

May 20, 2008

Via e-mail and first-class mail

Mr. Robert Thompson
Office of Regional Counsel
USEPA Region 5
77 West Jackson Boulevard
Mail Code: C-14J
Chicago, Illinois 60604-3507

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 of the licensed activity [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 actual 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.

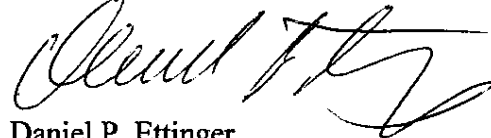
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As previously indicated, Kennecott wants to be (and has a right to be) an active participant in every stage of the NHPA process and would like to assist EPA in any way it can. We have a wealth of information regarding the site and the Eagle project, 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,



Daniel P. Ettinger

cc: Brian Grennell
Jon Cherry

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