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Received
JUN 15 2016

June 10, 2016

VIA EMAIL AND CERTIFIED MAIL

Sean McGrath, Regional Administrator
U.S. EPA, Region 8
8OC-EISC
1595 Wynkoop Street
Denver, CO 80202-1129
r8eisc@epa.gov

Re: Anaconda Aluminum Company Columbia Falls Reduction Plant National Priorities List Designation

Dear Regional Administrator McGrath:

I represent Columbia Falls Aluminum Company ("CFAC"), the current owner and operator of the above referenced facility. The site was proposed for listing on the NPL on March 26, 2015 and we understand that it is likely that the EPA will finalize that listing in the fall of 2016. I respectfully request that you address the site using the Superfund Alternative Approach ("SAA") and not place the site on the final NPL. In the alternative, I request that you postpone placing the site on the final NPL until after completion of the activities required under the current AOC.

Superfund Alternative Approach

Background

In correspondence with EPA Region 8 attorney Mark Chalfant, on behalf of CFAC I requested that the site be considered for the SAA in February 2015 prior to the proposal to list the site on the NPL and as CFAC was discussing with EPA entering into negotiations regarding an Administrative Settlement Agreement and Order on Consent for Remedial Investigation and Feasibility Study ("AOC") (see correspondence attached as Exhibit 1). In fact, CFAC was assured that EPA Region 8 would consider placing the site in the SAA and CFAC relied on such assurance in determining whether to enter AOC negotiations and to ultimately sign the AOC. CFAC was told during negotiations that the site qualified for the SAA and CFAC agreed to language in the AOC that was necessary to allow the site to be addressed under the

SAA. However, after negotiations were concluded and the AOC signed, EPA staff raised to CFAC what CFAC considered to be weak legal and policy arguments as to why the SAA should not be applied to the CFAC site. CFAC thought that it had effectively rebutted those arguments but now understands that it is the Region 8 staff position that the CFAC site should not be addressed through the SAA and that the site should be placed on the final NPL this fall.

The CFAC facility meets the criteria for participation in the SAA

The applicable SAA guidance[1] states that

> "the SAA should only be considered at those sites that the region has determined:
> 1. would meet the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) criteria for listing on the NPL. A region should have adequate documentation to demonstrate a score of 28.5 or greater in the Hazard Ranking System (HRS) (i.e. the site is NPL-caliber)
> 2. are expected to need RA; and
> 3. have viable PRPs that the region believes are capable of and agreeable to performing the cleanup work under an Administrative Order on Consent (AOC) or Consent Decree."

The CFAC site meets each of these criteria.

- NPL Listing: The EPA stated, with supporting material, in its March 25 proposal that the HRS score for the site exceeds 28.5 and the site is capable of being listed on the NPL. EPA staff have maintained at various public meetings since such proposal that the EPA has developed supporting material that demonstrates that the HRS score for the site still exceeds 28.5.
- RA The extent to which the site will require remedial action ("RA") is still unclear and will be better known after completion of the ongoing Remedial Investigation and Feasibility Study (RI/FS) but there are conditions at the site that could lead to RA.
- PRP viability: CFAC has demonstrated its viability as a PRP by (i) signing an AOC, after an efficient negotiating process, which requires the performance of a RI/FS; (ii) providing $4 million in liquid financial assurance to support its AOC obligations; and (iii) has already begun taking significant steps to comply with the AOC, including by developing a detailed and comprehensive RI/FS work plan, engaging contractors that have been working for several months and implementing the work plan on schedule. CFAC is currently performing Phase I of the RI which is expected to include 126 soil borings, 51 gridded sampling locations, 43 new and 25 existing monitoring wells, 16 surface water and sediment sampling locations and approximately 750 total analytical samples.

[1] "Updated Superfund Response and Settlement Approach for Sites Using the Superfund Alternative Approach (SAA)" September 28, 2012, OSWER Dir. No. 9200.2-125

The guidance provides that the decision to apply the SAA to a given site is within the discretion of the region: "On its own initiative or at the suggestion of interested parties [state, PRP, and communities], a region has the discretion to determine whether the SAA is appropriate at a particular site."

Region 8 should use its discretion to place the site in the SAA program

We believe that Region 8 should use its discretion to promote the best interest of the community and promote the efficient re-use of the CFAC site. For the following reasons, we believe that placing the CFAC site in the SAA program is necessary to achieve these objectives.

Placing the site in the SAA will prevent the stigma associated with finally listing the site on the NPL and facilitate redevelopment

Evaluations of the SAA program by EPA have recognized that the stigma associated with NPL listing plays a key role in the decision to address a site using the SAA and not list the site on the final NPL. In its most recent evaluation of the SAA program, the EPA states that "in the instances where the Regions have been asked to consider managing a site through the SAA, avoiding the purported stigma has often been [a] key part of the discussion."[2] An earlier EPA evaluation of the SAA program in EPA Region 4, where it is used extensively, found that its findings "suggest that the approach has value to participants, particularly related to avoiding "stigma" associated with NPL listings."[3]

A related but separate concern is that final NPL listing will restrict future site redevelopment. In the 2011 EPA evaluation, redevelopment concerns are included among the factors affecting listing decisions and use alternatives. The 2010 EPA evaluation states that "[i]nterviews with EPA staff suggest that sites using the SA approach may have a higher potential for redevelopment than comparable NPL sites if avoided 'stigma' increases financing options and willingness to redevelop."

It has been suggested to CFAC by EPA Region 8 staff that whatever stigma or redevelopment restriction that was going to apply to the CFAC site already exists because the site has been proposed for NPL listing and its environmental conditions and the site investigation process are public information. Therefore, final NPL listing should provide no additional stigma or redevelopment restrictions and addressing the site under the SAA and not placing the site on the final NPL should not avoid stigma or enhance site redevelopment prospects. We agree that the environmental conditions and the investigation process are public information but we feel

[2] See "Superfund Alternative Approach Baseline Assessment" EPA, Office of Superfund Remediation and Technology Assessment, April 14, 2011.

[3] See "Effectiveness Assessment of the Region 4 Superfund Alternative Approach" EPA. Office of Policy, November 2010.

that placing the site on the final NPL will add additional stigma and barriers to redevelopment that could be avoided if the site were addressed using the SAA. We have been told by Region 8 staff that one of the advantages of site final NPL listing is that the prospect of EPA being able to expend money to remediate the site and recover those costs from potentially responsible parties ("PRPs") is a significant incentive for formerly recalcitrant PRPs to settle with EPA or other PRPs. We agree with this view. However, the same prospect – that EPA could expend and recover remediation costs from PRPs - can also act as significant disincentive for prospective purchasers as well. Of course, bona fide prospective purchasers can attempt to take advantage of related liability exemptions under CERCLA, however, in order to effectively claim such a liability exemption, the PRP must, among other things, (i) perform all appropriate inquiry and (ii) exercise appropriate care, as defined by the statute, including preventing or limiting human, environmental or natural resource exposure to any previously released hazardous substance. (42 USC §9601(40) and §9607(q)(c)) Any prospective purchaser of the site – whether it is on the final NPL or covered by the SAA – will try to qualify for the bona fide prospective purchaser liability exemption. However, if the site is on the final NPL and not dealt with under the SAA, the consequences of failing to qualify are much higher because that PRP could be obligated to pay EPA's remediation costs. This risk can act as a significant disincentive to future site developers.

It has also been suggested that addressing the site through the SAA and not placing the site on the NPL could provide a recalcitrant PRP with the potential legal defense that EPA failed to follow the National Contingency Plan and therefore is not entitled to recover its costs from such PRP. I have discussed this concern extensively with EPA Region 2 legal staff and I will not repeat CFAC's entire legal analysis in this letter. However, CFAC does not believe that this is a material risk to CFAC or EPA. Under the applicable statute, EPA is entitled to recover from any PRP with whom it has not settled its costs incurred with regard to the site that are consistent with the National Contingency Plan. (42 USC 9607(a)(4)) We have found no case where failure to list the site on the NPL was determined to be a component of NCP compliance. Courts have consistently found that the NPL is an EPA management tool and not a prerequisite for cost recovery or contribution claims. In fact, in Morrison Enterprises v. McShares, Inc., 302 F.3d 1127, 1137-39 (10th Cir. 2002), the 10th Circuit allowed a party to seek contribution where they had participated in an NPL listing "deferral program" arguably an early version of the SAA. Morrison, a property owner, sued McShares for contribution. Morrison was the party cleaning up the property pursuant to an agreement with Kansas environmental authorities to investigate the site. Through a variety of tactical errors, Morrison had been precluded from introducing testimony regarding whether or not their cleanup efforts were NCP compliant, and the trial court granted summary judgment to McShares accordingly. However, the 10th Circuit reversed, reasoning that based on the specifics of the EPA pilot program, Morrison was entitled to a presumption of compliance with the NCP. The SAA guidance states that "[a]t sites using the SAA, the U.S. Environmental Protection Agency (EPA) should act in accordance with the practices normally followed at sites listed on the NPL, using the same response techniques, standards and guidance and achieving comparable clean up levels." Assuming that the guidance is followed then EPA expenditures for a site addressed under the SAA should also be cost recoverable.

<u>If EPA determines not to address the site under the SAA, we request that EPA postpone final NPL listing until after the work under the current AOC is completed.</u>

As stated above, CFAC entered into an AOC to perform a RI/FS and is conducting Phase I of the RI now. The final RI report, expected to be completed in the first quarter of 2020, will include the results of this sampling, a Phase II sampling event and a baseline risk assessment. This report will provide significantly more data about the conditions on the site and their potential impact on the environment than is know now. CFAC is legally committed to completing the RI and the rest of the AOC work, is performing the work and has provided substantial liquid financial assurance to complete the job in the unlikely event that CFAC does not follow through on its legal commitment. There is nothing that would occur during the performance of the AOC if the site were on the NPL that CFAC has not already committed to do under the AOC and for which it has provided financial assurance to ensure completion. Listing the site on the NPL now would not add any environmental or human health protection during the duration of the AOC.

It has been argued that postponing listing of the site until the completion of the AOC could delay site cleanup because, if no PRP stepped up to implement a remedial action, the site would have to be re-proposed for NPL listing and then placed on the final list. We agree that if there is no PRP willing to agree to next steps after the completion of the AOC, the site would have to be proposed again for NPL listing and a new final NPL listing package developed, however, we do not view this as a potential source of delay. After completion of the AOC, EPA must develop a Record of Decision. This process could take a year or longer. The EPA has already demonstrated that it can propose the site for NPL listing, take comments on such listing and develop a final listing package within a year. This could be done while EPA was developing the Record of Decision for the site thus not delaying the ultimate implementation of any remedial action.

CFAC appreciates the time that the EPA Region 8 staff has taken to discuss these issues. Senior CFAC management remains available to meet with you and your staff at your convenience to discuss this matter and any questions you may have about the ongoing work at CFAC

Best regards,

Andrew D. Otis

attachment

cc: via email with attachment
Cheryl Driscoll, Columbia Falls Aluminum Company
John Stroiazzo, Columbia Falls Aluminum Company
Steve Wright, Columbia Falls Aluminum Company
Deb Thomas, EPA Region 8
Martin Hestmark, EPA Region 8
Andrea Madigan, EPA Region 8
Mark Chalfant, EPA Region 8
Joe Vranka, EPA Region 8, Montana Office
Mike Cirian, EPA Region 8, Montana Office
Robert Moler, EPA Region 8, Montana Office

Andrew Otis Letter to Sean McGrath June 10, 2016

Exhibit 1

Otis, Andrew D.

From: Otis, Andrew D.
Sent: Tuesday, February 24, 2015 5:51 PM
To: 'Chalfant, Mark'
Subject: RE: Anaconda Aluminum Company Site, Flathead County, MT, SSID #A8-82 - AOC

Mark,

Thanks for getting back to me. With regard to NPL listing, we are aware of the letters from Governor Bullock and Senator Tester but do not think that there is unanimous support for listing the site on the NPL among the Montana Congressional delegation. We would be happy to provide our views to those at EPA Headquarters responsible for proposing the site on the NPL. Can you please provide me with a contact name.

We believe that CFAC is a good candidate for consideration in the Superfund Alternative Approach: without necessarily agreeing with the EPA's conclusions, we understand that the HRS computed by EPA based on past assessments exceeds 28.5 and CFAC is a willing, capable PRP who will negotiate an agreement with EPA to investigation. Thus, we request that the site be evaluated for the SA approach prior to being listed on the NPL.

We look forward to the prospect of working with you as well.

Best regards,

Andrew

From: Chalfant, Mark [mailto:Chalfant.Mark@epa.gov]
Sent: Tuesday, February 24, 2015 3:50 PM
To: Otis, Andrew D.
Subject: RE: Anaconda Aluminum Company Site, Flathead County, MT, SSID #A8-82 - AOC

Mr. Otis:

Thank you for your follow-up message. In response to your request that the EPA defer proposing the site for inclusion on the National Priorities List (NPL), we will relay your request to the EPA Headquarters officials responsible for proposing the site on the NPL.

The EPA's Denver regional office completed an initial site assessment in April, 2014 to evaluate potential or confirmed releases of hazardous substances that may pose a threat to human health or the environments. Based on available information, we believe that listing is appropriate and the best vehicle for addressing the site. Governor Steve Bullock and United States Senator Jon Tester are on record in support of listing. As I noted in my previous email, the proposed listing will be open for public comment.

There will be ample opportunity for the EPA and Columbia Falls Aluminum Company to discuss next steps, including an Administrative Order on Consent to study the nature and extent of contamination (Remedial Investigation) and evaluate potential cleanup alternatives (Feasibility Study). The EPA welcomes the company's desire to enter into an AOC, and I look forward to working with you.

-Mark

From: Otis, Andrew D. [mailto:aotis@curtis.com]
Sent: Monday, February 23, 2015 2:40 PM
To: Chalfant, Mark
Subject: RE: Anaconda Aluminum Company Site, Flathead County, MT, SSID #A8-82 - AOC

Dear Mark,

Thanks for your response and notice about a potential proposed NPL listing for the site. We would request that EPA hold off on proposing to list the site on the NPL until we have had a chance to meet and discuss an AOC for performing site assessment. CFAC believes that the site can be addressed effectively through agreements with EPA and need not be proposed to be listed on the NPL. We look forward to meeting with you but are also available to meet with others from EPA during the period on which you will be on leave.

Best regards,

Andrew

From: Chalfant, Mark [mailto:Chalfant.Mark@epa.gov]
Sent: Monday, February 23, 2015 4:25 PM
To: Otis, Andrew D.
Subject: RE: Anaconda Aluminum Company Site, Flathead County, MT, SSID #A8-82 - AOC

Mr. Otis:

Thank you for your message. I will be out of the office on leave for the next two and a half weeks returning to the office on Monday, March 16th. I appreciate your follow-up, and will contact you upon my return to the office in mid-March to discuss next steps on the Administrative Order on Consent for the above-referenced site.

I also wanted to let you know that the EPA may propose the above-referenced site for inclusion on the National Priorities List (NPL) as early as March, 2015. Public comment on the proposed NPL listing will be open for sixty days following publication of the proposed listing in the Federal Register.

-Mark

Mark A.R. Chalfant
Attorney
Legal Enforcement Program
Office of Enforcement, Compliance and Environmental Justice | U.S. EPA Region 8
303.312.6177 | chalfant.mark@epa.gov

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From: Otis, Andrew D. [mailto:aotis@curtis.com]
Sent: Monday, February 23, 2015 8:57 AM
To: Chalfant, Mark
Subject: Anaconda Aluminum Company Site, Flathead County, MT, SSID #A8-82 - AOC

Dear Mark,

Following up on our telephone call in November, 2014, CFAC would like to reiterate its desire to begin discussions about entering into an Administrative Order On Consent with the EPA regarding assessment activities at the above referenced

site. During our November telephone call, you had said that you thought that such discussions would be a logical next step and would contact me with regard to scheduling. I have not heard from you and thus wanted to follow up and begin that scheduling discussion.

Please feel free to contact me if you have any questions and I look forward to hearing from you regarding when we may schedule a call or in person meeting to discuss next steps with regard to an AOC.

Many thanks and best regards,

Andrew Otis

Andrew D. Otis
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