Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

December 18, 2020

Submitted via email to: bodine.susan@epa.gov; wright.peter@epa.gov; shiffman.cari@epa.gov

Ms. Susan Parker Bodine
Assistant Administrator
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
Washington, D.C. 20460

Mr. Peter C. Wright
Assistant Administrator
Office of Land and Emergency Management
United States Environmental Protection Agency
Washington, D.C. 20460

Ms. Cari Shiffman
Chief of Staff
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency
Washington, D.C. 20460

Re: Nez Perce Tribe's Comments and Renewed Request for Government-to-Government Consultation on the EPA's Draft ASAOC for the Stibnite Mine Site

Dear Ms. Bodine, Mr. Wright, and Ms. Shiffman:

These comments respond to the Environmental Protection Agency's ("EPA") December 11, 2020, request that the Nez Perce Tribe ("Tribe") provide comments by December 18, 2020, on the "nearly final" draft Administrative Settlement Agreement and Order on Consent, including its Statement of Work found in Appendix A (collectively "ASAOC") for phased removal actions at the Stibnite Mine Site. The Tribe's comments herein supplement, but do not substitute for, the comments, proposed cleanup approach, and request for government-to-government consultation that the Tribe submitted to EPA on November 6, 2020, in response to EPA's October 20, 2020, draft ASAOC for the Stibnite Mine Site. The Tribe also, herein, renews, pursuant to EPA's Policy

on Consultation and Coordination with Indian Tribes and EPA's Tribal Treaty Rights Guidance, its request for formal, government-to-government consultation with EPA, prior to EPA signing any iteration of this ASAOC.

In July of 2020, EPA consulted with the Nez Perce Tribal Executive Committee on a concept ASAOC for the Stibnite Mine Site. At the time of the consultation, EPA was very clear that the Agency had not developed a draft ASAOC and was only able to talk about a possible ASAOC in the broadest terms. Since then, EPA has afforded the Tribe the opportunity to look at two draft ASAOCs, including this one, but has ignored the Tribe's requests to consult on the document. This is despite the Tribe having repeatedly requested government-to-government consultation with EPA. This abdication by EPA of its trust responsibilities and violation of its own policies on tribal coordination and consultation is deeply concerning to the Tribe.

The Tribe is also troubled by the lack of acknowledgement in the ASAOC or elsewhere of the Tribe's treaty-reserved rights at the Stibnite Mine Site and by the deafening silence from EPA as to how the ASAOC fulfils the Agency's trust responsibility under federal law and policy to protect the Tribe's treaty-reserved rights and resources. This unacceptable deficiency only serves to make the following statement in paragraph 58 of the ASAOC more alarming: "[W]hile the Site is in operations during optional Phase 2 or optional Phase 3, the Respondents may, upon approval by the Agencies, reasonably restrict Site access to accommodate health, safety, and operational considerations." The Tribe requests an immediate explanation from EPA as to how Tribal members could be affected and how EPA intends to uphold its trust responsibilities to the Tribe and protect Tribal member rights in the immediate future and during all phases contemplated by the draft ASAOC.

EPA has given the Tribe one week to comment on this current draft ASAOC. This time frame is simply insufficient for the Tribe to thoroughly and completely evaluate and comment on the document. This is especially true in light of the fact that EPA and Midas Gold appear to have made significant changes to Phase 1 since the Tribe reviewed a previous draft of the ASAOC one month ago but have not provided the Tribe with documentation or other information related to the changes. EPA has also unreasonably delayed responding to the Tribe's August 2020 Freedom of Information Act request seeking documents related to EPA's development of, and discussions regarding, the ASAOC. Thus, the Tribe simply does not have the information it needs to adequately evaluate and comment on the current draft ASAOC. In order for the Tribe to provide EPA with thorough feedback, the Tribe needs, at minimum, to obtain and understand the following information:

- All documents incorporated by reference into the ASAOC, including: the "confidential enforcement addendum" referenced in section III.18 of the ASAOC; and Appendix A's

Attachments 1 and 2 and shape files showing the "Source Areas" the ASAOC is intended to address.

- An explanation of how EPA identified the "Source Areas" covered by the ASAOC.
- An explanation of why EPA has determined the Phase 1 removal actions to be "time critical."
- EPA's rationale, and all underlying information, regarding its conclusion in ASAOC section V.32. that: "The removal actions required by the Action Memoranda are necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this ASAOC, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP." [emphasis added]
- EPA's rationale for shifting the focus of the Phase 1 removal actions from the Keyway Dam and Marsh area to the Bradley Man Camp Dumps and the NW Bradley Dumps.
- EPA's rationale for changing the repository location for waste moved during Phase 1 from "an uplands area" to the Canadian Superior Heap Leach Pads and adjacent to the United States Forest Service ("USFS") repository on top of the NW Bradley Dump.
- Information relating to how EPA determined the viability of the Canadian Superior Heap Leach Pads and the USFS repository, whether these repositories have been deemed equivalent to new repositories, the judged adequacy of each site as a permanent repository; and the risks associated with using these repositories, given their proximity to live water. Such information could include the repositories' pre-construction site characterizations, as-built drawings, operational histories, and groundwater monitoring results.
- Information relating to EPA's determination that an 18-inch cover of "clean fill material" on either both repositories or just on the Canadian Superior Heap Leach Pads (not clear from text) constitutes an adequate infiltration control in light of conclusion in the Stibnite Gold Project Draft Environmental Impact Statement that an engineered cover would be necessary to address infiltration into the waste rock placed in Fiddle Creek, and in light of the fact that the proposed cover (and other characteristics of the proposed repositories) are inconsistent with more typical Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") repository designs for mine waste materials.
- The ownership status of the land underlying the mining waste to be moved under Phase 1 and the ownership status of the land underlying the Canadian Superior Heap Leach Pads and the USFS repository.
- An understanding of what baseline studies are still needed and why for the Bailey Tunnel, DMEA Adit, Bonanza Adit, Cinnabar Tunnel, and Meadow Creek Adit—given the extensive data already collected by the U.S. Geological Survey, the USFS, and Midas Gold, among others and why these studies are "time critical."
- Documentation supporting the level of financial assurance required by the ASAOC.

As noted above, the Tribe's analysis of the ASAOC was limited by its lack of supporting information. That said, after reviewing the ASAOC as provided by EPA, the Tribe has the following comments and observations:

- The Tribe sees no evidence that EPA considered, let alone incorporated, any of the Tribe's previous suggestions into the current draft ASAOC.
- The Tribe remains disturbed that EPA decided to forego public comment on an action that is too anemic to warrant EPA's rushed timeline.
- ASAOC, section I.6.: "Respondents assert that the full restoration and water quality benefits envisioned under Respondent MGII's PRO are contingent on Respondent MGII's ability to secure the necessary permits and operate a mine in the Stibnite Mining District." As made clear in the Draft Environmental Impact Statement for the Stibnite Gold Project, Midas Gold's mining plan would not result in "full restoration" but instead in the creation of more than 450 million additional tons of waste and tailings compared to the existing 10-15 million tons of historic mine waste currently at the Site and would result in the degradation of water quality, particularly as compared to what water quality would be at the Site were the Tribe's No Action Cleanup Alternative, provided to EPA on November 6, 2020, to be implemented.
- ASAOC, section I.8.: This section recognizes the voluntary nature of the ASAOC and "the opportunity for NFS lands impacted by legacy mining activities to be improved through private investment." The proposed Stibnite Gold Project would not result in National Forest System land being improved overall, but, instead, in that public land becoming significantly more industrialized and requiring water management in perpetuity.
- ASAOC, section I.9.: "[T]he purpose of this ASAOC is to address certain pre-existing environmental issues in the Stibnite Mining District that may not otherwise be addressed by other third parties or by Respondents through the actions proposed in the PRO." This statement ignores the existence and intent of the Tribe's Clean Water Act lawsuit against Midas Gold.
- ASAOC, section XXVII.122-23.: EPA has reduced the financial assurance Midas Gold is required to provide for Phase 1 from $16,663,000 to $7,500,000. The Tribe requests EPA's basis for this new cost estimate. The Tribe also strongly opposes EPA's decision to allow Midas Gold to use a corporate guarantee as financial assurance for any subsequent phase.
- Appendix A, section 2.2: Appendix A states that removal actions and subsequent in-stream restoration Best Management Practices are aimed at protecting downstream fish habitat through reduced sediment loads/water velocities. In restored stream reaches, Vegetation Control Best Management Practices should include placement of large-woody debris below the annual high-water mark to provide velocity controls similar to the step/pool method described, while providing improved fish habitat and facilitating natural ecosystem

processes. Fish need macroinvertebrates for forage and wood debris provides forage for detritivores and is a source of nutrients in a system devoid of nutrients.

- Appendix A, section 2.2: Appendix A's stated justification given for placing removed material adjacent to the USFS repository—"It provides the greatest separation from groundwater available in the vicinity of the removal"—is weak. Furthermore, the proposed location of the repository requires significant hillside cuts to prevent further erosion from the NW Bradley Dump into the East Fork South Fork Salmon River. Waste should be placed in areas that are not at risk of collapsing into the river without substantial slope stabilization. If the area adjacent to the USFS repository is used, the west bank must be cut to a 1:1 slope where possible and no more than a 2:1 slope to eliminate risk of slope failure and to further prevent erosion.

Based on the information EPA has provided to the Tribe to date, EPA's and Midas Gold's revisions to the ASAOC appear to be motivated by a desire to simplify the proposed tasks for Phase 1 and, thereby, significantly reduce their cost. Instead of requiring a robust and comprehensive removal of the material in the Keyway Dam and Marsh areas and a more suitable new repository location, the revised Statement of Work has pivoted to using an existing heap leach facility and repository, and to removing materials in close proximity to those facilities—at a significantly reduced cost to Midas Gold. There is no indication in the materials EPA provided that this approach is a preferable or more environmentally beneficial approach than that found in the October 20, 2020 draft ASAOC. It appears, instead, that EPA has simply caved to Midas Gold's desire for a limited, inexpensive ASAOC on an expedited timeline. While this conclusion may not be warranted, without further information, the Tribe cannot ascertain any other reason for the changes.

Finally, EPA has failed to address the Tribe's concern that the ASAOC is expressly conditioned upon Midas Gold dismissing its Clean Water Act complaint against the USFS. As a potentially liable party under the Clean Water Act, the USFS arguably has an incentive to approach the ASAOC negotiations from a defensive posture that minimizes its legal liability or exposure. Inclusion of a provision releasing the USFS from the Clean Water Act lawsuit raises legitimate, conflict-related concerns as to whether the USFS agreed to terms and conditions in the ASAOC favorable to Midas Gold in exchange for the company dismissing its complaint against the USFS.

In sum, it appears that the ASAOC fails to accomplish any of CERCLA's foundational purposes and simply amounts to a liability shield for Midas Gold's Clean Water Act violations at the Stibnite Mine Site. Neither this draft, nor any of the previous drafts of the ASAOC contemplate a true, comprehensive cleanup of the Site. Rather, this draft ASAOC only requires that Midas Gold complete one phase, which calls for extremely limited studies and evaluations of questionable utility, and for the removal of a mere fraction of the waste currently housed at the Site. As a result, it is unclear how this ASAOC serves either the Tribe or the public.

The Obama Administration refrained from making decisions on numerous important issues in its final days. It did so as a courtesy to the Trump Administration and in recognition that elections have consequences, and the will of people should come to bear on decisions of public importance in a democracy. EPA's decision to ignore this custom and rush to complete an ASAOC—a document with significant, long-term implications for the Stibnite Mine Site, the Nez Perce Tribe, and public—without seriously considering the Tribe's concerns, without a public comment period, and in the final days of the Trump Administration raises substantial questions about EPA's commitment to objectivity and transparency and to serving the interests of tribal nations and the public.

The Tribe requests that EPA provide the Tribe with the missing information outlined above, provide documents responsive to the Tribe's August 2020 Freedom of Information Act request, seriously consider and respond to the Tribe's comments on the draft ASAOCs to date, and consult with the Tribe prior to EPA signing an ASAOC for the Stibnite Mine Site. To schedule a consultation, please contact Executive Assistant to the Nez Perce Tribal Executive Committee Marie Baheza at (208) 843-2253 or mariea@nezperce.org. If you have any questions, please contact Mike Lopez, Senior Staff Attorney for the Nez Perce Tribe Office of Legal Counsel, at (208) 843-7355 or mlopez@nezperce.org.

Sincerely,

Shannon F. Wheeler
Chairman

cc: Chris Hladick, EPA Region 10 Administrator