, particularly the MOUs, it would be more productive to go through them together as I am confident that we could resolve them.

The rationale for the Deferral Agreement provision allowing EPA to request active groundwater interim measures, if necessary, before the groundwater remedy is implemented is to ensure that off-site groundwater does not migrate or endanger human health before a remedy is selected. This is particularly important given the significant delay, up to six years, proposed in the groundwater schedule. EPA acquiesced in leaving the extended schedule for groundwater in the Deferral Agreement, based on NDEP's suggestion that EPA propose language to allow EPA to seek to have NDEP to require active interim measures for groundwater. EPA acknowledges that NDEP would be the lead agency post deferral and is not seeking the ability to unilaterally require active interim measures for groundwater. Instead, EPA's proposed language simply includes an explicit reference to the possibility that active measures could be necessary if the plume continues to migrate or impact additional domestic or agricultural resources. It is in both NDEP's and EPA's interest to have a mechanism other than revoking deferral to address the possibility that active measures may be needed for groundwater before the remedy is selected.

It is necessary for NDEP to acknowledge that it can require active measures to prevent contaminated groundwater from impacting local agricultural or community receptors because of the explicit limitations in the IAOC for active groundwater measures. The ability to require active interim measures is also necessary to protect the Yerington Paiute Tribe, whose Reservation and groundwater resource lie directly in the path of the plume. EPA agrees with NDEP and ARC that the mine impacted groundwater has not impacted the Yerington Paiute Tribe at this time. EPA and NDEP have assured the Tribe that the plume will be addressed before it reaches the Tribe. If the plume continues to migrate towards the Yerington Paiute Tribe before a remedy is implemented, it may be necessary to take active measures to contain the plume and prevent it from impacting the Tribe. If NDEP's and ARC's predictions on plume stability are correct, no active measures will be necessary to prevent the plume from migrating toward the Yerington Paiute Tribe. However, given the significant delay in the groundwater remedy, and the explicit inability of NDEP to require active interim measures as part of the IAOC, NDEP should support inclusion of Note 2 in the Deferral Agreement so that ARC is aware that NDEP may require such measures, if warranted, outside of the IAOC.[1,2]

Turning to the IAOC and attached SOWs, EPA's primary concern is that the IAOC does not provide for a CERCLA equivalent RI/FS process. As noted in the criteria letter, NDEP must 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). EPA is concerned, based on the language of the proposed IAOC and SOW, that NDEP intends to allow ARC to do a risk assessment and FS that assumes no exposure to groundwater (that is a current source of drinking

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[1] EPA notes that these contingent interim responses advance the agenda of the "Superfund Task Force Recommendations," developed to implement the May 22, 2017 directive of the EPA Administrator, to "promote expeditious remediation," "Implement[..] early response actions at selected portions of sites," "get work underway quickly," and "Maintain current policy for drinking water aquifers that are currently used for these purposes."

[2] The Region would also like to make a non-substantive change to the Deferral Agreement to remove the reference to 105(h) in the Deferral Agreement.

water) because of institutional controls that will cut off access to the resource. This would be inconsistent with CERCLA and the NCP. Similarly, as explained in more detail in the attachment, EPA is concerned that the risk assessment referred to in the SOW for other OUs will be incomplete and leave out NCP required criteria based upon assumptions about land use that should not be included at the risk assessment stage of the CERCLA process. EPA cannot in good faith agree, as the present draft of the Deferral Agreement provides, that the IAOC meets the criteria of the 1995 Guidance and EPA's April 17 Criteria Letter.

As noted, EPA's remaining concerns with the Tribal MOUs and the IAOC and SOW are outlined on the attached Appendix. I propose that EPA and NDEP sit down in person or on the phone next week to resolve these issues. Thank you for your careful consideration of these matters.

Sincerely,

for Enrique Manzanilla
Director, Superfund Division

APPENDIX

This Appendix addresses the four specific comments regarding the Tribal MOUs in NDEP's October 31 email and sets out EPA's principal remaining concerns with the draft IAOC in light of NDEP's October 24 response to EPA's latest comments. Other issues are left for the proposed working session.

DRAFT MOUs

NDEP Comment 1. Section I.F (Characterization of "Site"): EPA agrees that the issue of whether mine-sourced contamination presently exists above action levels on Tribal lands has not yet been settled, but also believes that it is correct to note that mine-sourced wastes have flowed through and "have come to be located on" Tribal lands. Therefore, it is accurate to include Tribal land in the characterization of the Site.

NDEP Comment 2. Section II.A.2 and 3 (Tribal Review periods): EPA's edits to these sections regarding Tribal requests for extension of review time do not require NDEP to grant automatically all such requests. The text simply gives the Tribes the opportunity to request more time, and leaves open the response to such requests, which remain within NDEP's discretion.

NDEP Comment 3. Section II.A.4 (Tribal Consultation on off-Reservation Issues): The Tribes always have the right to invoke consultation with EPA on matters affecting their interests, and this sentence in the MOU simply restates that fact. This sentence does not affect NDEP's jurisdiction over the off-Reservation portion of the Site. EPA believes this sentence is necessary to assure the Tribes of their continued access to EPA to voice their concerns.

NDEP Comment 4. Section III.B.6 (Schedule for response actions on Tribal Land): EPA agrees that response activities on Tribal Land will need to be coordinated with NDEP's parallel activities off-Reservation, but deleted the language requiring a schedule for all such on-Reservation activities within 30 days of the Deferral Agreement. The MOU is not the proper vehicle for EPA and NDEP to set forth this coordination. EPA and NDEP can discuss and agree upon a path forward for coordinating these activities at the suggested working session to finalize these project documents.

DRAFT IAOC AND SOWs

I. General: EPA disagrees with NDEP's October 24 Response to EPA's comments (NDEP Response). Even though this IAOC is limited to the implementation of the OU8 RA and the Site-wide RI/FS, it is the only project document for the ARC/NDEP cleanup which EPA will review prior to the proposed deferral, and should contain the straightforward commitment of ARC to implement a CERCLA-protective RI/FS and CERCLA protective remedies for those portions of the Site (all OUs except OU8) for which remedies have not yet been selected. This concern was made clear to NDEP in EPA's initial comments on the draft IAOC, and in response NDEP suggested incorporation of protective CERCLA and NCP-based language from the Deferral Agreement into the IAOC. EPA agreed with this suggestion and yet the NDEP Response eliminates the agreed-upon language from the IAOC and instead substitutes a weakened and

shortened version in the back pages of the RI/FS SOW. Missing from the pared down NDEP language are the references to CERCLA-protective criteria for site-wide remedial action, the expansive definition of the Site to emphasize off-mine property impacts, the commitment to comply with NCP criteria for risk assessments, references to key sections of CERCLA and the NCP regarding preference for treatment and permanent remedies, and more. Regardless of the literal scope of the IAOC, EPA does not understand the reluctance of ARC and NDEP to commit to these basic principles in the only project document EPA will review prior to the proposed deferral.

Specific Comments:

1. The NCP requires that the risk assessment consider potential future uses of groundwater. CERCLA and the NCP do not allow EPA to write off a drinking water aquifer by restricting access to it. However, the IAOC allows ARC to assess risk by evaluating not potential uses, but restricted uses of groundwater by considering the effect of institutional controls.

2. The Tribes are still underfunded. NDEP has assured EPA that the funding for Tribal participation in post-deferral response actions would be maintained at the level provided by EPA over the last several years. The NDEP Response adds the WRPT as a recipient of funding as EPA had requested, but the level of funding, one-time grants of $100,000 for YPT and $50,000 to WRPT capped at those levels until completion of the next project ROD in 2023, is still insufficient.

3. NDEP has declined in the NDEP Response to delete the language asserting that mine impacts to OU7 (Wabuska Drain) are limited to the area south of Luzier Lane. Since the OU7 RI has not yet been completed, this statement is premature.

4. NDEP continues to dismiss the necessity for further characterization of the OU6 Oxide Tailings. EPA disagrees with the NDEP position, but is willing to discuss this issue further in the working session.

5. The NDEP Response continues to eliminate or truncate the risk assessments for other OUs (e.g., Pit Lake OU).