CERCLA Deferral Items to be Addressed Prior to Council Review
Yerington Paiute Tribe

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1 Overview

The CERCLA process acknowledges the Tribe as regulatory partner and stakeholder. For example, through a trust relationship with the Tribe, EPA works to ensure that applicable Tribal Environmental Ordinances (TEOs) are part of site standards as Applicable or Relevant and Appropriate Requirements (ARARs) and exposure pathways associated with cultural resources are part of Human Health Risk Assessments. EPA funds the Tribe to support these and other related activities through several programs as well as providing technical support.

As found at www.epa.gov/tribal-lands/tribal-laws-and-regulations:

> *"Pursuant to CERCLA section 126, the governing body of tribes are afforded substantially the same treatment as states for many response-related purposes, including: notification of releases, consultation on remedial action, access to information, and roles and responsibilities under the National Contingency Plan (NCP).*
>
> *CERCLA section 104 allows EPA to enter cooperative agreements with eligible tribes to perform or participate in Superfund-eligible site response activities."*

Adding to this, the Tribe is required to leverage funding from multiple federal agencies to meet its obligations to the health of Tribal members and protect its resources from releases related to the Anaconda Mine. The CERCLA status of the mine is an important factor in competing for this limited funding. Changes in the CERCLA status do not change the risk residents face from the site but can reduce the resources the Tribal government has to reduce the risk and participate in management of the site.

The Yerington Paiute Tribe (YPT) Tribal Council has directed the Tribal Environmental Program to direct the involved agencies, NDEP and EPA, and the responsible parties to the responsibilities and liabilities listed below and associated with the site. For the Tribal Council to consider supporting a deferral as defined in EPA/540/F-95/002 and leave the protections allowed to it under CERCLA, the following items must be addressed. Addressing these items are required if the proposed deferral is to be "CERCLA equivalent."

It is recognized that the request for deferral comes late in the process, our recent wet winter and current site conditions create an increased risk of releases from the site, and the demand to consider this option does come at the expense of site progress. ARC and the regulatory agencies will need to respond to these items listed below promptly to meet the proposed schedule for the site. The Tribal Council requires up to 60 days to review proposals such as a change to its support for listing, but may be reduced to 30 days if appropriate Tribal offices are participating.

2 Items currently supported by EPA in support of the CERCLA process

2.1 ***Financially support the Tribal Environmental Department***

The Tribe has two Superfund grants programs that are restricted to Superfund activities such as document review, associated sampling and support for participating staff and consultants. This funding is typical for CERCLA sites that involve tribes and has been fundamental to management of this site. In addition,

the Tribe's General Assistance Grant includes Superfund work plan components. Adding to this, the Tribe has more competitive SDWA 106 and EPA Tribal Air Quality Grants that not only have Superfund components, but the Tribe is more likely to be funded because of the CERCLA status of the site. This financial requirement is expected to increase with increased activity at the site and general inflation. If the site becomes CERCLA deferred, the funding discrepancies would need to be addressed and would likely come directly from the State of Nevada or the responsible party, ARC. In summary, a commitment to fully fund the Tribe's Environmental Office is expected to be in any CERCLA deferral agreement with ARC. It is noteworthy that under the CERCLA process, EPA funds the Tribe and seeks compensation from ARC, the State of Nevada would be expected to provide this guarantee under a deferred process.

2.2 Fund community education through the Tribal Education Department

EPA has committed to developing a revised Community Involvement Plan (CIP) for the site. Development of the cultural resources claim under NRDA has required the Tribe to conduct extensive outreach in the community; coordinating it through the Tribe's education program has been consistently successful. Determining pathways and estimating exposure from activities associated with tribal lifeways for Human Health Risk Assessments will require a similar effort. To facilitate this, public outreach has been a workplan component of nearly every Tribal Environmental Office program.

In the event the site is CERCLA deferred, much of the funding used for this effort must be subsidized through the state or responsible party. The funding can be from both direct and NRDA activities allowing for facilitated community outreach through the Tribe and access to Tribal facilities for meetings and the Tribe's websites and newsletters.

The Tribe's public outreach regarding the site through both response and NRDA processes has been more developed than those conducted by the federal and state agencies. In addition, the preferred, larger and more modern local meeting facilities are managed by the Tribe. The Tribe needs only to be acknowledged for leadership in this current role and would develop the CIP for the site in the event it is CERCLA deferred.

2.3 Develop a process for the Tribe to review, comment, participate in and approve workplans, reports and other site documents that include decisions and principle work.

The Tribe has a dual role in site regulation, both direct and indirect. The direct methods include regulation of portions of the site that are on Tribal Trust property. The Tribal Council has set regulations for various activities and expectations for managing Tribal resources that are effected by the mine and on Trust property. Another direct application of Tribal authority is through ARARs as the Tribe establishes environmental ordinances as standards for the site. The

basis for the Tribe's assertion of authority under this application includes the express congressional delegation of authority to eligible Indian tribes to administer regulatory programs over their reservation contained in Section 518 of the Clean Water Act. This authority is described in the U.S. Environmental Protection Agency's final interpretive rule, *Revised Interpretation of Clean Water Act Tribal Provision*, 81 FR 30183, May 16, 2016. As upheld in numerous cases, this authority can include resources off Trust Property that can affect Tribal resources.

The relationship with the Tribe and EPA also has a very functional role in the day to day management of the site. As a product of the Tribe's regulatory role at the site as described above, the Tribe participates in the development and review of site documents. This review is critical to the efficient operation of the site; the RPs, and other regulatory authority at the site benefits from the Tribe's knowledge of cultural and regional natural resources. This also adds to the public information role defined in the items above.

In general, with EPA as lead at the site and the site following CERCLA processes, the Tribe's role is defined in EPA guidance and applicable legislation and litigation. In a CERCLA deferred process, this role will need to be robustly defined to ensure the process is CERCLA compliant. The State of Nevada must accept the Tribe's regulatory role in the process and accept an appropriate partner relationship.

2.4 ***All work will include onsite cultural monitors.***

CERCLA sites, particularly those that are on or near Tribal Trust Property, utilize cultural monitoring to identify and manage artifacts and related items. The Tribe has a history with the site, it includes current Trust property, is completely in the traditional range of the Tribe and it includes known cultural sites. Subsequently, the Tribe would expect it, as a CERCLA site managed by EPA, to include cultural monitors.

Due to the size of the site, a minimum of 4 monitors are required. The Tribe will provide training and certification of the monitors using financial support from ARC. The monitors can have other roles at the site, but cultural monitoring will be the priority for those employees. It is also accepted that 4 is a minimum, additional monitor will be required if work becomes more intensive. The Tribe will work with NDEP and ARC to develop/adopt further guidelines for this need.

2.5 ***Have a local and tribal preference for site contractors; all contractors should be bid out by the State and administered through the State***

For CERCLA sites, EPA has several examples of preference for both Tribal and local contractors. This has been an important effort to both involve the community in clean up and provide for communities that have suffered a negative economic consequence of the sites. Adding to this, local businesses involved in

the site is a positive community involvement step improving public perception of the site. Examples of Tribal and local preference programs can be found as part of the programs at the Navaho Reservation, Sulphur Bank Mercury Mine Superfund site in Lake County, CA, and Jackpile Mine. This may require the state to add to their current procurement processes and create a specific procurement process for the responsible parties to follow as part of the agreement with them.

In summary, this requirement is already found at CERCLA sites and the Tribe has these expectations for this program as part of a CERCLA equivalent site. With financial support from ARC, the Tribe can adopt/develop specific guidelines benefiting from experience of other Tribes at other CERCLA sites.

3 Concerns shared by the State and the Tribe

3.1 ***Settle all NRDA claims.***

This can include a cooperative agreement to cover past and future assessment cost with funds for estimated damages set aside (method to be determined).

Tribal, federal and state agencies act as the trustees of natural resources on the behalf of the public as defined under federal law including CERCLA. The trustees assess and recover damages from injuries to natural resources with the intent to restore, replace, rehabilitate or acquire equivalent resources.

The Anaconda Mine NRDA Trustee Council was formed to assess damages related to the development and operation of the Yerington Anaconda Mine in Yerington, NV (Anaconda Mine). The Trustee Council includes the Yerington Paiute Tribe (YPT), Walker River Paiute Tribe (WRPT), U.S. Department of Justice (DOJ), Office of the Nevada Attorney General, Nevada Division of Environmental Protection (NDEP), Nevada Division of Wildlife (NDOW) and the U.S. Department of the Interior represented by the Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), and the U.S. Fish and Wildlife Service (USFW).

Both the State of Nevada and Tribe are Natural Resources Trustees and as such have damages that are currently being assessed. The USFW has already completed a claim that has been presented to ARC and the U.S. Department of the Interior (DOI) has funded multi-year programs to assess damages to groundwater and cultural resources. Previously, both the Tribe and the state have presented preliminary costs for damages to ARC.

Deferred listing will result in limited to no funding becoming available through DOI and create issues with the participation of the other agencies critical to this process. However, a solution to this issues has previously been provided to ARC and is appropriate considering the advanced state of assessment at the site. A

cooperative agreement will shift the assessment cost to ARC directly, compared to the current reimbursement scheme currently in use, and provide for the process to finish in a cooperative manner. At other CERCLA sites, this process has been found to be more efficient and reduces costs to both agencies and PRPs. It will guarantee the NRDA process will continue unaffected by CERCLA deferment.

Many responsible parties have found cooperative agreements to be effective methods to manage their NRDA liabilities and this option has been available to ARC for over 10 years under the current regulatory arrangement.

4 Other Regulatory Issues

4.1 ***Complete a site wide, comprehensive storm water management plan and emergency response plan prior to deferral***

As a CERCLA site, EPA is expected to provide storm water management that is equivalent to state requirements both as a policy and ARAR. However, stormwater management has been an issue for the site and uncontrolled releases of sediment laden stormwater occur regularly. Not only has this been photographed on numerous occasions but is evident from erosion features throughout the site. The Tribe has commented on several occasions for improvements in stormwater management at the site and remains concerned regarding this issue. It is noteworthy that storm water releases have been documented in Wabuska Drain, a part of the site that flow across the Reservation.

A CERCLA deferment and NDEP as state lead will result in an immediate need for more comprehensive and formal storm water management program. Improvements in management, storage and other components will need to be well defined and quickly implemented.

4.2 ***Agree to use CERCLA and UMTRA requirements, which ever provides the higher level of protection***

Uranium is a principle risk driver for the site and the site was evaluated for uranium production. It is important to clarify if UMTRA is applicable to the site and if the UMTRA guidance and experience can be used for more efficient site management.

5 Unresolved issues that would be addressed during the CERCLA process

Several issues are part of the sites future task list but now remain partially or not addressed. These are unique to the site and may create some confusion without the clarity of CERCLA applied by EPA lead. These issues should be addressed through commitments that acknowledge liability and establish paths to resolution.

5.1 ***Pay all current and expected future expenses (including historical) for water treatment on the Reservation***

The Tribe is operating a recently constructed water treatment plant to provide clean water to the Tribal residents. The plant was built to address increasing concentrations of uranium and arsenic in groundwater at the reservation. The comments from the Tribe regarding background water quality emphasize the concerns for ARC acknowledgement of the plume at the Tribe's boundary, the need to further investigate groundwater conditions on the reservation and address plume stability. Under any currently supported scenario; the plume on the Reservation or approaching the Reservation, water treatment is required.

Under EPA lead, multiple programs, both CERCLA and non-CERCLA, will provide technical and financial assistance to the Tribe. If the site is not listed, this assistance becomes more difficult and may be impossible to obtain. Adding to this, the current groundwater data set indicates a responsibility for ARC. Subsequently, to insure no loss of support through the CERCLA deferred process, the Tribe would expect a commitment by ARC to financially support their water treatment plant.

5.2 ***A supported economic development plan as the Tribe transitions to less water intensive industry***

The Tribe is currently working with EPA Brownfield programs that include state and county level efforts to address economic development on environmental compromised property. In addition, the Tribe has completed hoop house and other agricultural development programs that have the potential to provide for economic development with reduced groundwater use.

With groundwater already known to be compromised on/near the reservation and even under the most ideal circumstance, the Tribe must reduce pumping for irrigation. This step is required and could be part of a NRDA cooperative agreement. In this case, an economic development shift might provide a more effective settlement for the Tribe that is more efficient for ARC.

5.3 ***<u>Address use of mine waste as construction materials in YPT community (fill under houses, road base, etc.)</u>***

This longstanding issue remains a priority for the Tribe. Several homes were built on fill that was derived from mine waste. NDEP did alert Lyon County on several occasions regarding use of mine tailings due to concerns for inappropriate use.

Homeowners first expressed concerns regarding the material under their homes and in the colony playground in 2001. Limited analysis showed levels of copper above Region 9 U.S. EPA PRGs. A subsequent sampling event by U.S. EPA Region 9 of soils in the yards near the homes and in a nearby playground did find some parameters above PRGs but samples did not include crawlspace material (limited to soil samples near the homes).

The use of mine waste in Tribal homes has occurred at other CERCLA sites. Elem Indian Colony had many homes and roads replaced and emergency measures were recently required for the Fort McDermitt Tribe due to mercury laden mine waste used as fill. With data still being collected, any agreement should include clear standards for removal of mine waste used in the community and the financial liability for replacement clearly stated. Additional funds will be required to complete the investigation prior to the end of 2018 and any construction required completed by the end of 2019.

5.4 ***<u>The Tribe approves all seed mixes and other components of revegetation plans</u>***

The mine is entirely in the Tribe's traditional range and is a significant loss of gathering and in the case of the Wabuska Drain and siding, hunting areas. These areas are both on the Reservation and local to the Reservation and Colony; within walking distance. It also is an area that is more accessible, it could allow easier use by elders and others with mobility limits. Although some sections of the mine are permanent, irreplaceable cultural losses, the use of appropriate seed mixes and effective revegetation on such a large area can be a regional improvement for restoring diversity. Some areas are expected to be returned to a condition useable by Tribal members for gathering and hunting while other may still provide for productive habitat which propagates through seed distribution *et cetera* to improve regional conditions.

To provide for an efficient process of procuring appropriate seed mixes the Tribe will provide expertise and facilities to produce the seed mixes with financial support from ARC. Through funding from NFWF and cultural resource documentation developed through Superfund grants, the Tribe has already started this process. Greenhouse construction can begin on the Reservation by late 2017 with seed production, supplemented with other sources as needed, the Tribe can meet the restoration schedule.