

# Town Comment on EPA's Proposed Remedy

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Town Council Special Meeting  
May 12, 2023



# BACKGROUND



## IRON KING MINE - HUMBOLDT SMELTER SUPERFUND SITE PROPOSED PLAN

SEMS-RM DOCID # 100032066

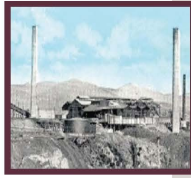
U.S. Environmental Protection Agency | Region 9 | Dewey-Humboldt, AZ | March 2023

### Introduction

The U.S. Environmental Protection Agency (EPA) proposes to protect human health and the environment by taking a cleanup action (or, "remedial action") for the Iron King Mine - Humboldt Smelter Superfund Site (IKM-HS Site) in Dewey-Humboldt, Arizona. This Proposed Plan identifies EPA's preferred cleanup (remedial) alternative to address the mine and smelter wastes, contaminated soil, and contaminated surface water at the IKM-HS Site. It also discusses the site and explains and compares the other cleanup alternatives that were considered. EPA is the lead agency for the IKM-HS Site. The supporting agency is the Arizona Department of Environmental Quality (ADEQ).

EPA is inviting public comment on this Proposed Plan and the supporting studies and documents that form the basis for its proposal. After considering the information submitted during the public comment period, EPA will select a cleanup alternative for the IKM-HS Site. The public is encouraged to review and comment on all the cleanup alternatives presented in this Proposed Plan.

This document highlights key information from the Remedial Investigation (RI) and Feasibility Study (FS) reports. The RI, dated September 2016, gives an extensive look at what, where, and how much contamination is at the IKM-HS Site and what risks to public health and the environment are posed by the contamination. Based on that information, the feasibility study, dated September 2022, develops, evaluates, and compares cleanup alternatives to address the contamination. Interested readers can obtain copies of these documents, and other documents used by EPA in developing this plan, in the IKM-HS Site Administrative Record file, which is available online at [epa.gov/superfund/ironkingmine](https://epa.gov/superfund/ironkingmine) and in the information repository listed on the last page. The Proposed Plan fulfills the requirements of Section 117(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund or Superfund Law) and the National Contingency Plan (NCP) set forth at 40 C.F.R. [Code of Federal Regulations] Section 300.430(f)(2). A simplified depiction of the Superfund process can be seen in Figure 1.



### OPPORTUNITY TO COMMENT

**Public Comment Period:**  
March 15 - May 13, 2023

**Public Hearing:**  
6:30 PM March 29, 2023

**Location:**  
Humboldt Elementary School  
2750 Corral Street  
Humboldt, AZ 86329

See further information about  
commenting on this Proposed Plan at  
the end of the document.

- Town Council held a special work meeting on April 26 regarding EPA's proposed remedial action plan
- After discussion, Town Council directed preparation and submittal of written comment to EPA
- A summary outline of the Town Council's direction was presented in a public Town Council meeting on May 2

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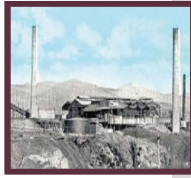
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➤ Town Council directed development of the following comments to EPA:

- ✓ Town supports EPA's Remedial Alternative #3B
- ✓ Robust "institutional controls" are needed to protect the integrity of EPA's constructed remedy
- ✓ Town is likely to be the primary adopter and enforcer of such ICs
- ✓ Town would like to partner with EPA on IC development and implementation

# REVIEW OF TOWN COMMENTS



TOWN OF DEWEY-HUMBOLDT  
P.O. BOX 69  
HUMBOLDT, AZ 86329  
Phone 928-632-7362 • Fax 928-632-7365

**DRAFT WORKING DOCUMENT - NOT SUBJECT TO PUBLIC DISCLOSURE**

SENT VIA FEDEX OVERNIGHT COURIER  
AND ELECTRONIC MAIL ([dhont.jeff@epa.gov](mailto:dhont.jeff@epa.gov))

May 13, 2023

Mr. Jeffrey A. Dhont  
Remedial Project Manager  
Superfund Division  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street (Mail Code: SFD-8-1)  
San Francisco, California 94105

Re: Town of Dewey-Humboldt's Comments on the U.S. Environmental Protection Agency's Proposed Remedial Action Plan, dated March 1, 2023, for the Iron King Mine-Humboldt Smelter Superfund Site, Dewey-Humboldt, Arizona

Dear Mr. Dhont:

Through its duly elected Mayor and Town Council, the Town of Dewey-Humboldt (the "Town") hereby submits written comment to the U.S. Environmental Protection Agency ("EPA") regarding its Proposed Remedial Action Plan, dated March 1, 2023 (the "PRAP"), for the Iron King Mine-Humboldt Smelter Superfund Site (the "IKM-HS Superfund Site") in Dewey-Humboldt, Arizona (the "Town's Comments").

Specifically, the Town's Comments consist of (1) this letter; (2) the enclosed document titled "Specific Comments on EPA's Remedy Selection Process", dated May 13, 2023; and (3) the enclosed documents titled "Technical Memoranda on the Adequacy of the FS and PRAP, and by Reference the RI, Regarding Soils and Groundwater," prepared by the Town's environmental advisor, Dr. Stephen Speyer, R.G. While the focus of the Town's Comments is on the PRAP, to the extent the PRAP refers to or relies on EPA's Feasibility Study Report, dated September 1, 2022 (the "FS"), EPA's Remedial Investigation Report, dated September 1, 2016 (the "RI"), or other reports and materials in the administrative record for the IKM-HS Superfund Site, the Town's Comments also address such other reports and materials.

## A. Introduction

At the outset, the Town wishes to thank EPA for the years of work undertaken at federal expense to characterize the nature, extent, and risk of contamination, to remove residential soils posing unacceptable risk to property owners and occupants, to develop, screen, and evaluate

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Remedial Project Manager, EPA Region 9  
May 13, 2023  
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alternative remedial options, and to select and propose a preferred remedial action at the IKM-HS Superfund Site. While it is no secret that the Town has been frustrated with the amount of time it has taken for the agency to get to this point in the Superfund process (i.e., remedy selection), the Town does appreciate that EPA is finally at the point of remedy selection and is prepared to spend tens of millions of dollars in designing and implementing a remedy. None of the Town's ensuing comments should be read to diminish the Town's appreciation for EPA's efforts to date, or EPA's contemplated efforts in the future. The Town's overriding concern is that its residents, businesses, and visitors are protected and its environment and natural resources are preserved for generations to come, and the Town appreciates EPA's commitment to achieve that outcome.

While the Town does not wish to diminish the comments of any other parties, particularly concerned Town residents, who have made, or will yet make, comments to EPA, the Town understands the importance of its voice among all commenters. The National Oil and Hazardous Substances Pollution Contingency Plan (the "NCP") requires that "in planning or undertaking Fund-financed action, [EPA] shall, to the extent practicable, ... [b]e sensitive to local community concerns."<sup>1</sup> Consistent with that general mandate, the NCP provides that "community acceptance" is one of nine criteria that EPA "shall ... consider" in evaluating remedial alternatives<sup>2</sup> and is a modifying criterion that "shall be considered in remedy selection."<sup>3</sup> By "community acceptance," the NCP means an assessment that (a) determines "which components of the [remedial] alternatives interested persons in the community support, have reservations about, or oppose" and (b) "may not be completed until comments on the proposed plan are received."<sup>4</sup>

As the local community's institutional representative, the Town has prepared and hereby submits its comments to EPA with the foregoing NCP provisions in mind, and therefore respectfully requests that EPA accord the Town's Comment the due attention and weight required by the NCP in the agency's consideration of its final remedy for the IKM-HS Superfund Site.

## B. The Town Supports Adoption of Remedial Alternative 3B

The NCP provides that "[t]he national goal of the remedy selection process is to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste."<sup>5</sup> The Town accepts that at the IKM-HS Superfund Site waste treatment and minimization are impracticable. The volume of IKM-HS waste is high, the waste is not liquid, and the waste constituents of concern are not highly mobile, all of which are

<sup>1</sup> 40 C.F.R. § 300.400(c)(4) (underscoring added).

<sup>2</sup> 40 C.F.R. § 300.430(e)(9)(iii)(I) (underscoring added).

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The Town is “the local community’s institutional representative”

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factors that allow EPA to pursue on-site non-treatment remedial alternatives at the IKM-HS Superfund Site.<sup>6</sup> Nevertheless, the Town absolutely supports the goal of, is totally committed to, and entirely expects selection of a remedy at the IKM-HS Superfund Site that is “protective of human health and the environment” and that “maintains protection over time.” The Town will necessarily live with EPA’s remedy long after it is implemented, and therefore is completely dedicated to ensuring the adoption and implementation of a remedy that protects the health of the Town’s residents and environment.

The remedy selection process established by the NCP requires EPA to develop a “range of alternatives” for addressing site contamination,<sup>7</sup> which is “fully integrated with the site characterization activities of the remedial investigation.”<sup>8</sup> This alternatives range should include, at one end, “an alternative that removes or destroys ... contaminants to the maximum extent feasible, eliminating or minimizing, to the degree possible, the need for long-term management.”<sup>9</sup> The other end of the range should consist of:

“[o]ne or more alternatives that involve little or no treatment, but provide protection of human health and the environment primarily by preventing or controlling exposure to hazardous substances ... through engineering controls, for example, containment, and, as necessary, institutional controls to protect human health and the environment and to assure continued effectiveness of the response action.”<sup>10</sup>

Developing and evaluating a range of remedial alternatives is the primary purpose of a “feasibility study”<sup>11</sup>, and in that regard the Town is generally comfortable with the remedial alternatives developed, screened and evaluated in the FS for the IKM-HS Superfund Site.

Following the development and evaluation of remedial alternatives, the next step in the remedy selection process established by the NCP is identification of “a preferred alternative” that is presented “to the public in a proposed plan, for review and comment.”<sup>12</sup> In the present case, EPA complied with this NCP requirement by publishing the PRAP, in which EPA identifies the FS’s Remedial Alternative 3B as the agency’s preferred remedial alternative at the IKM-HS Superfund Site. Remedial Alternative 3B consists of consolidation and containment of mine and smelter wastes in two waste repositories, one on the east side and the other on the west side of Highway 69, with the east side repository receiving all waste on the east side of Highway 69 and the west side repository receiving all waste on the west side of Highway 69. Under Alternative 3B, no waste moves across Highway 69.

<sup>6</sup> See 40 C.F.R. §§ 300.430(a)(iii)(A), 300.430(e)(3)(i).

<sup>7</sup> 40 C.F.R. § 300.430(e)(3)(i).

<sup>8</sup> 40 C.F.R. §§ 300.430(d), 300.430(e)(1).

<sup>9</sup> 40 C.F.R. § 300.430(e)(3)(i).

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<sup>11</sup> See 40 C.F.R. § 300.430(e)(1).

<sup>12</sup> 40 C.F.R. §§ 300.430(f)(1)(i), 300.430(f)(2), 300.430(f)(3).

“[T]he Town is generally comfortable with the remedial alternatives developed, screened and evaluated in the FS for the IKM-HS Superfund Site.”

From among the FS alternatives, EPA has proposed “Remedial Alternative 3B”

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Letter to Mr. Jeffrey A. Dhont  
Remedial Project Manager, EPA Region 9  
May 13, 2023  
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After due consideration of EPA's remedial alternatives in the FS, the Town concurs that Remedial Alternative 3B is preferred and supports its selection as EPA's final remedy at the IKM-HS Superfund Site.

C. The Town Urges Immediate and More Substantive Attention to the Development and Implementation of Institutional Controls

1. *Non-Treatment/Non-Removal Remedies Must Consist of Mutually Supplementary ECs and ICs*

As indicated above, the NCP requires that a "range of [remedial] alternatives" be developed in a feasibility study and that such a range include one or more non-treatment/non-removal alternatives that prevent or control "exposure to hazardous substances ... through engineering controls ... and, as necessary, institutional controls."<sup>13</sup> The pairing of "engineering controls" ("ECs") and "institutional controls" ("ICs") in crafting non-treatment/non-removal remedial alternatives for feasibility study evaluation is neither incidental nor insignificant.

The pairing of ECs and ICs is a fundamental NCP "expectation" in the development, selection, and implementation of any remedial alternative that leaves waste and waste residuals at a Superfund site, namely that EPA "shall consider":

"us[ing] a combination of methods, as appropriate, to achieve protection of human health and the environment. In appropriate site situations, treatment of the principal threats posed by a site, with priority placed on treating waste that is liquid, highly toxic or highly mobile, will be combined with engineering controls (such as containment) and institutional controls, as appropriate, for treatment residuals and untreated waste."<sup>14</sup>

In other words, any remedy that leaves waste and waste residuals at a Superfund site is presumed to have necessarily two components – ECs and ICs. The reason is that ICs accomplish something that ECs do not, indeed cannot.

"[I]nstitutional controls," according to the NCP, "supplement engineering controls."<sup>15</sup> Supplementation suggests adding something to complete a thing, supplying a deficiency to make a whole of something, or reinforcing or extending the whole of something, and that is precisely what ICs do for ECs. ECs are engineered and constructed physical measures, barriers, and systems that are designed to contain, prevent, reduce or limit exposure to waste or waste residuals. By contrast, ICs are non-engineered legal and administrative controls, restrictions, and

<sup>13</sup> 40 C.F.R. § 300.430(e)(3)(ii) (underscoring added).

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"After due consideration of EPA's remedial alternatives in the FS, the Town concurs that Remedial Alternative 3b is preferred and supports its selection as EPA's final remedy at the IKM-HS Superfund Site."

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C. **The Town Urges Immediate and More Substantive Attention to the Development and Implementation of Institutional Controls**

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“The Town urges more immediate and more substantive attention to the development and implementation of institutional controls”

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Under the NCP, "any remedy that leaves waste and waste residuals at a Superfund site [such as Remedial Alternative 3B] is presumed to have necessarily two components - ECs and ICs. The reason is that ICs accomplish something that ECs do not, indeed cannot."

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guidelines that are designed to govern or manage human behavior towards property containing waste and waste residuals, and the engineered systems controlling physical access to such waste and waste residuals. As such, ICs protect the long-term integrity of ECs and further limit the potential for human and environmental exposure to waste and waste residuals.

In short, a Superfund remedy that consists of ECs only, or ECs with inadequately conceived or developed ICs, is an incomplete, deficient remedy. Likewise, a Superfund remedy that consists of ICs only, or ICs with inadequately conceived or developed ECs, is an incomplete, deficient remedy. For this reason, the NCP generally proscribes Superfund remedies consisting only of ICs. "The use of institutional controls shall not substitute for active response measures (e.g., treatment and/or containment of source material, restoration of ground waters to their beneficial uses) as the sole remedy unless such active measures are determined not to be practicable, based on the balancing of trade-offs among alternatives that is conducted during the selection of remedy."<sup>16</sup> Although not expressly stated in the NCP, the logical implication of the foregoing statement is that ECs likewise should not be used without appropriately developed ICs.

Yet, when a Superfund remedy development process begins with the expectation that ECs will be the principal tools used to address waste threats, ICs can be, and often are, marginalized, which jeopardizes the crafting of a complete, fully protective Superfund remedy. EPA guidance cautions Superfund site managers to avoid this outcome.

"[Institutional controls, or] ICs are vital elements of response alternatives because they simultaneously influence and supplement the physical component of the remedy to be implemented. On the one hand, the right mix of ICs can help ensure the protectiveness of the remedy; on the other, limitations in ICs may lead to reevaluation and adjustment of the remedy components, including the proposed ICs. At some sites, remedy contingencies may protect against uncertainties in the ability of the ICs to provide the required long-term protectiveness. These points illustrate how important it is for site managers to evaluate ICs as thoroughly as the other remedy components in the Feasibility Study (FS) ... , when looking for the best ICs for addressing site-specific circumstances. Adding ICs on as an afterthought without carefully thinking about their objectives, how the ICs fit into the overall remedy, and whether the ICs can be realistically implemented in a reliable and enforceable manner, could jeopardize the effectiveness of the entire remedy."<sup>17</sup>

## 2. EPA's Contemplated ICs are Inadequately Developed

<sup>16</sup> 40 C.F.R. § 300.430(a)(1)(iii)(D).

<sup>17</sup> EPA 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, EPA 540-F-00-005 (September 2000), at 2 (underscoring added).

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In the Town's view, EPA's contemplated ICs for the IKM-HS Superfund Site are inadequately developed because EPA's focus in the FS and PRAP is primarily on the ECs. As a result, the effectiveness of EPA's proposed remedy for the IKM-HS Superfund Site is jeopardized. That EPA's primary focus in its remedy development and evaluation process on ECs (i.e., capped waste repositories) and the ICs are only an "afterthought" is plainly evident throughout EPA's FS and PRAP.

In the FS's executive summary, the essential elements of each evaluated remedial alternative are presented, and in doing so the focus is entirely on the various ECs associated with the alternative. The idea of ICs is simply tagged on at the end, without any meaningful amplification or development. The summary of Alternative 3B, EPA's preferred remedial alternative, is an example:

"Under Alternative 3B, as with Alternative 3A, most mine waste exceeding cleanup standards selected in the ROD would be excavated and disposed of in two waste repositories on either side of Highway 69. With this alternative, all waste west of Highway 69 would be excavated and disposed in a repository at the Main Tailings Pile; while all waste east of Highway 69, including waste from the Chaparral Gulch, would be excavated and disposed of in a repository at the smelter tailings swale. The Main Tailings Pile would hold 4.3 million CY of waste, and the smelter tailings swale would hold 1.0 million CY of waste. The other actions under Alternative 3B would be essentially the same as Alternative 3A. As with Alternatives 2 and 3A, for purposes of the FS it is assumed that the dam in Chaparral Gulch would be removed. The main body of the FS report text evaluates in detail such features as repository volume and areal footprint; repository cover construction, slope stability, grading and compaction, and soil borrow needs; structure demolition (including the dam); hauling routes and durations; long-term maintenance requirements; and institutional controls."<sup>18</sup>

Elsewhere, the FS's executive summary provides only modest explanation of the ICs contemplated for the evaluated remedial alternatives: "Alternatives 2, 3A and 3B include the following institutional controls: certain land use controls for waste covers, slag, post-remedial excavation, and preventing residential use of certain areas; zoning restrictions and/or deed restrictions applicable to capped and covered areas, which also applies to Alternative 4."<sup>19</sup>

Not surprisingly, the main report of the FS mirrors the FS's executive summary. In the main report of the FS, nearly all the substantive attention is placed on the ECs contemplated for the management of mine and smelter wastes and their constituents at the IKM-HS Superfund Site. While the need for ICs is acknowledged, it is done almost obligatorily. Their potential

<sup>18</sup> ES.4.4, *Alternative 3B: On-Site Consolidation and Containment at Two Repositories with Waste Remaining East and West of Highway 69*, at ES-12 (underlining added).

<sup>19</sup> ES.4.0, *Development of Alternatives*, at ES-10.

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content description is shallow, even tentative. In Section 3.3.1, the FS states that ICs “potentially applicable” to the ECs under evaluation include “restrictions on land use and access” that “may take the form of zoning ordinances or restrictions and covenants to deeds for individual properties.”<sup>20</sup> In subsequent sections discussing each evaluated remedial alternative, EPA gives primary attention to the engineered aspects of the alternative and provides only a superficial description of the ICs that might accompany the alternative. An example is, again, EPA’s discussion of Remedial Alternative 3B. In Section 4.5.8, the FS simply states that “land use would be restricted, and excavation prohibited to prevent cap and cover damage” at the mine waste and smelter waste repositories; “zoning restrictions (or deed restrictions, or both) would be implemented to prevent future residential, commercial, or industrial development of other capped and covered areas”; “land use restrictions,” “excavation” restrictions, and “a soil management plan” would be needed in certain areas outside the waste repositories; “potable groundwater use should be prohibited” at the mine waste repository; and “building” prohibitions would be needed in the slag area.<sup>21</sup> EPA’s PRAP treats the ICs potentially applicable to Remedial Alternative 3B exactly the same way.<sup>22</sup>

3. *More Substantive Attention to the Development and Implementation of ICs is Needed Prior to Remedy Design*

While EPA may contend that such superficial treatment of ICs is acceptable at the FS and PRAP stage of the Superfund remedy development and selection process, the Town would beg to differ for two important, related reasons.

a. *IC Development and Evaluation Deserve the Same Rigor and Focus as EC Development and Evaluation*

First, the ICs component of a Superfund remedy is no less important than the ECs component of the remedy. If ICs are “vital,” “essential,” and “critical” components of remedial alternatives as EPA has repeatedly emphasized in its guidance documents on the subject<sup>23</sup>, then the ICs component should be developed, screened and evaluated at the FS and PRAP stage with the same rigor and focus as the ECs component. Indeed, this is exactly what EPA guidance provides.

<sup>20</sup> 3.3.1, *Institutional Controls*, at 56.

<sup>21</sup> 4.5.8, *Institutional Controls*, at 103.

<sup>22</sup> See PRAP, at 38.

<sup>23</sup> See Office of Solid Waste and Emergency Response, *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites*, OSWER 9355.0-89 EPA-540-R-09-001 December 2012, at 34 (“vital”); Office of Solid Waste and Emergency Response, *Institutional Controls: A Citizen’s Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tank, and Resource Conservation and Recovery Act Cleanups*, OSWER 9255.0-98, EPA-540-R-04-004, February 2005, at 5 (“essential”); and 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, EPA 540-F-00-005 September 2000, at 1 (“critical”).

“More substantive attention to the development and implementation of ICs is needed prior to remedy design”

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In a guidance document to Superfund site managers, EPA states:

"If any remedial options being evaluated in the FS ... leave waste in place that would not result in unrestricted use and unlimited exposure, ICs should be considered to ensure that unacceptable exposure from residual contamination does not occur ... ICs should be evaluated in the same level of detail as other remedy components. ICs are considered response actions under CERCLA ... ICs must meet all statutory requirements, and are subject to the nine evaluation criteria outlined in the NCP (40 CFR 300.430 (e)(9)(i)) for CERCLA cleanups."<sup>24</sup>

In a subsequent guidance document to Superfund site managers, the same point is made with further elaboration.

"At sites where any media will not be cleaned up to a level that supports UU/UE [i.e., (unlimited use/unrestricted exposure)], the site manager and site attorney should discuss any IC instruments (in addition to active response measures where needed) that may be appropriate, taking into account financial concerns, legal implementation issues, jurisdictional questions, the impact of layering multiple ICs, and reliability and enforcement concerns ... The challenges of planning, implementing, maintaining and enforcing ICs ... [require] site managers and attorneys [to] fully evaluate ICs during the development of cleanup alternatives (e.g., during the FS stage of CERCLA ... and plan for the implementation, maintenance, and enforcement challenges early in the cleanup process."<sup>25</sup>

Finally, in a guidance document to the public on the role and importance of ICs, EPA emphasizes: "EPA, States, Tribes, local governments and cleanup parties should evaluate ICs as thoroughly and rigorously as all remedy components. This analysis will help to identify potential strengths and weaknesses and to develop the appropriate balance of ICs and ultimately increase the long-term viability of the remedy."<sup>26</sup>

<sup>24</sup> 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, EPA-540-F-00-005 September 2000, at 5 (underscoring added).

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Clearly, EPA guidance documents provide that the ICs component of a remedy should be treated no less equally in terms of development, screening, and evaluation than the ECs component of the remedy. Yet, in the present case EPA's FS and PRAP fail to do so. While the FS and PRAP identify and treat ICs as a component of the remedy, they are conceived and described in a most elementary manner. As a result, the ICs contemplated for the IKM-HS Superfund Site cannot reasonably be considered to have been "thoroughly and rigorously" evaluated.

- b. *The Town is Likely to be the Primary Adopter and Enforcer of Meaningful ICs, and Needs Guidance and Time to Develop Them*

The second reason that the Town begs to differ with any suggestion that EPA's generalized identification and evaluation of ICs is sufficient at this stage of the remedy selection process is that the ICs EPA is proposing at the IKM-HS Superfund Site - "vital," "essential," and "critical" as they are supposed to be - are largely outside EPA's authority to adopt, implement and enforce. Indeed, the "land use restrictions," "excavation" restrictions, "soil management plan", "potable groundwater use" prohibition, and "building" prohibition identified in the FS and PRAP as the general ICs necessary for the IKM-HS Superfund Site are entirely outside of EPA's authority to adopt, implement and enforce. Rather, all such restrictions, management plans and prohibitions would appear to be entirely within the State of Arizona's and the Town's authority to adopt, implement and enforce. The FS acknowledges that fact. "The local government, private and state landowners, Arizona State Land Department (ASLD), EPA, or BLM would likely enforce the ICs developed as part of an alternative for the Site. Therefore, these entities must be involved in developing and eventually implementing any ICs."<sup>27</sup>

To the Town's knowledge, however, EPA consultation with the State of Arizona and Town on identification, development, implementation, and enforcement of the specific ICs needed for the IKM-HS Superfund Site has not occurred to date. If there have been consultations between EPA and the State of Arizona on these matters, the Town is not aware of such consultations and believes it should not only have been made aware of them, but should have been invited to be an active participant in them. The reason is that, as between the State of Arizona and the Town, the Town undoubtedly has the larger role in developing, implementing, and enforcing the ICs contemplated for the IKM-HS Superfund Site. And with the larger role in such matters, the Town believes its active participation in any ICs discussion is vital to developing meaningful and enforceable ICs to supplement the ECs contemplated in the FS and PRAP for the IKM-HS Superfund Site.

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Significantly, EPA guidance makes it abundantly clear that both the state and relevant local governments should be actively consulted in the IC identification and development process. Regarding the state's role, EPA guidance provides as follows:

"If it appears that the state will be relied upon to establish the ICs, the site manager should immediately talk to state agency personnel to gauge their willingness to establish, maintain and enforce the control, if necessary. This discussion is encouraged regardless of the type of IC(s) that will be implemented. The site manager should work with his or her state counterpart to identify and contact the appropriate state agency and personnel for each proposed IC."<sup>28</sup>

Again, whether such consultations occurred in the present case is unknown to the Town.

Regarding the local municipality's role in the ICs identification and selection process, EPA guidance provides as follows:

"CERCLA ... and the NCP do not specify a role for local governments in implementing the selected 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. Therefore, it is critical that the site manager and his or her state counterpart involve the appropriate local government agency in discussions on the types of controls that are being considered. The capability and willingness of the local government to implement and ensure the short- or long-term effectiveness of the proposed ICs should be considered during the RI/FS. ... In certain cases, cooperative agreements may be considered to assist local governments in the implementation, monitoring and enforcement of required ICs."<sup>29</sup>

Notwithstanding the Town's "important role" in the "implementation and long-term-monitoring and enforcement" of ICs, however, to date the Town has had no discussion with EPA on the "types of [institutional] controls" EPA has contemplated for the IKM-HS Superfund Site or on the "capability and willingness" of the Town to "implement and ensure" the effectiveness of such controls. All that the Town has received so far from EPA on the subject of ICs is a statement in

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the PRAP that “the town government will receive instructions and a map of all parcels with warning barrier for use in permitting processes.”<sup>30</sup>

In the absence of any Town discussions with EPA or the State of Arizona on the ICs needed at the IKM-HS Superfund Site, the Town wishes to make it clear that the Town is willing and believes itself capable, to implement robust and meaningful ICs and ensure their effectiveness at the IKM-HS Superfund Site. Further, the Town strongly believes that discussions among EPA, the State of Arizona and the Town should commence immediately following the closure of the public comment period on May 13, 2023. If, as among EPA, the State of Arizona and the Town, the Town will have the predominant role in adopting and enforcing the ICs conceptualized in the FS and PRAP, the Town contemplates that such controls will need to be adopted and enforced largely in the form of one or more Town ordinances. The development and adoption of such ordinances, however, will take time to discuss, coordinate, and agree on among EPA, the State of Arizona, and the Town, and thereafter to present to the Town’s elected officials and residents for review and comment before formal adoption by the Town’s elected officials. Discussion of such matters cannot be deferred until remedy design or construction (or some other unspecified time in the future when EPA delivers to the Town “instructions and a map”), with an expectation that the Town can readily prepare, develop, and adopt one or more IC ordinances. For one or more ICs ordinances to be ready for implementation by the time of remedy design and/or construction, EPA, the State of Arizona and the Town need to consult now on the scope, content and terms of the ICs ordinances needed from the Town.

c. *The Town has Pressing Needs Currently for one or more IC Ordinances*

There are other reasons for immediate commencement of the foregoing recommended discussion among EPA, the State of Arizona and the Town. Standards and protocols for the excavation, movement, replacement, transportation, and disposal of residential, commercial, industrial, recreational, and municipal (e.g., roadways) properties, as well as the construction, building, and development on such properties, have been needed since EPA commenced its soil characterization and removal actions years ago, and are needed all the more urgently today.

On a regular basis, the Town and its residents, property owners, and businesses face soil management, excavation, and construction issues implicating Superfund wastes and waste residuals. For the sake of protecting human health and the environment now in connection with all the many ongoing activities in and on Town soils, EPA, the State of Arizona and the Town need to counsel together now to identify, develop, and implement an enforceable ICs program for soils.

<sup>30</sup> PRAP, at 38.

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There are other reasons for immediate commencement of the foregoing recommended discussion among EPA, the State of Arizona and the Town. Standards and protocols for the excavation, movement, replacement, transportation, and disposal of residential, commercial, industrial, recreational, and municipal (e.g., roadways) properties, as well as the construction, building, and development on such properties, have been needed since EPA commenced its soil characterization and removal actions years ago, and are needed all the more urgently today.

On a regular basis, the Town and its residents, property owners, and businesses face soil management, excavation, and construction issues implicating Superfund wastes and waste residuals. For the sake of protecting human health and the environment now in connection with all the many ongoing activities in and on Town soils, EPA, the State of Arizona and the Town need to counsel together now to identify, develop, and implement an enforceable ICs program for soils.

<sup>30</sup> PRAP, at 38.

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The Town notes that such programs have been discussed, agreed upon, and adopted by federal, state and local governments at other Superfund sites with historic metal mines and smelters in Butte and East Helena, Montana; Bunker Hill, Idaho; Murray, Utah; and Leadville, Colorado. An ICs program for soils similar to those at these other mine and smelter Superfund sites is needed sooner rather than later in the Town of Dewey-Humboldt, Arizona.

*d. Remedy Construction will Require Landowner Commitment to both ECs and ICs*

Further reason for immediate commencement of discussions among EPA, the State of Arizona and the Town on the ICs program for the Town arises from Town concern regarding the current ownership of the land that is targeted for the waste repository sites and the commitment of such ownership to both the ECs and ICs components of EPA's remedy. In other words, EPA, the State of Arizona and the Town need to discuss whether ownership of lands targeted for remediation needs to be transferred to parties committed to protecting the remedy. The Superfund statute and the NCP require that if EPA determines real property must be acquired to conduct a remedial action, EPA may acquire the real property but only if the state assures EPA that the state will accept transfer of the property upon completion of the remedial action.<sup>31</sup> EPA guidance goes a step further, suggesting that property transfers needed to protect a remedy need to be discussed with both the state and local municipality.

"[I]f a property interest is conveyed by the land owner to EPA to perform a remedial action (e.g., to ensure the reliability of the ICs restricting the use of the land), CERCLA requires the state to accept transfer of the title from EPA following completion of the CERCLA remedial action. If the state does not agree to accept title to the property, the site manager must find another party to assume ownership (e.g., a local government, community group or trust) or another type of IC (e.g., local government control) must be selected."<sup>32</sup>

Irrespective of whether property transfers are needed or will be undertaken, however, the NCP requires that for Superfund-financed remedial actions, the state must assure that any ICs implemented as part of a remedial action are in place, reliable, and will remain in place at a site after the initiation of operation and maintenance.<sup>33</sup> As a subdivision of the State of Arizona and the likely and predominant implementer of ICs at the IKM-HS Superfund Site, the Town believes it has a most important role to play, and therefore should be affirmatively included, in the provision of any such IC assurances to EPA. Again, this suggests that EPA, the State of Arizona

<sup>31</sup> See 42 U.S.C. § 9604(j)(2); 40 C.F.R. § 300.510(f).

<sup>32</sup> 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, EPA 540-F-00-005 September 2000, at 6 (underscoring added).

<sup>33</sup> See 40 CFR 300.510(c)(1); see also 40 C.F.R. § 300.435(f)(1).

Also, "EPA, the State of Arizona and the Town need to discuss whether ownership of lands targeted for remediation needs to be transferred to parties committed to protecting the remedy"

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and the Town should commence immediately discussing the nature, scope, and content of the ICs the Town will need to adopt to protect the integrity of the ECs proposed at the IKM-HS Superfund Site.

4. *The Town Recommends Preparation and Adoption of an ICIAP*

a. *An ICIAP Would Facilitate Discussion Among Governmental Agencies on Development and Implementation of ICs*

All the foregoing IC comments leads the Town to suggest that EPA consider the preparation and adoption of an Institutional Controls Implementation and Assurance Plan (“ICIAP”) for the IKM-HS Superfund Site. An ICIAP would assist EPA, the State of Arizona and the Town to establish and document the actions necessary to develop, implement, enforce, and protect the IC components of the remedy at the IKM-HS Superfund Site and to identify the parties responsible for such actions. An ICIAP for the IKM-HS Superfund Site would therefore serve as a single-source of concise site-specific ICs, and be a useful tool for planning and assuring implementation, maintenance, and enforcement of the controls.<sup>34</sup>

Generally, EPA guidance recommends that an ICIAP be “developed prior to, or at the same time as, the design of the engineered response (e.g., Remedial Design phase of CERCLA ...) and finalized with design completion,”<sup>35</sup> which is about where EPA is in the Superfund process at the IKM-HS Superfund Site. EPA explains that “[t]his approach should allow time for the site managers and site attorneys to complete detailed discussions with parties that are responsible for implementing, maintaining, and enforcing ICs and any other relevant stakeholders.” *Id.* This statement underscores the Town’s prior point about allowing EPA, the State of Arizona and the Town time needed to have the “institutional controls” conceptualized in the FS and PRAP ready for implementation by the time of remedy design and/or construction.

b. *An ICIAP Also Would Facilitate Discussion Among Governmental Agencies on IC Funding Sources*

Finally, development of an ICIAP for the IKM-HS Superfund Site will invite and advance discussion on the availability of funding resources for implementation and enforcement of the “institutional controls” contemplated at the Site. Funding of any “institutional controls” program to be developed, implemented, maintained and enforced by the Town is a critical issue

<sup>34</sup> See Office of Solid Waste and Emergency Response, *Institutional Controls: A Guide to Planning, Implementing, Maintaining, and Enforcing Institutional Controls at Contaminated Sites*, OSWER 9355.0-89 EPA-540-R-09-001 December 2012, at 10.

<sup>35</sup> Office of Solid Waste and Emergency Response, *A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites*, OSWER 9200.0-77, EPA-540-R-09-002, December 2012, at 3.

For all of the foregoing reasons ...

“The Town recommends preparation and adoption of an ICIAP.”

“An ICIAP would facilitate discussion among governmental agencies on development and implementation of ICs”

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for the Town to address, and should commence right away. As EPA has stated in relevant institutional controls guidance documents:

“Consistent with the ‘polluter pays’ policy, EPA generally strives to ensure that parties responsible for contamination pay for the cleanup, including IC-related costs. The site manager and site attorney may provide state, tribal, and local governmental officials with information concerning possible approaches and strategies to ensure that adequate funding will be available by responsible parties for IC costs. In some instances, it may be possible for state, tribal, or local authorities to use CERCLA’s § 107 liability provisions to secure responsible party financing for ICs.”<sup>36</sup>

To date, the Town has very little information regarding potentially responsible parties (“PRPs”) at the IKM-HS Superfund Site, EPA’s pursuit of such parties for cost recovery, or such parties’ ability to pay. Understanding where EPA is on these matters may assist the Town in understanding its options for securing “responsible party financing” for the Town’s ICs program.

In the absence of PRP funding for ICs, the Town understands that there are a variety of programs and tools to possibly help fund ICs. Such programs and tools include EPA’s Brownfields program that provides grants to states and local governments to carry out site assessment and cleanup activities. Section 104(k)(4)(C) of the Superfund statute and EPA guidance documents provide that a local government that is a Brownfields grant recipient can use up to ten percent of the grant to monitor and enforce ICs that are designed to prevent exposure to contamination from a Brownfields site. States also can use grant funds to establish or enhance their response program for addressing Brownfields sites, including operation and maintenance or long-term monitoring activities. In addition, funding provided to state and tribal response programs under § 128(a) of the Superfund statute can be used to monitor and maintain ICs controls, including the development of IC databases.

Another funding tool available to the Town may be an EPA cooperative agreement. According to EPA guidance on the subject,

“[EPA’s] site manager and site attorney may consider using CERCLA § 104(d) cooperative agreements, as appropriate, to support the initial implementation of ICs (but not O&M) by state and local governments at CERCLA Fund-lead sites. CERCLA authorizes EPA to enter into cooperative agreements with state and local governments to help conduct response actions at remedial action sites and non-time-critical removal sites. A Superfund cooperative agreement is the assistance vehicle that transfers EPA funds for a response to state, tribal, or local governments and documents both EPA and recipient responsibilities for a site. EPA generally will enter into cooperative agreements with the state-lead agency (usually the state’s pollution control agency) as designated by the

<sup>36</sup> *Id.* at 11.

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state's governor and, less commonly, with local governments. To involve other essential state agencies, the state-lead agency typically enters into an intergovernmental agreement with these other agencies. States also may enter into intergovernmental agreements with local governments as an alternative to a direct cooperative agreement between EPA and the local government.<sup>17</sup>

Brownfields programs, cooperate agreements and similar funding tools for ICs controls need to be actively and affirmatively explored for potential use, and could be appropriately discussed by EPA, the State of Arizona and Town in connection with the preparation of an ICIAP for the IKM-HS Superfund Site.

5. *Town Reuse/Revitalization Options for the Remediated Mine and Smelter Properties Need to be Factored into IC Development and Implementation*

The Town understands that current and reasonably anticipated future land uses are an essential part of the Superfund remedy selection process. To that end, use and reuse assessments were conducted at the IKM-HS Superfund Site in 2010 and 2020, and the 2020 use and reuse assessment was factored into EPA's FS and PRAP for the IKM-HS Superfund Site.<sup>18</sup> Based on the general references in the FS and PRAP regarding the 2020 reuse assessment, the Town understands that EPA is satisfied that its preferred remedy at the IKM-HS Superfund Site is compatible with current and reasonably anticipated future uses of land to be affected by the remedy.

However, the Town wishes to advise EPA that the Town is re-assessing current and future land uses and revitalization options at the mine and smelter sites and surrounding properties. While the Town does not anticipate that its re-assessment of land uses in these areas will be incompatible with the EC component of EPA's remedy, the Town does anticipate that its re-assessment of land uses will affect the development of the IC component of the remedy. For that reason, in addition to all of the other reasons cited above, the Town believes discussions among EPA, the State of Arizona, and the Town is needed well before remedy design and construction regarding ICs and the Town's anticipated development and adoption of one or more IC ordinances.

E. Summary and Conclusion

The Town appreciates the opportunity granted it to provide written comment on EPA's proposed remedy for the IKM-HS Superfund Site. The Town is satisfied that EPA's proposed consolidation-and-cap approach to management of mine and smelter wastes (i.e., Remedial Alternative 3B) is the appropriate remedy among the several viable alternatives considered.

<sup>17</sup> *Id.* (underscoring added).

<sup>18</sup> FS, at 15; PRAP, at 24-25.

Finally, “the Town wishes to advise EPA that the Town is re-assessing current and future land uses and revitalization options at the mine and smelter sites and surrounding properties ... [and] anticipates that its re-assessment of land uses will affect the development of the IC component of the remedy.”

“For that reason ..., the Town believes discussion ... is needed well before remedy design and construction regarding ICs ...”



**QUESTIONS?**