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February 19, 2009

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Re: **Kennecott Eagle Minerals Company's UIC Permit Application – NHPA Section 106 Review**

Dear Mr. Thompson, Ms. Glowacki, and Dr. Roy:

This letter concerns Kennecott Eagle Minerals Company's ("Kennecott") Underground Injection Control ("UIC") permit application and the procedural obligations imposed on EPA under Section 106 of the National Historic Preservation Act ("NHPA"). We continue to have serious concerns about EPA's Section 106 review process and what we consider to be unwarranted delays in that process. While we have discussed many of those concerns on several occasions in the past, we would like to reiterate and expand on them here.

By way of background, it has been almost **two years** since Kennecott filed its UIC permit application for its underground injection gallery with EPA in April 2007. While EPA determined early on that NHPA applied to the permit and has since engaged in extensive consultation with interested tribes, it has still not made a single determination under Section 106 to date. We have urged EPA to work through the Section 106 review process in an orderly fashion, as we believe such an approach benefits the agency, Kennecott, and any interested tribes. We summarized that process, as mandated by the regulations implementing Section 106, in a letter dated May 20, 2008 (which we have attached for your convenience). The process is also set forth clearly in EPA's own guidance materials. We again ask that EPA strictly adhere to that process.

As we have previously discussed, the first step in the Section 106 review process is to determine whether there is in fact an "undertaking" and, if there is, the scope of that undertaking. The Eagle project is the subject of comprehensive state oversight – Kennecott has applied for and received, in December 2007, a mining permit, a groundwater discharge permit, and an air permit from the Michigan Department of Environmental Quality ("MDEQ"). The state groundwater discharge permit strictly regulates every aspect of Kennecott's treated water

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infiltration gallery ("TWIS"), which will discharge drinking-quality water pumped from the mine into sandy soils in the ground near the mine. Although "injection" (i.e. infiltration) of high quality water into shallow soils through mechanisms like the TWIS may qualify as Class 5 wells that are permitted by rule under the UIC program, EPA took the unusual step of requiring Kennecott to apply for and obtain an individual UIC permit for the TWIS discharge – creating a federal "undertaking" subject to the NHPA Section 106 review process. Even though EPA has continually emphasized that the scope of its regulatory authority is very limited and does not extend beyond the TWIS, it has refused to conclude that its Section 106 review is limited to potential adverse effects stemming from the TWIS. This despite the fact that EPA's own regulations under the Safe Drinking Water Act state that its obligation under Section 106 of NHPA is to "mitigate potential adverse effects <u>of the licensed activity</u> [on] properties listed or eligible for listing in the National Register of Historic Places." 40 C.F.R. § 144.4. Instead, EPA "tentatively concluded" well over a year ago that the scope of NHPA review encompasses the entire Eagle project, and has proceeded based on that assumption even though, as far as we know, EPA has never made a formal determination to this effect or otherwise explained a single legal basis for its position.

Such an expansive view of the undertaking would be erroneous and lead to further erroneous determinations going forward (please see our May 20, 2008 letter to EPA for further discussion of Kennecott's position on this issue). For example, properly determining the undertaking is a necessary prerequisite to proceeding with a determination of the area of potential effects ("APE"). EPA still has not determined the applicable APE, but it should be limited to the area that could be affected by the TWIS. Of course, given that the applicable undertaking involves the underground injection of purified water, and nothing more, the APE would be quite limited. Indeed, EPA has admitted to Kennecott on several occasions that, if EPA was just looking at the effects of the TWIS, its NHPA review would have been completed long ago because it is quite clear that the TWIS will not have an impact on any historic properties.

After EPA has determined the APE, it must identify potential historic properties within the APE, accompanied by proper consultation with Kennecott, interested tribes in the region, and the State Historic Preservation Office ("SHPO"). It must then determine, with proper consultation, the significance of any identified properties using the eligibility criteria set forth in 36 CFR § 60.4. If eligible properties exist in the APE, EPA must then determine whether the undertaking will have an adverse effect on such properties using the criteria set forth in 36 CFR § 800.5, again with proper consultation. Only if EPA determines that the undertaking will have adverse effects on eligible properties should it proceed to consider ways to resolve or mitigate any such adverse effects (again, with consultation).

Well over a year has passed since EPA initiated consultation with the Keweenaw Bay Indian Community ("KBIC") and other tribes in the region. That consultation has been extensive. EPA officials met with KBIC representatives at the project site in December 2007, and received, on February 7, 2008, an assessment from KBIC in which the tribe asserted that a rock outcrop that will be near the portal to the Eagle mine is eligible for listing in the National Register of Historic Places. EPA has received comments from other tribes, including the Lac Vieux Desert Band and the Grand Portage Band. We understand that EPA has been in regular communication with the tribes about their cultural resource concerns over the past year. The tribes have been given ample opportunity to consult with EPA. And this does not even take into account the numerous opportunities for involvement and consultation with the State of Michigan and Kennecott through the state permitting process over the past four years.

While EPA can address multiple steps in the process at once with proper consultation – for example, EPA could simultaneously determine the scope of the undertaking, the APE, and whether there are eligible properties in the APE that could be adversely affected by the undertaking – Kennecott remains frustrated that almost two years have passed without a single NHPA determination. In an effort to assist EPA in assessing the eligibility of the outcrop and any other resources in the mine vicinity and in response to KBIC's assessment of the rock outcrop, we submitted a comprehensive report prepared under Section 106 of the NHPA and the implementing regulations (36 CFR Part 800) on August 18, 2008. The report was prepared by acknowledged experts in the fields of cultural resource management, history, archaeology, and anthropology, including an expert in Ojibwe culture, and it considered all information that has been submitted to EPA by interested tribes, as well as information that EPA did not have at its disposal – for example, KBIC testimony from MDEQ's Contested Case Hearing on Kennecott's mining and groundwater discharge permits.

For purposes of the NHPA report, Kennecott asked the experts to take an expansive view and consider the entire mining project encompassed by Kennecott's Michigan Part 632 mining permit, including aspects of the project over which EPA has no licensing or permitting authority. The report discusses the area of potential effects for archaeological resources and traditional cultural properties, examines whether there are any places of potential historic importance within the APE, and then assesses in great detail whether any of those places are eligible for listing in the National Register of Historic Places (36 CFR Part 60). The report concludes that there are no properties (archaeological sites or traditional cultural properties) eligible for listing in the National Register in the project area, including the rock outcrop.

At the time we submitted the NHPA report in August 2008, we asked EPA to provide the report to interested tribes, to adopt the report's conclusions, and notify SHPO so it could begin its statutorily-required 30-day review of EPA's determination. We understand that EPA submitted the report to KBIC and other interested tribes soon thereafter and asked them to

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submit any pertinent information in response that they wanted EPA to consider within 30 days. We also understand that EPA has since had extensive further communications with KBIC and its representatives, including emails, letters, another site visit in September 2008, and another meeting in Chicago on January 29, 2009. Yet, EPA has not received further submissions as part of the NHPA consultation process by or on behalf of KBIC or other interested tribes. EPA has inexplicably declined to set an end date for the consultation process with the tribes or indicate when the consultation process might end.

We have urged EPA for several months now to set a hard deadline for consultation with the tribes. NHPA requires that EPA engage in good faith consultation and undertake reasonable efforts in this regard, as NHPA is a procedural, not a substantive, statute: it provides absolutely no independent basis to deny a permit application nor is it intended to subvert, through endless delays, the substantive statute and permitting program at issue. EPA has more than complied with these requirements, and should set a firm deadline for receipt of further information from the tribes so the Section 106 process can proceed. Dr. John Eddins from ACHP has recently confirmed that EPA can properly set such a deadline.

At that point, we believe that EPA should make a determination that there are no eligible properties in the APE and submit that determination to SHPO for review. EPA and the tribes have had the NHPA report submitted by Kennecott for a half year now, and we believe EPA has had adequate time to make an eligibility determination. We understand that KBIC has asserted that the rock outcrop is a "traditional cultural property" and disagrees with the conclusion reached by the cultural resource experts in the NHPA report. While we respect KBIC's concerns, EPA's responsibility under Section 106 is ultimately to determine whether the rock outcrop is eligible for listing in the National Register of Historic Places applying the eligibility criteria set forth in the regulations. We believe the record definitively supports a conclusion that it is not.

As Kennecott has indicated to EPA, SHPO, and KBIC on numerous occasions, Kennecott remains willing to engage in a non-adversarial dialogue with KBIC and consider reasonable measures to address KBIC's cultural concerns. As outlined in the NHPA report, and Kennecott's August 18, 2008 cover letter (which is attached for your convenience), Kennecott's consultation efforts over the past four years have been extensive. Indeed, in response to concerns expressed by KBIC as part of the Michigan Department of Natural Resources' ("MDNR") approval of the Surface Use Lease for Kennecott's surface facilities, Kennecott agreed in the lease not to engage in any mining operations or activities on the exposed surface of the outcrop. Further, Kennecott is required by state law to reclaim the project area after the cessation of mining activities, so the surrounding area will be restored. Kennecott is open to considering other reasonable measures beyond these.

We remain concerned, however, that KBIC does not really want to discuss reasonable measures to address their cultural concerns, but instead wants to block the project, as evidenced by their many public statements to that effect and the numerous lawsuits and administrative appeals they have filed over the past few years to prevent the Eagle project from moving forward. Short of blocking the project, KBIC seems to be making a concerted effort to delay the UIC permit process in any way possible, as most recently evidenced by their January 20, 2009 letter to EPA, which wrongly suggests that EPA must complete the NHPA process before issuing a draft UIC permit (Kennecott has addressed that issue in another letter). We do not believe it would be proper for KBIC to cynically use the Section 106 process as another vehicle to advance their anti-mining efforts, and EPA should not allow the NHPA process to be utilized in such a way.

We stand ready to meet in person with EPA, SHPO, KBIC, and other interested tribes in an effort to reach a mutually acceptable understanding. However, as we have previously indicated, we do not believe that this should preclude EPA from moving forward with the Section 106 process and properly determining that there are no eligible resources in the APE.

We understand that EPA, Region 5 has been consulting with the agency's cultural resources expert in Region 2, Dr. John Vetter. We would welcome the opportunity to communicate directly with Dr. Vetter on the outstanding issues. As we have indicated previously, Kennecott has at its disposal cultural resource experts, such as Drs. Gail Thompson and Christopher Bergman, who have spent their careers working with federal agencies and tribes to discover and protect important cultural resources and are quite familiar with the Section 106 process. We hope that EPA will utilize their expertise as it completes the process.

Please feel free to give me a call if you have any questions.

Sincerely,

Daniel P. Ettinger

Enclosures
Via First Class Mail and E-Mail

cc via email: Mr. Brian Grennell, SHPO
Dr. John Eddins, ACHP
Mr. Rodger Field, EPA Region 5
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Ms. Vicky Peacey, KEMC

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May 20, 2008

Via e-mail and first-class mail

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Re: **EPA's Review of Kennecott's UIC Permit Application Under Section 106 of NHPA**

Dear Mr. Thompson:

The purpose of this letter is to follow up on our previous discussions regarding Kennecott Eagle Minerals Company's ("Kennecott") Underground Injection Control ("UIC") permit application.

First of all, let me say that we appreciate your willingness to ensure that EPA has a defined, efficient process in place for its review under Section 106 of the National Historic Preservation Act ("NHPA"). We remain concerned, however, about that process and would like to take this opportunity to reiterate some of our concerns.

In particular, we are hoping that EPA can provide us some clarification regarding the Region's implementation of the NHPA process so we can effectively participate and the process can proceed in a timely and comprehensive fashion. Our understanding of NHPA and its implementing regulations is that EPA must first determine whether there is an "undertaking" within the meaning of NHPA and the nature of its potential effects. Then, EPA must determine the area of potential effects ("APE"). After that, EPA must identify potential historic properties within the APE, accompanied by proper consultation with Kennecott, relevant tribes in the region, and the SHPO. It must then determine, with proper consultation, the significance of any identified properties using the eligibility criteria set forth in 36 CFR § 60.4. If eligible properties exist in the APE, EPA must then determine whether the undertaking will have an adverse effect on such properties using the criteria set forth in 36 CFR § 800.5, again with proper consultation. Only if EPA determines that the undertaking will have adverse effects on eligible properties should it proceed to consider ways to resolve or mitigate any such adverse effects (again, with consultation). Our understanding of this process is supported by EPA's NHPA guidance

materials, which you graciously provided to us in January. We ask that EPA confirm that it shares Kennecott's understanding regarding the NHPA process.

With respect to EPA's determination of the relevant "undertaking" under the NHPA, we want to make sure that Kennecott's position on this issue is clear. You have said in our previous conversations that the infiltration gallery is the only aspect of the Eagle project requiring a federal permit and is the only part of the project that could rise to the level of an "undertaking." Yet, you previously indicated that EPA had at least tentatively concluded that it would consider the Section 106 effects of the entire mining project encompassed by Kennecott's Michigan Part 632 permit, including aspects of the project over which EPA has no licensing or permitting authority.

In our view, any such conclusion regarding the scope of its NHPA review would not be legally valid. The proper scope of EPA's review is limited by the statute and rules to the effects, if any, of the infiltration gallery alone. This is the only aspect of Kennecott's Eagle project that requires a federal permit and is the only part of the project over which EPA has sufficient legal ability to control.

This conclusion is mandated by the language of Section 106 of the NHPA itself, its implementing regulations, EPA's regulations under the Safe Drinking Water Act, and pertinent case law. Section 106 review is triggered here by EPA's "authority to license" an "undertaking," namely the injection gallery. *See* 16 U.S.C. § 470f. Under the NHPA, "undertaking" is defined, in relevant part, as a "project, activity, or program" that requires "a federal permit, license, or approval." 16 U.S.C. § 470w(7); *accord* 36 C.F.R. § 800.16(y). As you know, Kennecott's entire project has been subject to unprecedented review by the State of Michigan, including a comprehensive review of the very activity subject to the UIC permit application. Indeed, the state review of that activity not only was the functional equivalent of the UIC permit, but was a much more comprehensive review of the activity than EPA is legally allowed to undertake. The project as a whole, however, does not require any other federal permit. Only the infiltration gallery has been determined by EPA to require a federal permit.

EPA's own regulations under the Safe Drinking Water Act state that its obligation under Section 106 of NHPA is to "mitigate potential adverse effects <u>of the licensed activity</u> [on] properties listed or eligible for listing in the National Register of Historic Places." 40 C.F.R. § 144.4. (Emphasis added.) The only activity licensed by EPA is the infiltration gallery. This language is unambiguous. It precludes EPA from expanding the scope of its authority and review to cover the entire project.

Cases under the NHPA, as well as under the National Environmental Policy Act ("NEPA"), support this conclusion. While these two statutes are different in many respects, NEPA, like the NHPA, is a procedural statute that is both triggered and limited by the level of federal involvement. That is why courts have looked to NEPA case law when examining the

proper scope of federal involvement under the NHPA. Neither NHPA nor NEPA can be used to expand the scope of an agency's substantive regulatory powers. *Natural Res. Defense Council v. EPA*, 859 F.2d 156, 169-170 (D.C. Cir. 1988) (stating that "[a]ny action taken by a federal agency must fall within the agency's appropriate province under its organic statute."). Should EPA use its UIC authority to control all non-federal elements of the project, the Agency would be acting contrary to this maxim.

Numerous circuits have held, under NEPA, that the scope of the agency's review is limited to the scope of its authority to control the project. Thus, in *Southwest Williamson County Cmty. Ass'n, Inc. v. Slater*, 243 F.3d 270 (6th Cir. 2001), for example, the Sixth Circuit held that NEPA did not provide the Federal Highway Administration ("FHA") authority to consider the environmental impacts of the entire state highway project, since only the interchanges required federal approval. The FHA did not have "sufficient control over the non-federal project so as to influence the outcome of the project." *Id.* at 283-85. Similarly, under the NHPA, if the federal agency does not have the power to effectuate the results of the Section 106 review through its permitting process, then such review would be merely an empty exercise. In this case, EPA's NHPA review should be limited to the only activity for which it has any control – the underground injection gallery.

To the extent that EPA has employed a "but for" analysis to determine the scope of its review under the NHPA, analyzing whether Kennecott could proceed with the Eagle mining project but for the UIC permit, such an analysis would be improper under NHPA. *Cf. Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) ("a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations"). Indeed, in *Public Citizen*, the Supreme Court recently held "that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770. Further, and more importantly, even under such an analysis, the scope of EPA's NHPA review should still be limited to the injection gallery because, as we have discussed, Kennecott does not require an injection gallery to safely and effectively operate the Eagle mine. Other means of water disposal clearly exist.

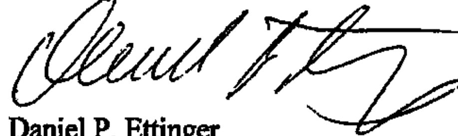
We hope that EPA will avoid what we believe would be an erroneous determination about the scope of EPA's Section 106 review, as this will inevitably lead to further erroneous determinations as the process continues. For example, properly determining the undertaking is a necessary prerequisite to proceeding with a determination of the APE. While the area potentially effected by the injection gallery may or may not extend beyond the confines of the injection gallery itself, EPA's role under the NHPA is nonetheless limited by rule to reviewing only the effects of the injection gallery, as that is the licensed activity here. The APE is determined solely by the <u>actual</u> federal undertaking. This is but one example of the potential consequences of an improper decision regarding the nature of the "undertaking." We welcome further discussion on this vital issue.

As previously indicated, Kennecott wants to be (and has a right to be) an active participant in every stage of the NHPA process and would like to assist EPA in any way it can. We have a wealth of information regarding the site and the Eagle project, as well as information concerning the historical use of the site and the vicinity. We want to make sure that EPA and the SHPO have sufficient information to help them understand the project and the potential effects of the licensed activity under Section 106 of NHPA. We hope to come up with an orderly schedule for the provision of this information to EPA – while some of this information may already be in the possession of EPA and/or the SHPO as part of the extensive state permitting process, much of it probably is not.

Finally, we ask that you continue to keep Kennecott apprised of your ongoing consultation with the tribes and the SHPO in a timely fashion so we may respond or provide additional information as appropriate.

Thank you for your consideration. Please feel free to give me a call if you have any questions.

Sincerely,



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cc: Brian Grennell
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AUG 20 2008

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August 18, 2008

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Re: **Kennecott Eagle Minerals Company's UIC Permit Application – NHPA Section 106 Report**

Dear Mr. Thompson and Dr. Roy:

This letter concerns Kennecott Eagle Minerals Company's ("Kennecott") Underground Injection Control ("UIC") permit application and EPA's consideration of that application under the terms of Section 106 of the National Historic Preservation Act ("NHPA").

We have enclosed for your review a comprehensive report prepared under the terms of Section 106 of the NHPA and the implementing regulations (36 CFR Part 800). It has been prepared by acknowledged experts in the fields of cultural resource management, history, archaeology, and anthropology, including an expert in Ojibwe culture. The report is being submitted in both paper and electronic forms. The report discusses the area of potential effects for archaeological resources and traditional cultural properties, examines whether there are any places of potential historic importance within the APE, and then assesses whether any of those places are eligible for listing in the National Register of Historic Places (36 CFR Part 60). Because the Keweenaw Bay Indian Community ("KBIC") and some other tribes have indicated to EPA that they believe the rock outcrop in the NW¼ of Section 12, T50N-R29W (which has recently been identified by KBIC as "Eagle Rock") is eligible for listing in the National Register, the experts paid particular attention to the rock outcrop.

The enclosed report ultimately concludes that there are no properties (archaeological sites or traditional cultural properties) eligible for listing in the National Register in the project area, including the rock outcrop. Because the experts did not find any eligible properties, a discussion of adverse effects or mitigation is not required under NHPA. The report therefore does not discuss either.

Kennecott continues to believe that the undertaking under Section 106 of the NHPA is limited to the permitting of the treated water infiltration gallery ("TWIS"), and that the scope of EPA's review under the NHPA should be limited accordingly (please see our May 20, 2008 letter to EPA for further discussion of Kennecott's position on this issue). Nevertheless, for purposes of the attached NHPA report, Kennecott asked the experts to take an expansive view and consider the entire mining project encompassed by Kennecott's Michigan Part 632 mining permit, including aspects of the project over which EPA has no licensing or permitting authority.

The experts considered all of the information that KBIC and other interested tribes submitted to EPA as part of the NHPA consultation process, as well as additional information provided by KBIC as part of its consultation with the State of Michigan, and information provided as part of the state's permitting process (including testimony provided by KBIC representatives at the Michigan Department of Environmental Quality's ("MDEQ") contested case hearing). The report also recounts the state permitting process for the Eagle project and sets forth the consultation history between Kennecott, EPA, MDEQ, the Michigan Department of Natural Resources ("MDNR"), SHPO, KBIC, and several other tribes. Further, the report provides an in depth discussion of the land use history for the Eagle site and the surrounding area, including the history of logging and mineral exploration on and around the rock outcrop.

We believe that the enclosed report is thorough, objective, and well-reasoned, and should be adopted by EPA and concurred in by SHPO. We are also submitting a copy of this report to the State Historic Preservation Office for its convenience. If EPA adopts the report and its conclusions, we expect that EPA will promptly notify SHPO so it can begin its statutorily-required 30-day review of EPA's determination. We also expect that EPA will concurrently provide the report to other consulting parties, including KBIC, the Lac Vieux Desert Band of Lake Superior Chippewa, the Grand Portage Band of Chippewa Indians, and the Sault Ste. Marie Tribe of Chippewa Indians, and ask that they provide any comments within 30 days of their receipt of the report. Because the report may include information considered sensitive by the tribes or others, we have marked the report "confidential." We leave it to the sound discretion of EPA and SHPO to determine whether it is appropriate to disseminate this report beyond the consulting parties.

While the experts have concluded that the rock outcrop is not eligible for listing in the National Register, Kennecott remains willing to consider reasonable measures to address KBIC's cultural concerns, as Kennecott has communicated previously to KBIC, EPA, and SHPO. Kennecott attempted to consult with KBIC in this regard beginning in early 2005, only to have KBIC break off communications shortly thereafter. Unfortunately, we have seen no indication thus far that KBIC seeks to do anything other than block the Eagle project. To date, KBIC has been steadfast in its opposition to the project – it has filed several lawsuits and

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administrative appeals challenging the Surface Use Lease between Kennecott and the State of Michigan and the state permits granted by MDEQ in December 2007, all in an effort to prevent the Eagle project from moving forward. If KBIC is now interested in engaging in a non-adversarial dialogue, Kennecott remains willing to do so.

In this regard, we note that Kennecott has already agreed under the Surface Use Lease (Section 4.B.6) not to engage in any mining operations or activities on the exposed surface of the outcrop. In fact, Exhibit G to the Surface Use Lease actually shows the non-disturbance boundary around the outcrop. Further, Kennecott is required by state law to reclaim the project area after the cessation of mining activities, so the surrounding area will be restored.

We have attached to the report several documents that we believe will be helpful to EPA and SHPO as they fulfill their respective responsibilities under Section 106 of NHPA, including key consultation documents between Kennecott, EPA, MDEQ, MDNR, SHPO, and KBIC over the past 3½ years, the State Surface Lease for state land in Section 12 that includes the rock outcrop, and documents explaining why the location proposed by Kennecott for the surface facilities and the mine portal is the preferred alternative. Additional documents related to the Eagle project, including Kennecott's state mining permit application, the mining, groundwater, and air permits approved by MDEQ in December 2007, the complete Surface Use Lease, and the Mining and Reclamation Plan ultimately approved by MDEQ and MDNR, can be found at the following MDEQ and MDNR website addresses: http://www.michigan.gov/deq/0,1607,7-135-3311_4111_18442-130551--,00.html and http://www.michigan.gov/dnr/0,1607,7-153-10368_11800-161951--,00.html. Further, we are happy to provide any additional documents or information that might assist EPA as it completes the Section 106 process.

Thank you for your careful consideration of the enclosed report. We look forward to the timely completion of the Section 106 process. Please feel free to give me a call if you have any questions.

Sincerely,

Daniel P. Ettinger

Enclosures

cc: Brian Grennell, SHPO (with enclosures)
Jon Cherry, KEMC

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