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From: Greg Lovato
Sent: Tue 10/31/2017 6:22:22 PM
Subject: Anaconda- Deferral Agreement and Tribal MOU

Angeles and Harry,

NDEP has been reviewing EPA's October 19 (transmitted October 25) suggested edits to the NDEP October 6 revision of the YPT MOU and the EPA October 17 (transmitted October 17) edits to the NDEP October 6 revision to the Deferral Agreement. We appreciate and concur with EPA's paragraph added to the MOU related to "Coordination Among the Parties" (Section IV).

Unfortunately, with respect to all the other edits, because EPA's most recent edits to the Deferral Agreement and MOU were made without accompanying explanation, it is difficult for NDEP to formulate an appropriate response so that we can be sure underlying interests and concerns are addressed. It is also important that we be able to read both documents and rationale together.

The following edits are of particular concern to NDEP, but we request explanation for all edits:

Deferral Agreement

1. New comment (2) on Table in 3.B. - this process for EPA to monitor, make determination and seek to have NDEP take action related to groundwater appears to be dual regulation of the site and not deferral. If EPA is concerned that the response under deferral is not protective, it should seek to terminate the agreement as already provided for in Section VI, not make independent determinations and direct NDEP to take specific action in accordance with those determinations.

MOU

1. I.F – EPA is defining the Site as where wastes have come to be located and that the Site is

located on tribal reservation land. NDEP will not stipulate to these findings, since the RI for Wabuska Drain is not complete and to date the RI for groundwater has not found that wastes from the site have come to be located on Tribal Land.

2. IIA.2 and 3 – EPA edits appear to require NDEP to grant all tribal requests for extension on Tribal comment periods, not considering the fact that NDEP will be providing a schedule ahead of time for the Tribe to be able to plan their review.

3. II.A.4 – EPA is proposing for the Tribe to invoke gov't to gov't consultation on issues off reservation land, that are under NDEP jurisdiction, which is a process that NDEP is not a party to. NDEP believes the newly proposed Section IV, Coordination Among the Parties, will provide an adequate and appropriate venue for the Tribe to bring concerns to EPA's attention, and that additional provision for gov't to gov't consultation for areas off reservation land is not necessary. Again, NDEP is concerned that EPA's proposed process undercuts the main goal of deferral to be State lead.

4. III.B.6 – EPA lined out NDEP's suggested language requesting a schedule for response actions on Tribal Land. In order to provide for coordination and open communication, NDEP believes it is necessary for there to be awareness of schedules for activities on Tribal Land.

In order to prepare complete responses and determine our next course of action, NDEP requests that EPA provide rationale for each of the edits made (both strikeout of NDEP language and EPA addition) to both the YPT MOU and the Deferral Agreement by this Friday November 3. This will allow NDEP to prepare complete responses that address all concerns raised. As we completed with the IAOC responses, NDEP commits to providing explanation for all our responses after we receive EPA's rationale.

Thank you,

Greg