NEVADA DIVISION OF
ENVIRONMENTAL
PROTECTION

STATE OF NEVADA
Department of Conservation & Natural Resources
Brian Sandoval, Governor
Bradley Crowell, Director
Greg Lovato, Administrator

January 25, 2018

Enrique Manzanilla
Director, Superfund Division
EPA Region IX
75 Hawthorne St.
San Francisco, CA 94105

RE: Anaconda Copper Mine Site
Review of Deferral Criteria

Dear Mr. Manzanilla:

As the United States Environmental Protection Agency (EPA) nears a decision on the Nevada Division of Environmental Protection's (NDEP) request for deferral of the Anaconda Copper Mine Site (Site) to NDEP regulatory oversight, NDEP provides this letter as an update to our original July 31, 2017 deferral request (attached).

NDEP and the Atlantic Richfield Company (ARC) have revised the draft June 2017 version of the Interim Administrative Order on Consent (IAOC) in response to questions and concerns from EPA and other interested parties. NDEP has recently distributed an updated January 2018 draft of the IAOC. The following sections are provided in addition to the July 31, 2017 letter, with additional explanation of how the current January 2018 version of the IAOC meets the deferral criteria outlined in EPA's April 19, 2017 letter to NDEP:

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

   EPA has determined that in order for Human Health Risk Assessments (HHRAs) conducted under deferral to be equivalent to that which would be conducted under CERCLA, assumptions about land use or presence of institutional controls should not be included in the risk assessment stage of the CERCLA process. NDEP also understands there is a concern that including such assumptions in the risk assessment may be used to avoid complete evaluation of potential exposure pathways and development of appropriate remedial action objectives.

   NDEP has acknowledged that a baseline risk assessment performed in accordance with EPA guidance evaluates risks that may be present if no remediation or institutional controls were applied at a site. However, EPA guidance also directs that reasonable

assumptions about future land use, including those based on institutional controls, should be considered in risk assessment and the remedy selection process. As stated in EPA's May 25, 1995 OSWER Directive No. 9355.7-04 ("Land Use in CERCLA Remedy Selection Process"):

> "EPA should gain an understanding of the reasonably anticipated future land uses at a particular Superfund site to perform the risk assessment and select the appropriate remedy." (p. 4)
>
> "Future land use assumptions allow the baseline risk assessment and the feasibility study to focus on the development of practicable and cost-effective remedial alternatives, leading to site activities which are consistent with the reasonably anticipated future land use." (p. 6)
>
> Sources and types of information that may aid EPA in determining the reasonably anticipated future land use include, but are not limited to: ...
> - institutional controls currently in place
> - Federal/state land use designation" ... (p. 5)

EPA's follow-up March 17, 2010 OSWER Directive 9355.7-19 on this issue ("Considering Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-lead Superfund Remedial Sites") confirms that:

> "Another opportunity to consider the reasonably anticipated future land use is during the Superfund site baseline risk assessment." (p. 5)

Further, as noted previously, EPA performed qualitative, rather than quantitative, evaluations of exposure to on-site workers to drain-down fluids and tribal receptors to Arimetco Operable Unit 8 (OU-8) when completing the OU-8 human health risk assessment. NDEP has noted that this type of qualitative approach may be applicable to certain exposure pathways on other parts of the Site and that EPA's determination on whether to conduct a qualitative evaluation relied in part on reasonable assumptions related to access and institutional controls.

Therefore, NDEP considers it appropriate to consider institutional controls and groundwater use restrictions during performance of the human health risk assessment. Consideration of institutional controls and groundwater use restrictions will not be used as a basis for eliminating exposure scenarios from the baseline human health risk assessment, but they should be considered, as EPA did during completion of the OU-8 HHRA.

NDEP also understands there have been concerns expressed about whether the scope of the investigation and risk assessments at certain areas of the Site will be adequate. NDEP notes that the Remedial Investigation of several Operable Units have not been completed, and no final decisions have been made with respect to the necessary characterization to complete those investigations. Similarly, risk assessment workplans for Operable Units have not been finalized, and the final risk assessment workplans approved by NDEP will determine the scope of risk assessment to be conducted.

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**

   EPA has determined that for the groundwater response under deferral to meet this criterion, the response must restore groundwater to its beneficial use, unless a waiver from Applicable or Relevant and Appropriate Requirements (ARARs) is justified. The scope of the IAOC extends through completion of a Feasibility Study for groundwater and not through remedy selection. This is typical of consent orders for completion of Remedial Investigation and Feasibility Studies (RI/FS). However, NDEP and ARC have modified Section 8 of the RI/FS Scope of Work attached to the IAOC to clearly require that development of Remedial Action Objectives for all media, including groundwater, be consistent with applicable sections of CERCLA and the National Contingency Plan (NCP). This includes those sections of the CERCLA and the NCP pertaining to restoration of groundwater to its beneficial use, evaluation of ARARs, including applicability of Maximum Contaminant Levels or Maximum Contaminant Level Goals to affected groundwater that is a current or potential source of drinking water.

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

   In addition to inclusion of applicable language from model EPA CERCLA settlement documents, including provision for stipulated penalties, work takeover provisions, financial assurance, and schedules for performance of work, NDEP has re-aligned internal resources to assign additional staff to the Bureau of Corrective Actions Abandoned Mine Lands program. NDEP will also contract necessary technical expertise from qualified professionals to enable it to perform independent technical review of all work conducted by ARC.

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

On October 20, 2017, representatives of the Yerington Paiute Tribe (in its capacity as lead administrative trustee) transmitted a Memorandum of Agreement (MOA) to ARC relating to tolling of Natural Resource Trustee Natural Resource Damage claims. On January 10, 2018, ARC communicated its intent to execute the MOA to the Natural Resource Trustees along with other deferral documents and requested a final version for signature be provided.

5. **Assurance of support for Tribal involvement**

NDEP understands there have been concerns regarding the level of funding support for the Yerington Paiute Tribe (YPT) and the Walker River Paiute Tribe (WRPT) in the IAOC. Section 72.b of the IAOC provides for an initial level of funding for the YPT and WRPT, with provision for additional funding consistent with the future NDEP-approved Community Involvement and Participation Plan (CIPP).

EPA and NDEP have jointly developed and agreed upon proposed language for a Memorandum of Understanding (MOU) with the YPT and an MOU with WRPT. The proposed MOUs provide a framework for consultation, communication and coordination under deferral. These MOUs provide assurance of support for Tribal involvement, including appropriate recognition of roles and responsibilities for response actions conducted on Reservation land.

6. **Assurance of support for community involvement**

As with assurance of financial support for Tribal involvement, NDEP notes that Section 72.b of the IAOC provides for an initial level of funding for technical support to a community group, with provision for additional funding consistent with the future NDEP-approved CIPP.

The CIPP, including the schedule and opportunities for review and input by interested parties on work conducted by ARC, will be provided in draft to the public for comment prior to approval by NDEP. Going forward, NDEP will strike a balance between the overall goal of making adequate progress on the site cleanup in accordance with the cleanup schedule in the EPA NDEP Deferral Agreement and stakeholder interests in having adequate opportunity for involvement.

NDEP is committed to public engagement and to fully considering and being responsive to significant and valid concerns from the public.

I appreciate this opportunity to explain why NDEP has met the deferral criteria and we look forward to EPA's decision on NDEP's deferral request.

Sincerely,

Greg Lovato
Administrator

Attachment: July 31, 2017 NDEP Deferral Request Letter

cc: Bradley Crowell, NV Department of Conservation and Natural Resources
Brian Amme, Bureau of Land Management
Jeffrey Page, Lyon County
Dan Newell, City of Yerington
Laurie A. Thom, Yerington Paiute Tribe
Amber Torres, Walker River Paiute Tribe
Brian Johnson, Atlantic Richfield Company
Tom Patton, Singatse Peak Services

NEVADA DIVISION OF
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July 31, 2017

Enrique Manzanilla
Director, Superfund Division
US Environmental Protection Agency, Region 9
75 Hawthorne St.
San Francisco, CA 94105-3901

RE: Anaconda Mine Site, Request for Deferral of NPL Listing Determination While NDEP Oversees Response Actions

Dear Mr. Manzanilla:

As provided for by CERCLA §105(h), the Nevada Division of Environmental Protection (NDEP) hereby requests that the Environmental Protection Agency (EPA) defer final listing of the Anaconda Mine Site (Site) while NDEP continues to actively pursue an agreement with Atlantic Richfield Company (ARC) to perform response actions under NDEP oversight.

NDEP and ARC have made considerable progress in negotiating such an agreement, referred to as the Interim Administrative Order on Consent (IAOC). The IAOC will assure funding and implementation for: 1) the remedy selected in the July 2017 *Interim Record of Decision for Arimetco Facilities Operable Unit 8*; and, 2) completion of Remedial Investigations and Feasibility Studies for the remainder of the Site. Although the IAOC has not been finalized, the IAOC is substantially complete as of June 13, 2017. NDEP expects that NDEP and ARC will execute the IAOC immediately after a final version of the Deferral Agreement language is accepted by NDEP and EPA.

In an April 19, 2017 letter, EPA described key criteria it will consider in making a deferral determination. In response, NDEP offers the following, referring to the versions of the IAOC and attached Scopes of Work distributed to EPA on June 13, 2017:

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

   Section VIII.B of the IAOC and the attached Appendix B RI/FS Statement of Work require completion of an RI/FS for the entire Site in accordance with CERCLA, applicable sections of the National Contingency Plan, and applicable guidance selected by NDEP, including OSWER Directive #9355.3-01.

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**

   As provided for in Section II.D of the Deferral Agreement, NDEP agrees to select a remedy that is CERCLA-protective.

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

   The IAOC is an appropriate enforcement mechanism and was drafted from applicable model language included in the EPA Model RD/RA Consent Decree and the EPA Model RI/FS Administrative Order on Consent. Section XX of the IAOC contains appropriate enforcement mechanisms and will be executed prior to execution of a final Deferral Agreement between NDEP and EPA. The Statements of Work for the IAOC contain Deliverable Schedules that form the basis for the timely and comprehensive schedule of performance in Section III.B of the Deferral Agreement.

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

   As provided for in Section II.E of the Deferral Agreement, NDEP agrees to appropriate notification and coordination with federal Natural Resource Trustees. NDEP understands the Trustees and ARC have made substantial progress and remain engaged in good faith negotiations to address any Natural Resource Damage (NRD) claims. Our current understanding is that on June 13, 2017, ARC provided suggested edits to a Memorandum of Agreement relating to tolling of Natural Resource Trustee NRD claims to the Yerington Paiute Tribe (YPT). ARC is currently awaiting response from the Natural Resources Trustees on this matter.

5. **Assurance of support for Tribal involvement**

   As provided for in Section II.F of the Deferral Agreement, NDEP agrees to enter into and follow the terms of a Memorandum of Understanding (MOU) with all Tribal governments within 90 days after execution of the Deferral Agreement. Because EPA will retain a trust responsibility toward Tribes for portions of the Site that are on tribal lands, NDEP plans to enter into an MOU with EPA and each Tribal government. NDEP, YPT and the Walker River Paiute Tribe received draft MOU language from EPA on July 31, 2017. NDEP will review and consult with EPA, YPT, and WRPT to finalize these MOUs as soon as possible, but no later than 90 days after execution of the Deferral Agreement. Paragraph 72 of the IAOC contains provision for providing funding to the YPT to ensure their ability to participate fully in the process. NDEP understands that YPT and the Walker River Paiute Tribe (WRPT) may request funding assistance at different levels than proposed in the IAOC and we welcome further supporting information and detail from YPT and WRPT on those requests.

6. Assurance of support for community involvement

Over the past several months, NDEP has engaged in a number of outreach efforts to gauge community concerns related to deferral and community expectations for involvement under a deferral scenario.

The development and implementation of a Community Involvement and Participation Plan (CIPP) has been contemplated and included in the Deferral Agreement language and in the Interim Administrative Settlement Agreement and Order on Consent between the NDEP and ARC. NDEP developed a proposed approach to a CIPP and included that in discussion during the July 17, 2017 Roundtable Stakeholder meeting. The proposed CIPP approach included an initial community workshop to review the overall project schedule and provide opportunities for input on timing of fact sheets and public meetings to support transparency on project progress and key milestones. It also provided the opportunity for future roundtable meetings to help support decision-making, transparency for anticipated document review on an internet-accessible site, and set expectations on the amount of time interested parties would have for document review and comment. The proposed CIPP approach appeared to be well received, although some additional discussion on document review duration may need to be discussed further with the YPT depending on the complexity or significance of individual documents.

Initial meetings to discuss the deferral evaluation process and to understand initial questions, concerns and requests from the YPT and the WRPT were conducted on March 17 and March 24, 2017, respectively. Input from the YPT and WRPT was documented on a flip chart during the meetings for each tribe to review and edit prior to the end of the meeting. These notes were subsequently written up and electronically delivered to the meeting attendees for further review and comment. The YPT also provided NDEP with written requests to discuss during the March 17th meeting, which were later addressed in an NDEP response table. A number of other stakeholders provided NDEP with initial questions, which were answered in the response table. On May 23, 2017, NDEP organized the first roundtable stakeholder meeting in Yerington, at the request of the WRPT, to provide a setting where other interested stakeholders could engage in discussion and hear other points of view. Prior to the meeting, NDEP provided the stakeholders with the NDEP response table, so each stakeholder had the opportunity to review questions being posed to NDEP. With facilitation assistance from EPA, NDEP provided an opportunity for each stakeholder to voice their questions and concerns during the first stakeholder meeting, which were documented on a flip chart for all attendees to review. Additional questions and concerns received during that meeting were added to the response table and NDEP's responses were redistributed to the stakeholders for review. A summary of the more frequently asked questions and concerns during the deferral evaluation process are provided below.

- NDEP received questions regarding the opportunity for financial support to stakeholders in a deferral scenario. In each case, NDEP responded that stakeholder support is a critical component to project success and the level of funding that the EPA would grant under an

NPL-listed site scenario would be provided for under a deferral scenario where the State would be the lead regulatory agency.

- The ability for stakeholders to review and provide input and comment on work plans, reports, and other decisional documents was questioned on a number of occasions. The NDEP stated that the same level of review and comment the EPA would grant under an NPL-listed site scenario would be provided for under a deferral scenario. The NDEP has requested that all interested parties reviewing documents would be provided 30 days to submit comments to NDEP on most documents (e.g. work plans, reports) and 45 days for major documents. NDEP will consider all comments received and either discuss or provide written responses to comments. NDEP anticipates provided technical assistance to the community at a level similar to EPA's Technical Assistance Grants.
- The NDEP received requests to strongly consider local workforce opportunities during construction activities. NDEP has heard this request in different meetings from different stakeholders and understands that the Nevada Department of Transportation has developed a successful program to support local communities with a workforce program and this information will be passed onto ARC as a consideration when workforce procurement occurs in the future. NDEP has also been made aware of the local Counseling and Supportive Services Program in Yerington, supported by the Nevada Division of Public and Behavioral Health, which could provide local labor for the proposed work.
- The regulatory role of EPA, in a deferral scenario, was the subject of questions from stakeholders. NDEP's responses assured stakeholders that under the proposed deferral agreement, the State will be the lead regulatory authority, and the EPA will periodically review and be briefed by NDEP on site progress to determine if the response is progressing adequately and remains CERCLA-protective. If EPA determines the response is not progressing adequately or does not remain CERCLA-protective, EPA has the authority to terminate the Deferral Agreement and require response actions.
- Stakeholders were also concerned about the development of schedules, adherence to schedules, and penalties for delays. The NDEP relayed that remediation and compliance schedules will be established for all components of Site work and there are stipulated penalties for failure to meet deadlines or comply with approved plans in the Interim Administrative Settlement Agreement and Order on Consent between NDEP and ARC. Under a deferral path and State lead, a defined schedule for overall site closure will be established.
- Stakeholders were concerned that the deferral option and process appeared to be rushed and unnecessary at this time. It was explained that a decision must be made soon to establish a funding source and plan to cap the Arimetco portion of the site (OU-8) and minimize future fluid draindown.
- NDEP's ability to support this project financially and with staff resources in a lead regulatory role capacity was questioned by stakeholders. NDEP indicated that staff time and contract technical support necessary to provide oversight for the project would be reimbursed by ARC

and that NDEP has a number of different funding accounts that have been set up over the years to support the 7.8% cost share for the OU-8 portion of the site.

- No fiscal impact to Lyon County is expected as a result of the 7.8% cost share the State will assume for OU-8, because NDEP is not requesting this funding from the State General Fund. NDEP will use separate funding sources for the 7.8% cost share. Some positive fiscal impact to the Yerington community may be realized due to the amount of construction planned over the next 10 years and local services that will be necessary to support this work.

NDEP conducted two additional roundtable stakeholder meetings on June 27, 2017 and July 17, 2017. These meetings focused on questions about the documents developed in support of the deferral evaluation process and whether questions and concerns by stakeholders had been addressed in different sections of these documents. NDEP believes that it has adequately addressed all significant and valid concerns raised by community with respect to deferral.

As a viable and cooperative Potentially Responsible Party, ARC has participated in all the roundtables and conducted additional outreach to community stakeholders as explained in the attached July 31, 2017 letter from ARC to NDEP.

On July 14, 2017, NDEP received a letter from landowner Singatse Peak Services, expressing support for the NPL Deferral approach.

In addition to periodic briefings with Lyon County Manager Jeffrey Page and Yerington City Manager Dan Newell, NDEP briefed and the Yerington City Council on June 12, 2017 and the Lyon County Board of County Commissioners on June 15, 2017 on the deferral evaluation process. No concerns or objections regarding deferral were expressed at either meeting. NDEP is in discussion with County and City staff regarding a resolution from these respective bodies regarding deferral.

Conclusion

NDEP recognizes and appreciates EPA's collaborative approach to evaluating NPL deferral at the Site. NDEP is also in receipt of EPA's July 27, 2017 review comments on the IAOC and associated Statements of Work. Among other technical concerns, EPA indicates it has several concerns related to Remedy Selection, CERCLA Protectiveness and Tribal Participation. In general, NDEP acknowledges EPA's perspective and interpretation on these matters. NDEP plans to consider all these comments seriously. However, NDEP's initial review concludes that none of the expressed concerns indicate that the IAOC violates threshold deferral requirements included in CERCLA §105(h) or EPA's May 1995 *Guidance on Deferral of NPL Listing Determinations while States Oversee Response Actions*. Therefore, we request that EPA make a determination to defer the Site from the NPL and enter into a Deferral Agreement with NDEP.

In closing, and in recognition of the substantial resources dedicated by all parties to evaluating the deferral path, NDEP requests a written response from EPA on the status of its determination this request for deferral by August 31, 2017.

Sincerely,

Greg Lovato
Administrator

cc: Bradley Crowell, Nevada Department of Conservation and Natural Resources
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
Tom Patton, Singatse Peak Services
Patricia Gallery, Atlantic Richfield

Attachment: July 31, 2017 letter from Atlantic Richfield