



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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February 23, 2001

Reply To
Attn Of: ECL-115

Alfred Peone
Chairman, Spokane Tribal Business Council
Spokane Tribe of Indians
P.O. Box 100
Wellpinit, WA 99040

Dear Mr. Peone:

I am writing to respond to your December 15, 2000 letter to Charles Findley, as promised in Mr. Findley's letter to you dated December 21, 2000. Your letter referenced the decision of the U.S. Environmental Protection Agency (EPA) in 1995 not to propose the Dawn Mill site (Mill) at that time for inclusion on the National Priorities List (NPL). You expressed concern with aspects of the closure of the Mill being undertaken by the Washington Department of Health (DOH) and concluded your letter with a request that EPA participate with the Spokane Tribe (Tribe) and DOH in a Memorandum of Agreement (MOA).

I wish to explain why EPA believes its current role with respect to the Mill is appropriate. First, I acknowledge that the Tribe is not currently requesting that EPA propose the Dawn Mill for inclusion on the NPL. EPA believes that changing the regulatory lead to CERCLA at this stage could lead to unnecessary costs and delays without significantly changing the outcome of closure at the Mill. As an alternative, your letter requests that EPA participate in a formal deferral agreement with DOH and the Tribe.

I believe EPA participation in a deferral agreement is not necessary to assure the Tribe's primary goal of a responsible cleanup at the Dawn Mill. Nor would EPA participation in a deferral agreement assure that the Tribe's expectations of concurrence on the remedy and funding for participation would be met. These expectations stem from provisions which the Lower Elwha Klallam Tribe obtained through various agreements associated with the deferral of the Rayonier Mill site (Rayonier) in western Washington. At Rayonier, the Washington Department of Ecology (Ecology) had requested the deferral in order to conduct the site studies and cleanup under its Model Toxics Cleanup Program, a program similar to CERCLA. EPA entered a deferral agreement with Ecology and the Tribe, which described state and tribal roles during cleanup. Although the deferral agreement referenced a remedy concurrence role for the Tribe, this role had been previously negotiated between Ecology and the Tribe over a year earlier in a separate agreement. EPA did not require this role at Rayonier, nor would we require such a provision for the Dawn Mill Closure. Funding for the Lower Elwha-Klallam tribe's participation was also not assured by EPA but was provided under a separate agreement between the tribe and the potentially responsible party conducting the cleanup.

As you note in your letter, EPA's decision regarding the Dawn Mill preceded issuance of

STP-006 Template
R-105 List. SP08

EPA's "Guidance on Deferral of NPL Listing Determinations While States Oversee Response Actions." As a practical matter, very few sites have been formally deferred under the guidance, and to our knowledge, they have all been deferred to states with CERCLA-like cleanup programs. EPA is unaware of any such agreements for sites being addressed under a non-CERCLA-like program. I believe that applying the formal deferral approach at the mill would not substantively alter the cleanup, as explained below.

With regard to our common goal of protecting human health and the environment, including tribal uses, the standards in the Dawn Mill Closure Plan are similar to CERCLA's standards of protectiveness (e.g., risk range, ARARs). As you know, the Dawn Mill closure is proceeding under the authority of the Nuclear Regulatory Commission (NRC), derived from the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) and delegated to DOH under the NRC agreement state program. By way of background, federal criteria were promulgated pursuant to UMTRCA to address NRC licensing and closure requirements for uranium mills. These requirements are set forth at 40 CFR Part 192 (Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings) and 10 CFR Part 40. These requirements are also incorporated in State of Washington regulations (WAC 246-252-030) and form the basis for the Closure Plan for the Dawn Mill. The standards and approach to closure at the Dawn Mill are being applied at uranium mill sites nationwide.

Your letter suggests that the closure of the Dawn Mill is not protective. First, you reference a dose limit of 25 mrem per year from the Closure Plan and compare it to EPA guidance which recommends 15 mrem per year as the "minimally acceptable dose limit". As a point of clarification, I believe that the 25 mrem dose limit you referred to is used in the Closure Plan as a standard for exposure during mill operation (from 40 CFR 190.10(a)), rather than a standard for mill closure. In any case, this dose limit (which is a three-fold limit of 25 mrem to the whole body, 75 mrem to the thyroid, and 25 mrem to any other organ) corresponds to the same level of risk as a 10 mrem per year dose limit using current dose assessment methodologies, and so is below the 15 mrem per year. Second, your letter notes that 4 mrem per year is the EPA dose limit for drinking water alone. This ground water dose limit (from 40 CFR Part 141.16) is not cited in the Closure Plan and would not be applied under CERCLA either, because it applies to radionuclides which are not generally associated with uranium mills. As explained in the previous paragraph, the closure standards being applied in the Dawn Mill Closure Plan are set forth in 40 CFR Part 192.

EPA developed the standards of 40 CFR Part 192 specifically for uranium mill sites, using conservative assumptions and exposure factors. They include a limit on radon flux through construction of a radon barrier over areas with radium activities exceeding specified radium-226 levels for two depth intervals, which should reduce gamma exposure from the tailings or waste to background levels. 40 CFR Part 192 also requires that ground water be protected from uranium tailings to background or drinking water levels to preserve its future uses by incorporating the Solid Waste Disposal Act (48 FR 45927) rules. Existing Maximum Contaminant Levels (MCLs) from the Safe Drinking Water Act (SDWA) for mill-associated metals and radionuclides in groundwater were also incorporated. EPA guidance (OSWER Directive No. 9200.4-23) found

that UMTRCA closure standards in 40 CFR Part 192 are generally consistent with the CERCLA risk range.

EPA recognizes the Tribe's concerns regarding the Mill's potential impact on tribal resources and the status of the groundwater remedial action plan. Appropriate and timely closure of the Mill is a priority. EPA's previous decision not to propose the Dawn Mill to the NPL was based on the determination that closure by DOH was proceeding appropriately. EPA continues to believe that this is so.

I understand that in a recent letter DOH offered to enter into a Memorandum of Understanding with the Tribe for the Dawn Mill UMTRCA closure and that such an agreement worked well for the closure of another UMTRCA site located on the Spokane Indian Reservation. In discussions with my staff, DOH has indicated that they plan to meet with the Tribe to discuss the schedule for alternative groundwater remedial action and a risk assessment for tribal exposures. We encourage the Tribe to initiate negotiations of a formal agreement with DOH to outline the closure schedule and articulate the Tribe's participation in the closure process.

EPA is mindful of its trust obligations to the Tribe with respect to the programs that we implement. We will periodically review the progress of closure at the Dawn Mill, and we reserve the right to assert CERCLA jurisdiction. Because NRC also has trust obligations to the Tribe, we are providing a copy of our letter to Paul Lohaus of the NRC Office of State and Tribal Programs.

If I have incorrectly characterized your concerns at the Mill, please let me know. I am available to discuss these matters further with you in a government-to-government consultation. Please have your staff contact Ellen Hale of my office at (206) 553-1215 if you are interested in such a meeting.

Sincerely,



Michael F. Gearheard, Director
Office of Environmental Cleanup

cc: John Erickson, Washington Department of Health Office of Radiation Protection
Shannon Work, Special Counsel, Spokane Tribe of Indians
Paul Lohaus, Director, Office of State and Tribal Programs, NRC



Spokane Tribe of Indians

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CENTURY OF SURVIVAL
1881 - 1981

File
-1215

December 15, 2000

Charles E. Findley
Acting Administrator
Region 10
U.S. Environmental Protection Agency
1200 6th Avenue
Seattle, WA 98101

Re: Dawn Mining Company Uranium Mill Site

Dear Mr. Findley:

This letter is a formal request from the Spokane Tribe of Indians that EPA, Region 10, comply with OSWER Directive 9375.6-11, entitled Guidance of Deferral of NPL Listing Determinations While States Oversee Response Actions, dated May 3, 1995 ("Guidance"). The deferred site is the Dawn Mining Company Uranium Mill Site, located immediately adjacent to our Reservation, and to an important Reservation stream known as Chamokane Creek.

In May of this year, representatives of the Spokane Tribe learned for the first time that several years ago, Region 10 examined CERCLA issues involving the mill. It is our understanding that in 1994, EPA Region 10 convened a Regional Decision Team to consider placing Dawn's mill site on CERCLA's National Priorities List. The Tribe was not invited to participate as a member of that RDT, and was not advised of the meeting. EPA determined at that time, apparently at the request of WADOH, to defer further consideration of listing, and to allow Washington Department of Health ("WADOH") to continue in its oversight of the mill's cleanup. The next year, the above-referenced Guidance was adopted by EPA to address state deferrals. Following the 1994 RDT decision, EPA apparently took no further action at the mill site until February 29, 2000, when it formally reviewed the site's cleanup progress. A meeting was subsequently held at EPA Region 10 in Seattle during which

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WADOH presented to EPA a report on its site cleanup progress, including an assessment that the WADOH/Dawn groundwater remedial action plan has failed. At the end of that meeting, Tribal representatives asserted the Tribe's rights based on the Guidance and on Region 10 precedent at Lower Elwha Klallam, where EPA required Washington to enter a site deferral MOA with that Tribe.

While we realize that EPA's deferral decision pre-dated the Guidance, it was only by a matter of months. Since the Guidance was issued, neither EPA nor the State have even remotely approached adhering to the purposes or spirit of the Guidance. Under the Guidance, both EPA and the State are responsible for working with the Tribe as a government in solving remediation problems, and to notify the Tribe of the deferral and its procedural and substantive effects. But, as mentioned above, the Tribe received no notice until more than five years following the deferral decision. Meanwhile, the Tribe was left on the outside looking in, despite the fact that the Tribe is the most impacted by Dawn's mill, and despite the trust responsibility the United States government, including EPA, owes the Tribe.

The Guidance, which now applies, identifies factors which, if present, should lead to EPA's termination of deferral. The Guidance states:

Pending 30 days notice to the State, the Region should terminate the deferral status of the site, if, at any time during or upon completion of a response action, the Region determines that the response is not CERCLA-protective, is unreasonably delayed or inappropriate, or does not adequately address the affected community's concerns.

Those factors are present with regard to Dawn's mill. Additionally, a serious question exists whether this site, which is a "mixed ownership" site (having both federal and non-federal ownership), should even have been deferred.

First, the cleanup of a deferred site must be "CERCLA-protective." The Guidance explains what this means.

A CERCLA-protective cleanup at a deferred site should be protective of human health and the environment as defined generally by a [10 (-4) to 10 (-6)] risk range and a hazard index of 1 or less.

The remedy selected at a deferred site must comply with all applicable Federal and State [and Tribal] requirements. Additionally, the State should generally select a remedy which

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provides a level of protectiveness comparable to relevant and appropriate Federal requirements for the site.

Dawn's Closure Plan, as approved by Washington's Department of Health, fails to achieve an exposure level within the risk range CERCLA requires. Under that plan, annual post-closure radiation exposure will be 25 mrem. But EPA itself has concluded that an exposure level of 1.5 mrem/year or less is necessary to achieve CERCLA's risk requirements. Also, EPA has determined that under the Safe Drinking Water Act's groundwater protection requirements, exposure at 4 mrem is the maximum allowed. Serious questions surround this aspect of closure, since WADOH and DMC both have admitted that the mill site's Groundwater Remedial Action Plan ("GRAP") has failed. These factors are compounded when exposure risks specific to Spokane Tribal members, such as greater consumption of contaminated fish, wildlife, plants and waters are considered. Also, Tribal specific pathways associated with sweat lodge and other ceremonies increase ingestion and dermal exposure, and must be considered. Thus far, however, WADOH has not addressed these Tribal specific factors. Consequently, it is unlikely this aspect of mill closure is "CERCLA-protective" in the context of the human health related requirement of the Guidance. Additionally, Dawn's State-approved closure plan will not be "CERCLA-protective" because it will not satisfy the water quality standards promulgated by the Tribe - which are viewed by the Tribe to be ARARs.

Second, the Guidance provides for termination based on another ground, expressed as the "affected community's concerns." The Guidance states:

If, at any time after a site is deferred to the State, the Region determines that the community or other parties have significant, valid, unresolvable objections to the deferral, the Region should terminate the deferral status of the site.

The "community acceptance" criterion, then, applies after the deferral decision. The Guidance states that factors such as impacts to downwind or downstream communities, Natural Resource Trustee interests, and environmental justice concerns weigh heavily in considering "community acceptance," and should, therefore, inform termination decisions. Our Reservation is immediately adjacent to Dawn's uranium mill, and we are necessarily both downwind and downstream of the site. We fall within each of the above categories, yet our concerns have yet to be taken seriously by either WADOH or Dawn. One key technical matter that the Tribe has raised on numerous occasions with both Dawn and the Department of Health is the virtual absence of monitoring of the lower aquifer associated with the Chamokane Creek system. Both Dawn and the Department have rejected the Tribe's repeated requests for such monitoring, despite the fact that the lower aquifer serves as a source for Reservation drinking water, and provides water to the Tribe's fish hatchery. For the Tribe, this is a significant, valid objection to the State's approach that has proven unresolvable.

William E. Findley
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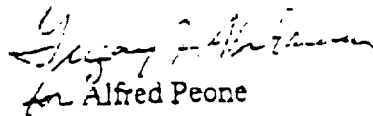
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Environmental justice concerns also exist, ranging from the currently approved plan to import radioactive waste for disposal at Dawn's mill -- which continues to contaminate the Chamokane Creek Basin -- to the inability of Tribal members to use Basin resources for cultural and subsistence purposes. These, too, have been raised over the years and have never been resolved. WADOH's current failure to assess risk to Tribal members using a tribal specific risk model also has proven unresolvable. It should also be mentioned that, in addition to the Tribe, none of the other Natural Resource Trustees have been consulted with concerning the deferral. Consultation with those Trustees would undoubtedly reveal various significant and valid objections to the State's approved response actions. And given the site's history (a "complicating factor" under the deferral criteria), there is no reason to believe these objections would be resolved.

Although there are sufficient significant grounds on which to base a termination of deferral, the Tribe is not requesting termination at this time. Rather, the Spokane Tribe requests a Memorandum of Agreement among the Tribe, the State and EPA, as called for in the Guidance. The MOA must, at minimum, contain provisions which the Tribe views as key, and which were required in connection with the Rayonier Mill site. As required by Region 10 at Rayonier, the Lower Elwha Klallam Tribe is in a concurrence position regarding cleanup decisions made by the State, is provided "sufficient resources for substantive Tribal participation and oversight of the project," and maintains the "right" to seek cleanup under CERCLA "if it determines that [State] procedures will not restore and protect [the Tribe's] governmental interests." An MOA with such provisions is more than appropriate in this case, particularly since the Tribe was improperly cut out of the process for so long following EPA's deferral decision. In the alternative, if such an MOA is not timely entered, the Tribe requests that EPA terminate its deferral decision at Dawn's mill, and proceed with cleanup under CERCLA.

A responsible cleanup of Dawn's Mill is of the highest priority to the Tribe, and I hope that the requests in this letter lead to better intergovernmental coordination, which in turn will lead to a successful remediation and a safe Reservation environment for our people.

Sincerely,



for Alfred Peone

Chairman

Spokane Tribal Business Council

laf

cc: Shannon D. Work, Special Counsel, Spokane Tribe of Indians

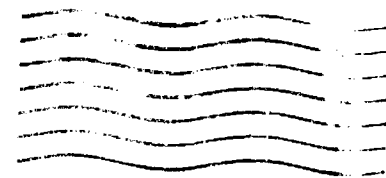
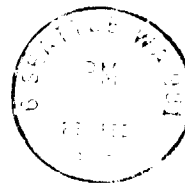
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