UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C., 20460

John Cruden
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Ronald J. Tenpas
Vinson & Elkins
2200 Pennsylvania Ave NW
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Washington, D.C. 20037

July 7, 2020

Dear Mr. Cruden and Mr. Tenpas:

Thank you for sharing your interests and concerns in negotiating an Administrative Settlement Agreement and Order on Consent (ASAOC) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for work to be performed at the Stibnite Mine Site (Site) to address legacy mine wastes and associated water quality issues.

Through our conversations with you, we understand that time is of the essence for Midas to reach settlement with the United States so that Midas can begin work under the settlement this field season. To this end, we have been working with EPA Region 10 to develop a path forward that facilitates necessary cleanup performed under a CERCLA ASAOC in a way that addresses all parties' interests and concerns. If Midas accepts EPA's proposed settlement terms, negotiations of an ASAOC will be conducted by the Region. We have not provided our government or Tribal partners the opportunity to review and comment on this draft proposal prior to sending this letter. We intend to solicit input from our government and Tribal partners if Midas accepts this proposal and modifications may be necessary based on such input.

EPA is prepared to pursue a phased "bridge" type of agreement that was briefly explored towards the end of our last meeting. Under this approach, EPA and Midas would enter into a CERCLA ASAOC that establishes various phases of work that would improve environmental conditions at the site within specific timeframes that can be adjusted, creating a bridge as Midas progresses into mining activities covered by approvals and permits issued by the U.S. Forest Service (USFS), U.S. Army Corps of Engineers (USACE), and the State of Idaho (Idaho).

Although EPA initially suggested a Remedial Investigation/Feasibility Study (RI/FS) for the Site, EPA believes that an RI/FS would not be beneficial to EPA at this time and would be impracticable given the changing landscape of the Site caused by the proposed mining operation. EPA believes a more appropriate cleanup will be completed by conducting the actions described below, which include

removal actions and focused baseline studies of adits at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

Some key elements of this Phased/Bridge proposal are as follows:

- The agreement would be designed to allow Midas to perform data collection and plan and perform removal work in phases under an ASAOC while pursuing mining related permits and approvals from USFS, USACE, and Idaho.
- Each phase of this proposed approach would set forth specific actions to be performed in specific timeframes under a CERCLA ASAOC. The cleanup work to be performed would be a series of removal activities that could be performed in three (3) phases.
- **Opt out:** Work outlined in Phase 1 would be required under the ASAOC. Under a phased bridge approach, Midas would have the option to conduct work under the subsequent phases or opt out of the agreement at the end of each phase.
- The three phases would be structured as follows:
  - **Phase 1** would begin on the effective date of the ASAOC. Phase 1 actions must be completed under the ASAOC within a specified timeframe (ASAOC Years 1-4).
  - **Optional Bridge Phase** between Phase 1 and 2:
    - At the end of Phase 1, if mine permits and approvals are not obtained by Midas, the ASAOC can remain effective for up to one year with no option for an extension so long as ASAOC actions occur during this bridge period. The work to be performed by Midas during this year will include removing additional tonnage of legacy waste from the floodplain.
    - If Midas does not obtain necessary permits and approvals by the end of this bridge year, the agreement will terminate.
  - **Phase 2** work would begin after timely completion of Phase 1, or after completion of the Optional Bridge Phase, but only if all permits and approvals for the Stibnite mine project have been issued by the end of Phase 1 or the Bridge year (ASAOC Years 5-8). Midas has the option to conduct work described under Phase 2 under the ASAOC or under a modified Plan of Restoration and Operations (PRO) or Clean Water Act (CWA) permit. The goal here is to have only one governing document (i.e., either CERCLA PRO or CWA) cover any particular work area.
  - **Phase 3** would begin when mining operations are underway and through mine reclamation (ASAOC Years 9-20). Work will need to be conducted continuously for the ASAOC to remain in place. Midas has the option to conduct work described under Phase 3 under the ASAOC or under a modified PRO or CWA permit. Same principle applies here – one governing document for each work area.
- **Termination:** The agreement will terminate if Midas does not have all necessary permits and approvals for mining at the completion of Phase 1 or bridge phase/option year.

Terms of the agreement would be based on EPA's model removal ASAOC and include the following:

- **Work to Be Performed:** The phased work would be described in an attached Statement of Work.
- **Payment of Future Response Costs:** Midas would pay EPA's future response costs related to the work which includes oversight costs and ASAOC negotiation costs.
- **Covenants Not to Sue/Contribution Protection:** The scope of the ASAOC and related covenants/contribution protection would be focused on the work to be performed and costs paid under the ASAOC. The covenants would take effect upon the effective date of the agreement and be conditioned upon completion and satisfactory performance of the work. This is consistent with the most recent ASAOC sent by Midas. There will be no covenant not to sue or contribution protection for releases or threats of releases of hazardous substances, pollutants or contaminants caused by or related to Midas' mining activities at the Site.

- **Financial Assurances:** Midas would establish a financial assurance mechanism that sets aside funds for performance of the upcoming phase of work – i.e., at the beginning of Phase 1, Midas would be responsible to set up financial assurance only for the amount required for performance of the Phase 1 work.
- **Model "permit" language:** The ASAOC would include the model permit language which cites to Section 121(e) of CERCLA.
- **Section 113(h) of CERCLA:** The ASAOC would be silent regarding the applicability of Section 113(h) of CERCLA. EPA would not make any commitments or statements regarding the U.S. position on this matter.
- **Past Costs:** The ASAOC would not address past costs. This means that Midas would not be required to pay past costs under the ASAOC and that EPA would not compromise its claims for these costs. Our rationale is that any such compromise would necessitate negotiating some level of payment from Midas and would require Department of Justice engagement. The United States will reserve its right to collect past costs from Midas.
- **Provisions Regarding Sale of Claims:** If Midas sells its claims at any time after completion of Phase 1, Midas will pay EPA from the proceeds of the sale an amount equal to the estimated cost for EPA to complete the remaining work under the phase of work that Midas is in at the time of the sale, less any sum remaining in the trust account/FA mechanism.
- **BFPP Status:** The ASAOC would be silent regarding BFPP and PRP status. This would be consistent with your suggestion that the ASAOC be agnostic regarding Midas' BFPP status. These are legal conclusions that are best resolved by the courts.

The EPA Office of Enforcement and Compliance Assurance, Office of Land and Emergency Management, and the Region worked together on this proposal. We look forward to hearing whether Midas is interested in pursuing this path by entering into negotiations of an ASAOC with Region 10.

Sincerely,

SUSAN BODINE Digitally signed by SUSAN BODINE Date: 2020.07.07 16:46:42 -04'00'

Susan Parker Bodine
Assistant Administrator
Office of Enforcement and Compliance Assurance

Wright, Peter Digitally signed by Wright, Peter Date: 2020.07.07 18:40:06 -04'00'

Peter C. Wright
Assistant Administrator
Office of Land and Emergency Management

Enclosures
1. EPA's Proposed Bridge Approach for the Stibnite Mine
2. Table 1: Stibnite Site Sources

cc: Chris Hladick
Region 10 Regional Administrator, U.S. Environmental Protection Agency

Jess D. Byrne
Deputy Director/Acting Director, Idaho Department of Environmental Quality

Steven Vaden
General Counsel, U.S. Department of Agriculture