

US EPA ARCHIVE DOCUMENT

Via FedEx

May 1, 2008

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**Re: *Kennecott Eagle Minerals Company ("KEMC");
Marquette County, Michigan;
Underground Injection Wells***

Dear Ms. Harvey:

This follows up on our December 10, 2007 letter to you on behalf of our client, the Keweenaw Bay Indian Community (the "Community"), concerning discharges proposed by KEMC that are subject to the Underground Injection Control ("UIC") regulations promulgated under the Safe Drinking Water Act ("SDWA"), 33 USC § 300f *et seq.* In our December 10th letter, the Community provided comments regarding the need for KEMC to obtain UIC permits before mine construction for the following three underground injections: (i) the discharge of 124 gallons per minute of contaminated so-called "utility" water; (ii) cemented and other mine backfill; and (iii) post-mining operation injection of water into the mine workings to accelerate flooding of the mine (collectively referred to as "the three underground injections"). Permits for the three underground injections are required in addition to the UIC permit the U.S. Environmental Protection Agency ("EPA") has required KEMC to seek for the treated water infiltration system ("TWIS").

EPA should require KEMC to obtain UIC permits for the three underground injections **prior to** construction of the mine due to the substantial threat of both groundwater and surface water contamination posed by both the discharges and the associated mining operation. Although KEMC predicts that its operations will not cause any groundwater and surface water contamination, history reveals that such predictions are almost uniformly wrong, as documented in the December 2006 study, entitled *Comparison of Predicted and Actual Water Quality at Hardrock Mines – The reliability of predictions in Environmental Impact Statements*, by James R. Kuipers, P.E., and Ann S. Maest, PhD ("Kuipers/Maest Study") (*see* Attachment A).

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Additionally, in light of the environmental threat posed by both the discharges and the mining and mining-related activities, if EPA decides to issue a UIC permit to KEMC, EPA should prepare an Environmental Impact Statement (“EIS”) under the National Environmental Policy Act (“NEPA”), 42 USC § 4321 *et seq.*, pursuant to EPA’s Statement of Policy for Voluntary Preparation of [NEPA] Documents (“Voluntary NEPA Policy”), 63 Fed. Reg. 58045 (Oct. 29, 1998).

We understand that there may be at least some reluctance on the part of EPA to require pre-mine construction permits for the three underground discharges because EPA has not previously required mine operators to obtain mine backfill injection permits prior to construction. We have not identified any provision of either the SDWA or the UIC regulations which would preclude EPA from requiring KEMC to obtain UIC permits for the mine backfill and the two other proposed injections prior to construction of the mine. In fact, the UIC regulations expressly provide to the contrary: “Any underground injection, except into a well authorized by rule or except as authorized by permit issued under the UIC program, is prohibited. The construction of any well required to have a permit is prohibited until the permit has been issued.” 40 CFR § 144.11.

Moreover, it clearly makes more practical sense and is more environmentally protective to require that KEMC obtain UIC permits for the three underground injections prior to mine construction rather than at some later date. Put quite simply, what if the proposed discharges are incapable of being performed in compliance with the SDWA and UIC regulations? The horse will already be out of the barn – it will be too late to prevent the damage to the environment. In this regard, EPA should take note that numerous mining sites are listed as “Superfund” sites under the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 USC § 9601 *et seq.*, or have required remediation under CERCLA.¹ Moreover, various Kennecott-related entities have been named as responsible parties at numerous such Superfund sites.² Requiring KEMC to obtain a UIC permit, with its attendant monitoring, reporting, operation and corrective action requirements, for each of the three underground injections will help ensure that KEMC does not create yet another mining Superfund site.

¹ See, e.g., *Abandoned Mine Site Characterization and Cleanup Handbook*, EPA/910-B-00-001 (August 2000); *EPA’s National Hardrock Mining Framework* (September 1997). See also the hundreds of sites listed on EPA’s web pages at www.epa.gov/superfund/programs/aml/amlsite/index.htm.

² Examples of such sites include: (i) the McLaren Tailings Superfund Site, Park County, Montana (62 Fed. Reg. 19812); (ii) the Herriman Residential Soils Removal Action Site, Herriman, Utah (62 Fed. Reg. 58730, 63 Fed. Reg. 29213); (iii) the Butterfield Canyon Site, Salt Lake County, Utah (62 Fed. Reg. 58730); (iv) the Bingham Creek Channel Superfund Site, Utah (64 Fed. Reg. 33911); (v) the Kennecott North Zone/Kennecott Magna Soils Site, Salt Lake County, Utah (www.epa.gov/region8/sf/ut/kennecottnorth, 73 Fed. Reg. 9825); and (vi) the multiple sites included within the Kennecott South Zone/Bingham Mining District (www.epa.gov/region8/sf/ut/kennecottsouth).

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Considering that KEMC's proposed mine of this type of construction and operation is the first of its kind in Michigan, and may well be the first of its kind in the United States, EPA should not be reluctant to require KEMC to obtain permits for all UIC-regulated injections prior to beginning mine construction, whether or not EPA considers such action to be the first of its kind.

A. Kuipers/Maest Study Documents Failures Of Mine Operators And Regulators To Predict Groundwater And Surface Water Contamination.

Review and permitting pre-construction is particularly warranted when one considers the history of gross environmental contamination associated with nearly every hardrock mining operation in the United States. The failure of mine operators and regulators to accurately predict the environmental impact of hardrock mines in the United States is extensively documented in the Kuipers/Maest Study. A Whitepaper (*see* Attachment B) produced by Earthworks announcing availability of the Kuipers/Maest Study describes in lay terms some of the conclusions of the Kuipers/Maest Study, as follows:

The study, conducted by Jim Kuipers and Ann Maest, brings to light a decades-long failure by government regulators, industry, and consultants to recognize and correct deficient procedures and methods for predicting contamination of water at hardrock mines.

Kuipers and Maest have discovered that, in practice, there is a failure to compare predictions made before the mines are permitted with the actual results. The predictive modeling results are not adjusted to account for real-life failures—this, despite the fact that at the vast majority of mines, problems were worse than predicted. Establishment of credibility in modeling requires that the predictions be tested, and then the models adjusted based on the results. This process appears broken when it comes to predicting the impact of mines on water quality for mine permits.

...

Do predicted water quality impacts match reality?

The answer, in short, is no. The [Kuipers/Maest Study] reveals:

- 100 percent of mines predicted compliance with water quality standards before operations began (assuming pre-operations water quality was in compliance).

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- 76 percent of mines studied in detail exceeded water quality standards due to mining activity.
- Mitigation measures predicted to prevent water quality exceedances failed at 64 percent of the mines studied in detail.

Earthworks Whitepaper at 1 (emphasis added).

The Earthworks Whitepaper further summarizes the findings of the Kuipers/Maest Study as follows:

Major Findings: Chronic Underestimates of Water Quality Problems

Prediction vs. Reality: Overall Water Quality Impacts to Ground and Surface Water

Of the 25 mines sampled:

- 76% of mines polluted groundwater or surface water severely enough to exceed water quality standards.
- 60% of mines polluted surface water severely enough to exceed water quality standards.
- At least 13 mines (52%) polluted groundwater severely enough to exceed water quality standards.

Predictions vs. Reality: the Failure of Mitigation

In the cases where water quality standards were exceeded, in some cases the mine proponent anticipated the potential for pollution and prepared mitigation strategies (e.g. a mine waste dump lined with plastic to prevent acid drainage leaching into groundwater).

Predictions of the efficacy of mitigation were no more reliable than overall predictions of water quality:

- 73% of mines exceeded surface water quality standards despite predicting that mitigation would result in compliance. The other 4 mines didn't predict the need for mitigation.

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- 77% of mines that exceeded groundwater quality standards predicted that mitigation would result in compliance. The other 3 mines didn't predict the need for mitigation.

Predictions vs. Reality: Mines near Water with Elevated Acid Drainage or Contaminant Leaching Potential are High Risk

Some mine projects are so high risk that water quality exceedances are a near certainty: those mines that are both near groundwater or surface water resources, and possess an elevated potential for acid drainage or contaminant leaching.

- 85% of the mines near surface water with elevated potential for acid drainage or contaminant leaching exceeded water quality standards.
- 93% of the mines near groundwater with elevated potential for acid drainage or contaminant leaching exceeded water quality standards.
- Of the sites that did develop acid drainage, 89% predicted that they would not.

Id. at 3 (emphasis added).

The surface water and groundwater contamination documented by the Kuipers/Maest Study is consistent with the history of extensive mining-related contamination subject to CERCLA, as noted above.

KEMC's proposed mine falls squarely within the last "high risk" category, as described in the above quote from the Earthworks Whitepaper and documented in the Kuipers/Maest Study. That is, KEMC's mine is within the category of mines studied by Kuipers and Maest that resulted in a "near certainty" of mining related contamination of surface water and groundwater. KEMC's proposed mine will be excavated in an aquifer (i.e., it is completely surrounded by an aquifer), the mine is directly under and adjacent to surface water bodies (wetlands and the Salmon Trout River), and the ore and its host rock have a moderate to high ability to leach acid and metals.³

³ See *Geochemical Review of the Eagle Project Mine Permit Application*, prepared by Stratus Consulting, which is Attachment E to my December 10th letter.

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B. Kennecott's Flambeau Mine Has Impacted Both Groundwater And Surface Water.

As you may be aware, the Flambeau mine located near Ladysmith, Wisconsin, operated by the Flambeau Mining Company, which, like KEMC is owned by Kennecott, has been cited (mainly by Kennecott) as the primary example of how a sulfide mine may be operated without causing impacts to groundwater and surface water. Yet, even the much-touted Flambeau mine has not been successful in avoiding surface water and groundwater contamination, as its owner and operator has asserted. The Flambeau mine is discussed at pages 165 – 167 of the Kuipers/Maest Study. It summarizes the status of the Flambeau mine groundwater condition as follows: “Compared to EIS-predicted post-mining concentrations in the pit backfill, post-mining concentrations in the backfill were higher by up to 45 times for copper, 70 times for manganese, 30 times for iron, and 1.25 times for sulfate. Therefore, modeling underestimated actual concentrations of metals and other contaminants in the pit backfill leachate.” At the time the Kuipers/Maest Study was released, the authors did not know that impacts had occurred to surface water (*see* Table 6.31); however, that was later corrected in a May 10, 2007 letter from Dr. Maest (*see* Attachment C) based upon the discharge of pollutants from the mine site to a tributary to the Flambeau River known as Stream C.⁴

Thus, the Flambeau situation stands as a warning to all that even the touted best-practices example of a sulfide mine has, in fact, caused groundwater and surface water contamination.

C. KEMC's Proposed Mine Backfill Process Requires A UIC Permit.

We understand that EPA may be currently taking the position that the technique KEMC proposes to utilize for injecting the mine backfill materials is not subject to regulation under the SDWA UIC program because KEMC will be using trucks for the underground transport of the backfill to its final location. This position appears to be inconsistent with the determinations expressed in your March 31, 2006 letter to KEMC and Jo Lynn Traub's January 31, 2007 letter to KEMC, in which Ms. Traub indicated that “mine backfill wells” were among the types of Class V injection wells that EPA had identified as being associated with KEMC's proposed mine.

As described in § 4.6 of KEMC's Mine Permit Application (“MPA”), the backfill cement plant will be located near mine level 263 m (meters above mean sea level), which, based upon a mine portal level of approximately 444 m, places the backfill cement plant at approximately 181 meters (594 feet) below the ground surface. Partially treated “utility” water will, of course, be delivered to the underground backfill plant via a pipe. The MPA states that the cement/fly ash mixture to be used in the backfill “will be discharged to an underground binder bin via a cased 250 mm (~10 in) diameter borehole, feeding a colloidal mixer.” MPA § 4.6. The MPA also

⁴ *See also* Attachment D (April 5, 2006 press release from the Great Lakes Indian Fish & Wildlife Commission, entitled *Contaminated discharge continues at Kennecott Minerals' Flambeau Mine.*)

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states that a “2.4 m (~8 ft) diameter raise” will be used to feed aggregate⁵ for the backfill to the underground backfill plant. *Id.* The cement/fly ash components of the backfill will be mixed with the utility water in a “colloidal slurry mixer” to form cement which will be combined with the rock used in the backfill. *Id.*

Thus, all ingredients for the backfill will reach the backfill plant, which is approximately 600 feet below ground, through pipes or boreholes meeting the definition of a “well” under the UIC regulations: “A bored, drilled, or driven shaft whose depth is greater than the largest surface dimension ...” 40 CFR § 146.3. In the backfill plant, the solid ingredients will be combined with utility water to create a slurry that is a UIC-regulated fluid. Basing a regulatory determination on the fact that the backfill slurry will be delivered from the underground backfill plant to its final location by a truck instead of a pipe is placing form over substance. The environmental endangerment sought to be prevented by the SDWA UIC program is no different whether the backfill slurry is delivered through the mine shafts by a pipe or by a truck.

Moreover, EPA’s pronouncements on this subject make it clear that the mine shaft itself meets the definition of a “well” under the UIC regulations. Volume 10, Mining, Sand, or Other Backfill Wells, of The Class V Underground Injection Control Study (the “Class V UIC Study”) (EPA/816-R-99-014, Sept. 1999), states:

Piping systems within mine shafts and workings, as well as more “conventional” drilled wells, used to place slurries/solids in underground mines are considered mine backfill wells under the USEPA’s UIC regulations. **Similarly, mine shafts are considered backfill wells if backfill is injected into the shaft.**

Id. at p 2 (emphasis added).

The Class V UIC Study additionally states the following regarding backfill well characteristics:

Mine backfill materials are typically injected into underground mines through one or more drilled wells or through a pipeline installed in the mine shaft and appropriate portions of the underground workings. **In some situations, injection may be**

⁵ Note that this aggregate will, for at least the initial years of mine operation, be comprised of mine development rock that has been stored on the surface in the Temporary Development Rock Storage Area. Although this rock will not be ore grade material, it will nevertheless contain considerable sulfide metal mineralization. While stored on the surface, the sulfide mineralization in the development rock will be exposed to humidity and air, thus causing the formation of sulfuric acid with dissolved minerals on the surface of the rock – that is, acid mine drainage will be formed. Acid mine drainage will continue to be formed once the rock is injected underground in the backfill as it comes into contact with groundwater seeping out of the surrounding rock from the bedrock aquifer.

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directly into a mineshaft without a pipeline for distributing the injected material within the mine workings.

Id. at p 24 (emphasis added).

Consequently, it is immaterial, from both a regulatory and environmental standpoint, whether a pipe or a truck is used to transport the mine backfill slurry from the underground backfill plant to its final point of injection. The end result is the same, and is a UIC-regulated injection that EPA should not allow KEMC to make without first obtaining a permit.

D. Fractures Within The Bedrock Will Provide Preferential Pathways For The Transport Of Water Into, And Contaminated Water Out Of, The Mine.

Studies of the structural integrity of the bedrock at the proposed KEMC mine site reveal that the bedrock surrounding the proposed mine has numerous wide fracture zones that will transport large volumes of water away from the mine and downgradient in the bedrock aquifer. These studies were performed by Structural Geologist Marcia Bjornerud, PhD, utilizing KEMC's drill core photographs obtained from the Michigan Department of Environmental Quality ("MDEQ"), and are documented in a report, entitled *Independent report on Rock properties at the Kennecott Eagle Project site* (see Attachment E), which is Appendix A to the report entitled *Stability Analysis of the Proposed Eagle Mine Crown Pillar*, and contained in Volume I of the Combined Comments submitted to MDEQ on October 17, 2007. Dr. Bjornerud concludes, in part, that "[t]he fractures and other discontinuities of the rocks at the site of the proposed mine provide a complex three-dimensional network of high-permeability zones for vertical and lateral groundwater flow."

Consequently, once mine dewatering ceases, groundwater from the surrounding bedrock will immediately flow into the mined-out and backfilled areas through the large fractures and discontinuities, causing the formation of additional acid mine drainage upon contact with the aggregate in the mine backfill. The acidic and metal-laden water will quickly migrate into the surrounding bedrock aquifer and continue migrating downgradient through these fractures and discontinuities, contaminating an underground source of drinking water ("USDW") protected under the SDWA UIC program.

E. EPA Should Prepare An Environmental Impact Statement.

While we understand that it is EPA's general position⁶ that UIC permitting is not subject to the environmental impact review requirements of NEPA, in light of the environmental threat

⁶ Based on the so-called "functional equivalency" doctrine as codified at 40 CFR § 124.9(b)(6). While this judicially-created exception ignores the express language of NEPA, EPA has correctly noted in the Voluntary NEPA Policy that NEPA review is appropriate and beneficial for many EPA actions. NEPA review is particularly appropriate in UIC permitting actions, such as in this instance, because EPA's limited scope of review in the UIC

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posed by the KEMC mine, the Community hereby requests that EPA perform a voluntary EIS pursuant to EPA's Voluntary NEPA Policy. The Voluntary NEPA Policy provides for EPA's preparation of an environmental assessment ("EA") or EIS as follows:

EPA will prepare an EA or, if appropriate, an EIS on a case-by-case basis in connection with Agency decisions where the Agency determines that such an analysis would be beneficial. Among the criteria that may be considered in making such a determination are: (a) the potential for improved coordination with other federal agencies taking related actions; (b) the potential for using an EA or EIS to comprehensively address large-scale ecological impacts, particularly cumulative effects; (c) the potential for using an EA or an EIS to facilitate analysis of environmental justice issues; (d) the potential for using an EA or EIS to expand public involvement and to address controversial issues; and (e) the potential of using an EA or EIS to address impacts on special resources or public health.

63 Fed. Reg. 58046.

All but the first of the circumstances listed above in the Voluntary NEPA Policy for preparation of an EIS are applicable to the KEMC matter, as outlined below:

- Preparation of an EIS would allow EPA "to comprehensively address large-scale ecological impacts, particularly cumulative effects" in connection with the KEMC project. In addition to the harm the UIC-regulated activities may in and of themselves pose, the mine as a whole threatens to cause considerable impacts as described in comments prepared by the Community and others in the state permitting actions. (Basis (b).)
- An EIS would "facilitate analysis of environmental justice issues" in connection with impacts on Tribal Community members. (Basis (c).)
- While there has been public comment in the State permitting actions, an EIS would serve to "expand public involvement and to address

permitting process is not anywhere near the scope of the environmental review required under NEPA and that would be performed if another federal agency were issuing the UIC permit. Note that if KEMC's proposed discharges required a National Pollutant Discharge Elimination System ("NPDES") permit from EPA under the Clean Water Act, 33 USC § 1251 *et seq.*, NEPA review of such action would be required. 33 USC § 1371(c)(1) (exempting certain EPA actions, but not NPDES permitting, under the CWA from NEPA review). The SDWA contains no similar provision exempting any of EPA's actions under the SDWA from NEPA review. The Community reserves the right to contest the applicability of the functional equivalency doctrine to UIC permitting actions, particularly as applied in this instance.

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controversial issues” with respect to the federal permitting action and impacts that would result directly and indirectly from issuance of the UIC permit(s). (Basis (d).) Nor is the State permitting process comparable to the EIS process – the State statute requires the mining company, as opposed to the State, to prepare an Environmental Impact Assessment, which included, in this instance, the same type of self serving statements as referenced above and which does not address the impact of the three underground injections. *See* MCL § 324.63205(2)(b).

- An EIS would also serve as a mechanism “to address impacts on special resources or public health” by the proposed mine, in particular, the Salmon Trout River, Lake Superior and the Coaster Brook Trout, which is the subject of a petition for listing as “endangered” under the Endangered Species Act (“ESA”), 16 USC § 1531 *et seq.*⁷ (Basis (e).)

As documented in the Kuipers/Maest Study, mine operators have consistently underestimated the potential for pollution associated with mining operations, particularly in circumstances similar to KEMC’s proposed mine – where the mine is in close proximity to both groundwater and surface water and both the ore and its host rock have a moderate to high ability to produce acid and metals contaminants. These are the circumstances documented by the Kuipers/Maest Study that have resulted in a “near certainty” of pollution to surface water and groundwater. Moreover, while one would naturally expect mine operators to downplay the potential for harm to be caused by a proposed mine, as documented in the Kuipers/Maest Study, regulatory agencies have all too often accepted mine operators’ assertions of minimal expected environmental risk at face value and have not performed the necessary critical review of a proposed mine’s potential for causing contamination. Thus, while MDEQ has reviewed KEMC’s proposed mining operations in connection with the State permitting process, MDEQ has not reviewed the impact of the three underground injections on the environment. Accordingly, federal NEPA review would be particularly important and valuable, especially because MDEQ does not have any prior experience with permitting sulfide mining operations.

Moreover, the geographical scope of, and the number of cumulative impacts from, KEMC’s proposed mining project have significantly increased since MDEQ reviewed KEMC’s Environmental Impact Assessment and issued a mining permit to KEMC, thus making NEPA review by EPA even more essential. KEMC has announced that it will process ore from the

⁷ The petition for listing under the ESA was jointly filed by the Sierra Club Mackinac Chapter and the Huron Mountain Club on February 22, 2006. On March 20, 2008, the U.S. Fish and Wildlife Service (“FWS”) announced a “90-day finding” under the ESA that the petition presents substantial information that listing of the Coaster Brook Trout as endangered under the ESA may be warranted. 73 Fed. Reg. 14950 (Mar. 20, 2008). In the notice of the finding, the FWS requests that the public submit scientific and commercial information regarding the Coaster Brook Trout to the FWS by May 19, 2008, and states that upon completion of its review, it will issue a “12-month finding” on the petition, i.e., whether the petitioned listing is warranted.

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mine at a former mine in Humboldt, Michigan, in order to be able to be able to ship a more concentrated product to Canada for smelting. *See* Attachment F (MDEQ web site describing KEMC's plans). Previously, KEMC planned on shipping the ore directly to the smelter in Canada, thus reducing the prospect for additional local mine waste contamination. The decision to process ore in Humboldt would also result in a significant increase in local truck traffic burdens (impacts on existing, and the need for additional, transportation infrastructure also should be reviewed).⁸ In addition, KEMC has announced that it has reached an agreement with Alger Delta Cooperative Electric Association to supply electricity to the mine instead of the diesel-fueled generators originally proposed. According to MDEQ's web site (*see* Attachment F), the electric project would involve construction of a new substation and installation of a temporary underground power line to the mine.⁹ Also, it has become apparent that duration of the mining project will be much longer than originally described by KEMC. A press release by KEMC's corporate parent, Rio Tinto, states the following regarding the potential development of six additional mines in the vicinity: "Our focus is on six further adjacent prospects that may have the potential to extend significantly the mine life at current planned production rates." *See* Attachment I.

As discussed in my December 10th letter, EPA should require KEMC to apply for and obtain permits for the three underground injections in order to provide for: (i) monitoring of injectate and groundwater; (ii) notification of upset conditions; (iii) notification of malfunctions that may endanger a USDW; and (iv) provision of financial assurance. The permits should include stringent terms and conditions to ensure compliance with monitoring, reporting, operation, corrective action and the implementation of appropriate remedial measures if compliance is not maintained or a USDW is contaminated.

F. Conclusion

For the reasons discussed above, EPA should require KEMC to obtain UIC permits for the three underground injections **prior to** construction of the proposed mine. In addition, EPA should prepare an EIS in connection with its review of the UIC permit application for the TWIS as well as the three underground injections discussed above and in my December 10th letter.

We would appreciate being apprised of your decision in this regard. As requested in our December 10th letter, in the event EPA decides that it is not necessary for KEMC to submit inventory information and apply for and obtain UIC permits for any of the three underground injections **prior to** construction of the mine, the Community requests consultation with EPA

⁸ KEMC has also recently stated that it is exploring using an alternative southern route to access the mine – a route that was not reviewed by MDEQ in connection with KEMC's mining permit application. *See* Attachment G (February 23, 2003 Marquette Mining Journal article).

⁹ A February 19, 2008 Marquette Mining Journal newspaper article states that the line will be approximately 13 miles long. *See* Attachment H.

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concerning such decision(s).¹⁰ The Community similarly requests consultation with EPA if EPA issues a UIC permit to KEMC and/or if EPA declines the Community's request that EPA conduct a NEPA review of any decision to issue a UIC permit to KEMC.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

A handwritten signature in cursive script that reads "Joe Polito" with "w/p/k" written in smaller letters to the right.

Joseph M. Polito

Enclosures

c: Ross Micham ✓
Robert L. Thompson, Esq.
John R. Baker, Esq.

DETROIT.2986896.10

¹⁰ This request is made pursuant to the Presidential Memorandum, Government-to-Government Relations With Native American Tribal Governments, April 29, 1994.