

January 20, 2009

Rodger Field, Esq.
Associate Regional Counsel
USEPA Region 5
77 West Jackson Boulevard
Mail Code: C-14J
Chicago, IL 60604-3507

RE: Kennecott Eagle Minerals Company (“KEMC”) Eagle Mine Project;
Marquette County, Michigan;
Underground Injection Control (“UIC”) Permit Application
No. MI-103-5W20-0002;
National Historic Preservation Act Compliance

Dear Roger,

This letter follows up on the November 21, 2008 and December 19, 2008 letters to Timothy C. Henry, Acting Director, Water Division, United States Environmental Protection Agency Region 5 (“EPA”), from Warren C. Swartz, Jr., Tribal Council President, Keweenaw Bay Indian Community (the “Community”), addressing, among other things, the implementation of requirements under The National Historic Preservation Act of 1966 (“NHPA”), 16 USC § 470 *et seq.*, in connection with KEMC’s UIC permit application.

The Community respectfully disagrees that EPA does not need to complete compliance with the NHPA’s requirements until the time EPA finally determines that a UIC permit may be issued to KEMC. That is, EPA has taken the position that NHPA consultation and compliance need not be complete at the time EPA issues a draft permit and notice of a public comment period thereon. As explained below, this position is incorrect and contrary to the express requirements of EPA’s rules governing the processing and issuance of UIC permits and applicable agency precedent.

Tribal consultation is an important component of the NHPA process; however, it is not the only step in the process that remains to be completed before EPA issues a draft permit decision for public comment. As of this time, EPA and the Community have had only one, very preliminary, consultation meeting on December 13, 2007 and no EPA archaeologists have even

surveyed the area of KEMC's proposed Eagle Mine Project.¹ EPA has, at best, reached only the second step of the four-step NHPA process required by the NHPA Rules, 36 CFR Part 800, and summarized in the attached flow chart (Attachment 1) contained in the EPA document entitled *Historic and Archaeological Resource Protection for USEPA Personnel* (August 2007). Clearly, there is much work to be done before EPA completes the NHPA process.

The UIC permitting process is governed by EPA's rules at 40 CFR Part 124, Procedures For Decisionmaking, (the "Decisionmaking Rules") which set forth the procedures EPA must follow in deciding whether to issue permits under several programs, including the UIC program. See 40 CFR § 124.1(a). The specific content of a UIC permit is governed by EPA's rules at 40 CFR Parts 144 and 146 (the "UIC Rules").

Part 144, Subpart E, Permit Conditions, of the UIC Rules lists numerous requirements to be incorporated into a UIC permit. Contained within Subpart E is 40 CFR Part 144.52(a), entitled "Establishing permit conditions," which requires EPA to "establish conditions, as required on a case-by-case basis under ... § 144.4 (considerations under Federal law)." The NHPA is listed under 40 CFR § 144.4(b) as one of several Federal laws that, if applicable to the facts under consideration, **must be** taken into account by EPA in a UIC permitting matter.²

The following is a list of Federal laws that may apply to the issuance of permits under these rules. **When any of these laws is applicable, its procedures must be followed. When the applicable law requires consideration or adoption of particular permit conditions or requires the denial of a permit, those requirements also must be followed.**

...

(b) *The National Historic Preservation Act of 1966*, 16 U.S.C. 470 *et seq.* Section 106 of the Act and implementing regulations (36 CFR part 800) require the Regional Administrator, before issuing a license, to adopt measures when feasible to mitigate potential adverse effects of the licensed activity and properties listed or eligible for listing in the National Register of Historic Places. The Act's requirements are to be implemented in cooperation with State Historic Preservation Officers and upon notice to, and when appropriate, in consultation with the Advisory Council on Historic Preservation.

40 CFR § 144.4 (emphasis added).

¹ Under the NHPA Rules, EPA is legally and financially obligated to fulfill the NHPA's requirements and carry out appropriate identification efforts. 36 CFR § 800.2(a) and §800.4(b)(1).

² Also included are the: (i) Wild and Scenic Rivers Act, 16 USC § 470 *et seq.*; (ii) Endangered Species Act, 16 USC § 1531 *et seq.*; (iii) Coastal Zone Management Act, 16 USC § 1451 *et seq.*; and (iv) Fish and Wildlife Coordination Act, 16 USC 661 *et seq.* 40 CFR § 144.4(a), (c), (d) and (e).

Nothing in the UIC Rules indicates that EPA may defer consideration of the requirements of such other Federal laws listed in § 144.4 until after it issues public notice of a draft permit or that EPA may choose to omit and/or defer the imposition of permit conditions implementing such requirements from a public-noticed draft permit. Moreover, as explained below, EPA's Decisionmaking Rules clearly mandate inclusion of such terms in a draft permit and agency precedent supports this view.

EPA's Decisionmaking Rules direct that once a permit application is complete, EPA shall tentatively decide whether to deny the application or to prepare a draft permit. 40 CFR § 124.6(a). 40 CFR § 124.6 makes clear that if EPA decides to prepare a draft permit, the draft permit must contain **all of the requirements and conditions** required under the regulations applicable to the involved permitting program. With respect to the inclusion of NHPA requirements in draft UIC permits, 40 CFR § 124.6(d)(4)(ii) provides, in relevant part, that if EPA "decides to prepare a draft permit, [EPA] shall prepare a draft permit that contains the following information ... [f]or ... UIC permits, permit conditions under § 144.52." As discussed above, 40 CFR § 144.52 requires that a UIC permit include, as applicable on a case-by-case basis, conditions required under the other Federal laws listed in § 144.4, which includes the NHPA.

Presumably, EPA would not choose to issue a public notice for a draft permit that intentionally omits all or even some of the technical requirements or conditions imposed by the UIC Rules, leaving those requirements and conditions to be addressed during the public comment period. The UIC Rules and Decisionmaking Rules make no distinction between any of the requirements and conditions required to be included in a draft UIC permit by allowing some of those requirements and conditions to be addressed later. There is no indication that the requirement under 40 CFR §§ 124.6(d)(4)(ii) to include in a draft permit the "other Federal law" requirements under 40 CFR § 144.4 is any less important than any of the other permit condition requirements in the UIC Rules. That is, EPA may not issue for public notice a half-drafted permit and rely on the public to fill in the missing blanks during the comment period. In this case, EPA has acknowledged that the NHPA is applicable and, therefore, its procedures must be followed. 40 CFR § 144.4. **Clearly, the intent of the Decisionmaking Rules is to allow both the public and the applicant the opportunity to comment on all the required conditions in a draft permit, including those relating to NHPA compliance.**

To state the obvious, in order for EPA to determine whether a UIC permit may be issued without violating NHPA and, if so, what conditions concerning NHPA requirements must be included in a draft UIC permit, the NHPA assessment and consultation process at 36 CFR Part 800 must be completed before the draft permit decision is made and public noticed. Therefore, EPA simply cannot under its own regulations defer compliance with the NHPA until final issuance of a UIC permit.

Moreover, EPA also cannot address the NHPA compliance requirements in a draft UIC permit by simply including generalized permit conditions. Such a practice was held to violate the NHPA in connection with the Bureau of Land Management's sale of oil and gas leases containing "stipulations" intended to avoid adverse effects on NHPA-protected historic properties:

The process of identifying [historic] properties and consulting with affected tribes as well as members of the public is the goal sought by the statute. **Lease stipulations do not accomplish the same goal, and cannot replace the BLM's duties under NHPA. Moreover, it is conceivable that different lease stipulations would evolve from a larger discussion of possible effects on historic tribal lands from oil and gas leasing.** It seems to me that agency efforts to comply with the law are more productive than efforts that appear to be directed at circumventing the law.

The plain language of NHPA requires consultation once an agency embarks on an undertaking. The sale of oil and gas leases is an undertaking. I am therefore granting Plaintiffs' motion for summary judgment that BLM violated NHPA by failing to follow the prescribed NHPA process prior to selling the leases herein.

Montana Wilderness Ass'n v. Fry, 310 F. Supp.2d 1127, 1152 – 53 (D. Mont. 2004) (emphasis added).

Thus, both EPA's rules and NHPA case law require that EPA must complete the NHPA process before public noticing a draft permit and include applicable conditions in any draft permit it proposes to issue. Notably, EPA Region 8 has reached the same conclusion, i.e., that NHPA compliance must be completed before public noticing a draft UIC permit, when EPA Region 8 voluntarily withdrew an issued UIC permit subject to an appeal before the Environmental Appeals Board because of its failure to do so:

As a result of information considered by EPA subsequent to the filing of the Petition, EPA has determined that it will withdraw the existing UIC permit and undertake additional procedures related to the [NHPA] before issuing a new UIC permit. Consequently, with this letter, the Region hereby withdraws this Permit, pursuant to 40 C.F.R. § 124.19(d).

To address the Withdrawn Permit, the Region intends to issue for public comment a new draft permit **after EPA has undertaken additional procedures related to the NHPA.** The new draft permit will proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to 40 C.F.R. Part 124.

In the Matter of Antelope Creek Steamflood Pilot Project UIC Permit No. UT20960-0000, February 23, 2006 Letter Re: Notice of Withdrawal of UIC Permit UT20960-0000 (emphasis added) (*see* Attachment 2).

Therefore, for the reasons explained above, EPA must complete all required steps under the NHPA before deciding whether to prepare a draft UIC permit for KEMC. If, after doing so,

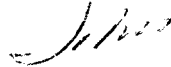
Rodger Field, Esq.

January 20, 2009

EPA decides to prepare and public notice a draft UIC permit for KEMC, then EPA must include in the draft permit appropriate terms and conditions addressing NHPA compliance.

We will be happy to further discuss these issues during our meeting on January 29, 2009 at the conclusion of the technical discussions.

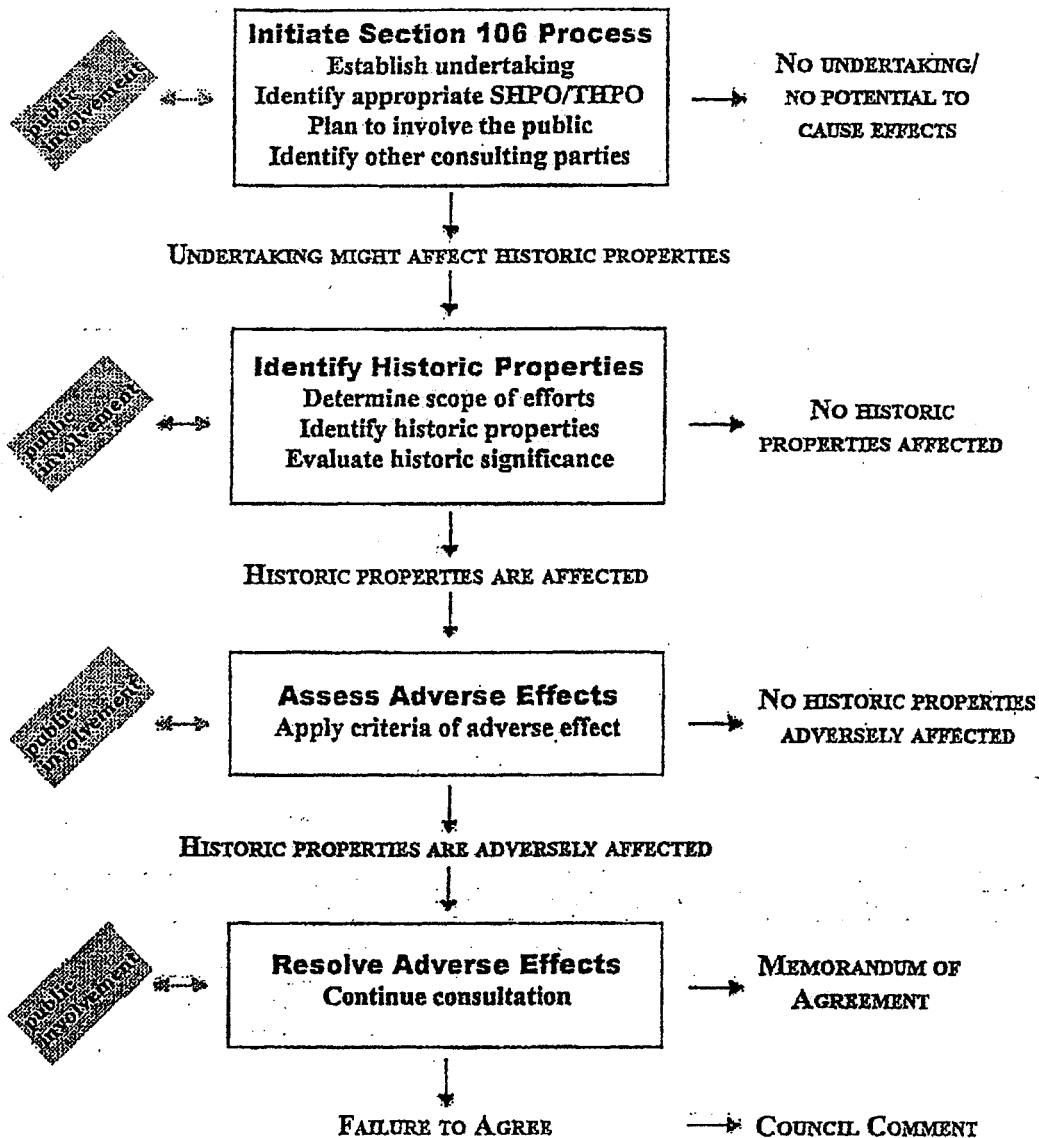
Sincerely,



John R. Baker
Tribal Attorney

cc: Warren C. Swartz, Jr., President
Summer Cohen, THPO
Tinka G. Hyde, Director, Water Division
Rebecca Harvey, Chief, UIC Branch
Ross Micham, Geologist, UIC Branch
Jennifer Manville, Michigan Tribal Liaison, EPA

The Revised Section 106 Process: Flow Chart



(over)

ATTACHMENT II

RECEIVED
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

ENVIR. APPEALS BOARD

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

U.S. Environmental Protection Agency
Environmental Appeals Board (1103B)
Eurika Durr, Clerk of the Board
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

FEB 23 2006

Western Resource Advocates
Sean Phelan, Esq.
425 East 100 South
Salt Lake City, Utah 84111

Re: Notice of Withdrawal of UIC Permit UT20960-00000

Dear Ms. Durr and Mr. Phelan:

By letter dated July 13, 2005, Western Resource Advocates ("WRA") filed, pursuant to 40 C.F.R. § 124.19(a), a Petition for Review ("Petition") of UIC Permit UT20960-00000 ("Permit") with the Environmental Appeals Board ("Board"). For good cause shown, the Board granted WRA's and EPA's joint motions for extensions of time for EPA to file a response to the Petition; the current response deadline is Monday, February 27, 2006. As a result of information considered by EPA subsequent to the filing of the Petition, EPA has determined that it will withdraw the existing UIC permit and undertake additional procedures related to the National Historic Preservation Act ("NHPA"), 16 U.S.C. 470 *et seq.* before issuing a new UIC permit. Consequently, with this letter, the Region hereby withdraws this Permit, pursuant to 40 C.F.R. § 124.19(d).

To address the Withdrawn Permit, the Region intends to issue for public comment a new draft permit after EPA has undertaken additional procedures related to the NHPA. The new draft permit will proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to 40 C.F.R. Part 124.

If you have any questions regarding this correspondence, please feel free to contact Suzanne Bohan, the Region's legal counsel in this matter, at (303) 312-6925.

Sincerely,

A handwritten signature in black ink, appearing to read "Roberts" with a stylized flourish at the end.

Robert E. Roberts
Regional Administrator

cc: Robert Ward, 8RC
Suzanne Bohan, 8RC
Steven Tuber, 8P
Carol Campbell, 8P
Dan Jackson, 8P-W-GW



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET- SUITE 200
DENVER, CO 80202-2466
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ENVIR. APPEALS BOARD

Ref: 8RC

FEB 23 2006

Ms. Eureka Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
401 M Street, S.W.
Mail Code 1103-B
Washington, D.C. 20460-0001

RE: Antelope Creek Steamflood Pilot Project
UIC Appeal No. UIC 05-02

Dear Ms. Durr:

Enclosed for filing with the Environmental Appeals Board is the original and five copies of EPA Region 8's Notice of EPA Permit Withdrawal and Joint Motion to Dismiss related to the above-captioned case.

Thank you very much for your attention to this matter.

Sincerely,

Suzanne J. Bohan, Esq.
Office of Regional Counsel
U.S. EPA, Region 8

Enclosures

cc: Tina Artemis, Regional Hearing Clerk
Suzanne Bohan, Assistant Regional Counsel
Sean Phelan, Western Resources Advocates
Joro Walker, Western Resources Advocates



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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

JUL 27 AM 10:16
ENVIR. APPEALS BOARD

In the Matter of:)
)
)
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Antelope Creek Steamflood Pilot Project)
UIC Permit No. UT20960-00000)

UIC Appeal No. 05-10
)
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NOTICE OF EPA PERMIT WITHDRAWAL AND JOINT MOTION TO DISMISS

The Region 8 Office of the United States Environmental Protection Agency ("EPA" or the "Region") and Western Resource Advocates ("WRA" or "Petitioner") (together, the "Parties") respectfully submit to the Environmental Appeals Board ("EAB" or "Board") this status report, notice of permit withdrawal and joint motion to dismiss the petition filed in connection with the above-captioned matter.

BACKGROUND

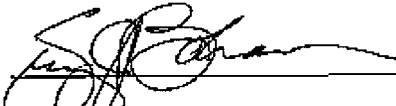
On June 23, 2005, EPA issued an underground injection control ("UIC") permit to Petroglyph Operating Company, Inc. for the proposed Antelope Creek Steamflood Oil Recovery Pilot Project - UIC Permit UT20960-00000 ("Permit"). On July 13, 2005, WRA timely filed a petition for review ("Petition") of the Permit with the Board. The Board directed the Region to submit a response by August 10, 2005, that addressed whether the Petitioner satisfied the requirements for obtaining review under 40 C.F.R. § 124.19(a). For good cause shown, the Board granted WRA's and EPA's joint motions for extensions of time for EPA to file a response to the Petition; the current response deadline is Monday, February 27, 2006.

WRA's Petition contested, among other things, the adequacy of EPA's compliance with the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.* As a result of information considered by EPA subsequent to the filing of the Petition, EPA has determined that it will withdraw the existing UIC permit and undertake additional procedures related to the NHPA for the issuance of a new UIC permit. Pursuant to 40 C.F.R. § 124.19(d), the Region is withdrawing the Permit which is the subject of the pending appeal before this Board and will prepare a new draft permit under 40 C.F.R. § 124.6 . Consequently, the above-captioned matter is now moot.

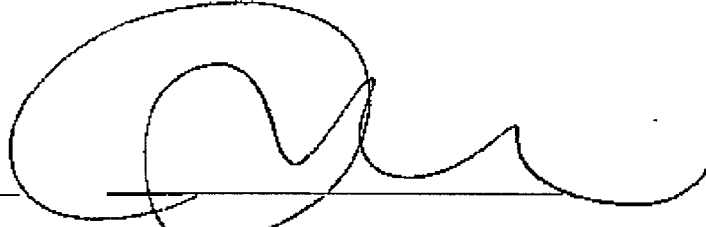
REQUESTED RELIEF

The Parties respectfully request the Board to dismiss the Petition in its entirety.

Respectfully submitted,



U.S. Environmental Protection Agency,
Region 8



Western Resource Advocates

By its Attorney,
Suzanne J. Bohan
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Fax (303) 312-6859

By its Attorney,
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Salt Lake City, UT 84111
(801) 487-9911
Fax (801) 486-4233

Dated: February __, 2006

Dated: February 22, 2006