



TOWN OF DEWEY-HUMBOLDT  
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**SENT VIA FEDEX OVERNIGHT COURIER  
AND ELECTRONIC MAIL ([montgomery.michael@epa.gov](mailto:montgomery.michael@epa.gov))**

March 19, 2024

Michael Montgomery  
Director  
Superfund and Emergency Management Division  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Re: Iron King Mine-Humboldt Smelter Superfund Site, Dewey-Humboldt, Arizona

Dear Mr. Montgomery:

Through its duly elected Mayor and Town Council, the Town of Dewey-Humboldt, Arizona (“*Town*”) hereby rescinds its opposition to the U.S. Environmental Protection Agency’s (“*EPA’s*”) residential soil investigation and cleanup project that is being undertaken in connection with the Iron King Mine-Humboldt Smelter Superfund Site (the “*Superfund Site*”). By rescinding such opposition, the Town hereby returns to its prior position of support of EPA’s residential soil and cleanup project. However, the foregoing rescission and expression of support of EPA’s project is expressly conditioned on EPA’s good faith satisfaction of and adherence to the agency’s commitments to the Town, as expressed in recent meetings and communications between EPA and the Town and memorialized in your letters to the Town’s Mayor signed February 2, 2024, and February 16, 2024.

**A. EPA’s Commitments.**

To ensure mutual understanding, the Town wishes to identify the commitments EPA has made to the Town, and the Town’s understanding of those commitments, which the Town is relying on to rescind its opposition to, and return to its prior position of support of, EPA’s residential soil investigation and cleanup project.

1. EPA Collaboration with the Town.

In general, EPA has committed to collaborate with the Town. Your February 2 letter notes EPA’s prior efforts to “maintain a collaborative partnership throughout [the] cleanup decision-making process” and indicates that, going forward, EPA “would like to continue to work collaboratively to obtain the full cooperation of locally elected officials.” Your February 16 letter restates EPA’s desire

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for collaboration, emphasizing: “It is important for [EPA] to collaborate with [the Town] and to have the support and cooperation of the Town government and residents as we move forward” (underscoring added).

While the Town welcomes EPA’s commitment to a “collaborative partnership” with the Town, the Town is concerned that EPA’s and the Town’s respective understandings of collaboration differ markedly from each other. This concern is addressed more fully below since it goes to the heart of all EPA’s commitments to the Town.

2. EPA Respect for the Town’s Land Use Authority.

EPA also has committed to respect the Town’s land use authority. In your February 2 letter, you stated that “EPA does not have a direct role in zoning” and “does not intend [to] request specific zoning to meet the response objectives for the Site cleanup.” These statements are consistent with your November 21, 2023 letter to the Town, wherein you responded to the Town’s plan to update its general land use plan to include new zoning designations for the IKM and HS sites with the following statement: “We consider any development and/or amendment of General Plans as a process that is independent and separate from the cleanup of environmental contamination undertaken by EPA under the federal Superfund program” (underscoring added). A similar statement was made by Jeff Dhont in a November 15, 2023 email to a Town resident (Lynn Collins): “The planned cleanup of the Site under the federal Superfund program is entirely separate from the process being undertaken by the Town to update its General Plan ... [General planning and zoning] are within the Town’s purview, not elements of the EPA Superfund process” (underscoring added).

Again, while the Town welcomes EPA’s commitment to respect the Town’s land use authority as being “independent and separate” from EPA’s Superfund authority, the Town remains concerned with EPA’s potential to exercise its Superfund authority in a manner that undermines the Town’s land use authority. This concern, arising from your February 2 letter indicating that “EPA will frame its response actions based on the reasonably anticipated use of any property and without regard to ownership,” also is addressed more fully below.

3. More Frequent, Effective Channels of Communication and Sharing of Information.

EPA has further committed, as set forth in your February 16 letter, to “create more frequent and effective channels of communication and sharing of information” with the Town so that the Town can “[obtain and] provide current and correct information about the status of the investigation and cleanup at the Superfund Site.” To that end, EPA committed to certain actions to “facilitate communication with the Town,” including (a) “regular meetings” leading up to and during EPA’s cleanup work, (b) development of an online platform for sharing of important information about upcoming investigation and cleanup activities, FAQs, work updates, progress maps, and public outreach announcements, (c) dissemination of important information through the Town newsletter, (d) one or more open house events, and (e) establishing a hotline for Town residents.

Again, the Town welcomes EPA's commitment to improved communication with the Town as outlined in your February 16 letter and expects that EPA will honor and fulfill this commitment. While the Town has recently witnessed more frequent communication from EPA, the Town believes that improved communication requires not just greater frequency, but better engagement and interaction. One-way communication, such as an email notifying the Town what EPA will be doing or wants the Town to do, is better than no communication. But better yet is two-way communication, such as a phone and/or video call allowing for meaningful engagement and interaction (e.g., question-and-answer) with the Town's environmental team.

Further, the Town respectfully requests, again, that EPA honor the Town's request that all communications with the Town be directed to its environmental legal counsel, James Hamula, with a copy to the Town Manager, Dan Field, as originally requested in Mr. Hamula's February 19, 2023 email to Jeff Dhont and David Kim. Since then, the Town has received several written communications directed to the Town's Mayor, the Town Manager, and the Town's assistant clerk. The Town has requested that all communications be directed to Mr. Hamula for a reason, namely to allow EPA to have a single point of contact for the Town, and to ensure proper routing of EPA's communication within the Town's organization and timely response from the Town to EPA.

As for the regularity of EPA's planned meetings with the Town, it is hoped that such meetings will commence soon, will include the Town Manager (Dan Field) and the Town's retained environmental advisors (James Hamula and Steve Speyer) as previously requested, and will be held no less than monthly prior to and after EPA's actual field work (until conclusion of the soil cleanup project) and no less than weekly during EPA's field work. In this way, the Town believes that EPA can fulfill its specific commitment to work with the Town "to learn about issues being raised by residents as they arise and to provide timely responses."

**B. Town's Outstanding Concerns.**

1. Real vs. Nominal Collaboration.

While the Town welcomes EPA's foregoing commitments, the Town is concerned, as previously indicated, that EPA's and the Town's respective understandings of collaboration, upon which all of EPA's commitments are premised, differ markedly from each other. Your February 2 letter, for instance, suggests that EPA believes that the agency has "maintain[ed] a collaborative partnership throughout [the] cleanup decision-making process." From the Town's perspective, however, the Town cannot say that it has previously experienced a "collaborative partnership" with EPA. To the contrary, the Town has felt very much kept at arm's length from EPA by, for instance: (a) the agency informing Town representatives at the March 2023 public meeting that the agency would not allow itself to be disturbed or distracted by Town issues or concerns in order to meet aggressive internal agency deadlines relating to remedial funding; (b) the agency initiating communication with the Town only when the agency was encouraged by the Arizona Department of Environmental Quality's ("ADEQ") Laura Malone before her September 2023 retirement to

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communicate with the Town, but even then emphasizing in a November 2023 meeting that the Town must “stay in its lane” and not distract EPA from its work schedule; and (c) the agency not informing the Town of recent soil sampling and testing activities in Town (for instance, at the Brittany Duncan and other residential properties), and not sharing the analytical data from such activities when specifically asked.

Going forward, such actions must not characterize EPA and the Town’s relationship. Collaboration between EPA and the Town must be real and meaningful if the Town’s support for EPA’s work in the Town is to be sustained. As the Town sought to make clear in its December 8, 2023 letter to you, Town residents strongly desire, indeed insist, that they, through their local government, manage their own environmental future. As explained in that same letter, Town residents have awakened to the health and environmental risks in their lives stemming from decades-long uncontrolled exposure to contamination originating at the Iron King Mine (“*IKM*”) and Humboldt Smelter (“*HS*”) sites. Town residents also have awakened to the reality that EPA’s remedy to abate such risks - engineered waste repositories, residential soil removals, and institutional controls, all of which the Town fully supports in principle - will be something the Town will live with forever.

Consequently, Town residents want to assure themselves that their health and environment will be maximally protected in perpetuity. Specifically, Town residents want to assure themselves that the engineered and legal/administrative measures intended to control exposure to *IKM* and *HS* wastes and their residuals, whether in the waste repositories or in residential soils, will in fact minimize and control public exposure to such wastes and their residuals. In the Town’s view, such assurances cannot be obtained solely on EPA and ADEQ assertion (i.e., “trust us, we’re big government, we know what we’re doing”). Town residents will be assured only through the real and meaningful involvement of the Town’s local government and retained professional representatives with EPA and ADEQ during the forthcoming phases of design, construction, operation, maintenance, and enforcement of the remedial measures intended to protect the Town’s health and environment.

To be clear, the Town acknowledges, as it has in the past, that it needs EPA and ADEQ and wants them to pursue their work to conclusion. On its own, the Town could not have characterized, as EPA and ADEQ have, the nature and extent of the *IKM* and *HS* contamination. On its own, the Town could not have identified and evaluated, as EPA and ADEQ have, remedial options for *IKM-HS* contamination that would be protective of the Town’s residents and environment. On its own, the Town could not, as EPA and ADEQ will, construct, operate and maintain the engineered controls that EPA has chosen to address *IKM* and *HS* contamination.

But, in addition to acknowledging that the Town needs EPA and ADEQ, the Town asserts that EPA and ADEQ also need the Town. The Town is the primary, if not exclusive, land use regulator at the Superfund Site. By contrast, EPA and ADEQ have little to no land use regulating authority, which you and others have acknowledged (as discussed further below). Thus, without the Town, EPA and ADEQ cannot design, implement, maintain or enforce land use plans, ordinances, regulations or similar institutional controls that are sufficiently protective and sustaining of EPA’s

engineered controls. Further, the Town Council is the primary, if not exclusive, collective instrument of the voice and will of the Town's residents. Thus, without the Town, EPA and ADEQ cannot secure the support and acceptance of Town residents for the agencies' planned remedial actions, which are essential for, among other things, obtaining consents to access residential properties in connection with the residential soil investigation and cleanup project. Significantly, EPA has long recognized that local governments fulfill such vital roles in connection with Superfund remedial actions and has encouraged Superfund site managers to ensure local government involvement.<sup>1</sup>

In sum, real and meaningful, not nominal and token, collaboration is what the Town expects going forward, and what the Town believes is essential for the successful execution of and conclusion to all the work contemplated by EPA and ADEQ at the Superfund Site. Literally, collaboration means "co-labor." Thus, the Town expects to "co-labor" with EPA and ADEQ and to be regarded as a genuine, valued partner and "co-laborer," not an annoyance or irritant, in the pursuit and execution of the agreed upon remedial measures. As a partner, the Town expects to be regularly and willingly (even anxiously) consulted and advised on developments, plans, schedules, and outcomes. As a partner, the Town expects sharing of analytical results, technical conclusions, unexpected risk issues, and other important information during the course of the unfolding project. As a partner, the Town expects its review and comments to be sought and, when provided, valued. Regarding those matters for which EPA and ADEQ have primary responsibility, the Town acknowledges that EPA and ADEQ have final decision-making authority, and the Town will honor and respect such authority. Likewise, EPA and ADEQ may reasonably expect to be treated as a collaborative partner in the execution of the Town's work relative to the Superfund Site (e.g., development and implementation of land use plans, ordinances, regulations, and similar institutional controls). Regarding matters for which the Town has primary, if not exclusive, responsibility, such as the development and implementation of land use plans, ordinances, regulations, and similar institutional controls, the Town expects EPA and ADEQ will honor and respect such authority, as discussed further below.

## 2. Real vs. Nominal Respect for Town's Land Use Authority.

A related concern of the Town is the extent to which EPA is genuinely committed to respecting and honoring the Town's land use authority. This concern arises in connection with EPA's authority to make "reasonably anticipated future land use" ("*RAFLU*") determinations independent of Town land use plans and zoning designations, and in connection with EPA's guarded reception of and seemingly limited interest in the Town's reuse and redevelopment plans for the IKM and HS sites and the Town's related land use, zoning, and institutional control plans for not only the IKM and HS sites but also for residential and non-residential soil areas outside of these sites.

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<sup>1</sup> "CERCLA ... and the NCP do not specify a role for local governments in implementing [a CERCLA remedy]. However, a local government is often the only entity that has the legal authority to implement, monitor and enforce certain types of ICs (e.g., zoning changes). While EPA and the states take the lead on CERCLA ... response activities, local governments have an important role to play in at least three areas: (1) determining future land use; (2) helping engage the public and assisting in public involvement activities; and (3) implementation and long-term monitoring and enforcement of ICs." Office of Solid Waste and Emergency Response, *Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups*, OSWER 9355.0-74FS-P (September 2000) (underscoring added).

Regarding EPA's RAFLU authority, the Town notes that EPA is not constrained by the Town's zoning designations and that a RAFLU determination that is inconsistent with a Town zoning designation can potentially limit property from being used as contemplated by its zoning designation. While the Town recognizes that RAFLU is often based on local zoning, RAFLU can differ from local zoning, particularly where a current use is inconsistent with current zoning, or where a reasonably anticipated future use will differ from current zoning. EPA's Record of Decision ("**ROD**") is an example of RAFLU differing from local zoning. The ROD expressly provides that "RAFLU does not always match the zoning designation for a site area," and notes that, for instance, open land north of the IKM site managed by the Bureau of Land Management ("**BLM**") is zoned "residential," but EPA's RAFLU designation is "recreational." The reason for this difference between the RAFLU and zoning designation is not provided, but is likely based on the presumption that BLM land will not likely be sold to private parties for residential use. EPA also notes in the ROD that "there is a small contiguous block of parcels in Humboldt proper that is zoned commercial but currently used for residential purposes" and for that reason notes that the RAFLU designation for that commercially zoned area is "residential."

These foregoing examples of RAFLU determinations being inconsistent with Town zoning designations make sense under these circumstances and, therefore, are acceptable to the Town because EPA's RAFLU determinations support and sustain current and reasonably anticipated future land uses. The Town, however, is concerned with the possibility of EPA making (or modifying) a RAFLU determination that is inconsistent with a Town zoning designation for the purpose of changing current and future land use contrary to Town zoning. Had EPA not suggested to the Town that it change the zoning of of the 40-acre block from residential to another zoning designation in order to facilitate a non-residential cleanup, the Town would not likely be concerned that EPA might seek to effect a similar outcome by way of a RAFLU modification. But the Town's concern in this regard was heightened by the following statement in your February 2 letter: "EPA will frame its response actions based on the reasonably anticipated use of any property and without regard to ownership," the phrase "without regard to ownership" suggesting to the Town "without regard to use" or "without regard to a current or reasonably anticipated future owner's use."

The Town wishes to make clear that it will not countenance any action by EPA that compels current residential users from safely occupying properties they acquired and have developed, or are now developing, in reliance on Town zoning designations, without consulting with the Town and securing the Town's express approval. Any such action, without the Town's review and approval, would be viewed by the Town as a countermand to the Town's land use decisions for the properties involved. It also would, in the Town's view, be a violation of EPA policy and practice and EPA's direct commitment to Town residents. EPA policy and practice is to make RAFLU determinations solely for the purpose of protecting and preserving actual land uses, now and in the reasonably anticipated future.<sup>2</sup> Further, EPA has unequivocally committed to Town residents via a notice printed

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<sup>2</sup> See Office of Solid Waste and Emergency Response, "*Land Use in the CERCLA Remedy Selection Process*," OSWER Directive 9355.7-04 (May 1995); Office of Solid Waste and Emergency Response, "*Considering*

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in the Town's monthly newsletter and a March 2024 "Recent Questions and Answers" document that if EPA's residential soil investigation determines that a residential property needs to be cleaned up to EPA's more protective residential standards set forth in the ROD, EPA will clean up the residential property to a condition that satisfies the more protective residential standards.

Finally, a related "respect-for-Town-land-use-authority" concern is EPA's guarded reception of the Town's reuse and redevelopment plans for the IKM and HS sites and the Town's related land use, zoning, and institutional control plans for these sites and other areas of the Town. As the Town has indicated in a prior meeting with EPA (November 2023) and in subsequent correspondence to you (December 2023), the Town is in the process of updating its general land use plan, and the Town's updated general land use plan will address the Town's reuse and redevelopment plans for the IKM and HS sites. Once adopted, the Town's updated general land use plan will be followed by Town consideration of zoning ordinances consistent with the general land use plan, including zoning ordinances for the IKM and HS sites that will serve as institutional controls complementary of EPA's planned engineering controls at these sites. These undertakings of the Town cannot be postponed, neglected, or avoided. Land use planning and zoning are essential, non-discretionary, and exclusive functions of municipal government.

In the Town's view, there is an obvious intersection between the Town's land use planning and regulation of the IKM and HS sites and the engineering and institutional control measures contemplated by EPA for these same sites. Yet, EPA has stated that EPA's "planned cleanup of the [IKM and HS Superfund] Site under the federal Superfund program is entirely separate from the process being undertaken by the Town to update its General Plan" (see Jeff Dhont's November 15, 2023) and that the Town's general land use planning process is "independent and separate from the cleanup of environmental contamination undertaken by EPA under the federal Superfund program" (see your November 21, 2023 letter to Dan Field). Such statements indicate that EPA has little to no interest in the Town's land use planning for the IKM and HS sites or in engaging with the Town on such matters. Yet, in the Town's view, the Town's land use planning for the IKM and HS sites should be of vital interest to EPA because of the inevitable effect such planning will have on zoning and related ordinances that will intersect with, and will themselves serve as, institutional controls contemplated at the IKM and HS sites. The Town acknowledges that remediation of the IKM and HS sites currently is not as pressing of a concern to EPA as remediation of residential soils, and that you have indicated in your November 21, 2023 correspondence that EPA "look[s] forward to working with the Town to develop and implement appropriate institutional controls, including various land use restrictions, during the remedial design phase" of the waste repositories. However, the Town remains concerned that EPA's siloed attitude about the relevance of the Town's land use planning process to the current Superfund project indicates a lack of regard and respect for the Town's land use authority generally and that such lack of regard and respect will transfer over into the coming discussion among EPA, ADEQ and the Town regarding design and construction of

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*Reasonably Anticipated Future Land Use and Reducing Barriers to Reuse at EPA-Lead Superfund Remedial Sites,*  
OSWER Directive 9355.7-19 (March 2010).

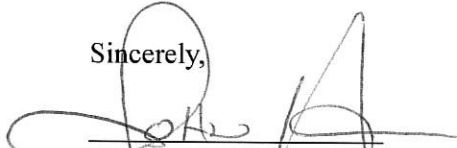
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engineering and institutional controls. The Town sincerely hopes otherwise, and that real and meaningful collaboration will characterize EPA and Town discussions on these issues.


**C. Conclusion**

In conclusion, in spite of outstanding concerns about EPA's commitment to engage in a collaborative and partner-like manner with the Town, the Town is, as a gesture of good faith, rescinding its opposition to EPA's residential soil investigation and cleanup project and returning to its prior position of support for the project. In doing so, the Town expects real and meaningful collaboration with EPA; indeed, the Town expects to be regarded as a genuine partner and co-laborer. EPA may be assured that the Town recognizes and respects EPA's primary authority and responsibility to remediate the IKM-HS Superfund Site, and genuinely desires to facilitate the expeditious and complete implementation of EPA's planned remedy. The Town simply expects that EPA will likewise recognize and respect the vital role the Town plays in implementing and completing EPA's and ADEQ's remedy, and will demonstrate such respect by working with the Town in a real and meaningful way to ensure enduring protection of public health and environment for the Town of Dewey-Humboldt and its residents.

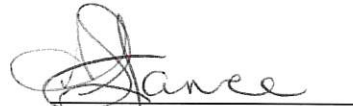
Sincerely,




John Hughes, Mayor



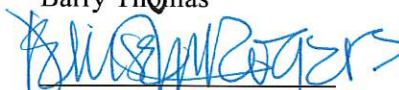
Jeremiah Barron, Vice Mayor



Amy Lance



Barry Thomas



Denise Rogers



Matthew Fenn

cc: Dan Field, Town Manager  
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Katelyn Kane-DeVries, ADEQ Project Manager, IKM-HS Superfund Site  
Rick Zeise, Arizona Assistant Attorney General