Warner Norcross&Judd LLP
ATTORNEYS AT LAW

DANIEL P. ETTINGER

616.752.2168
FAX 616.222.2168

dettinger@wnj.com

February 19, 2009

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

Dr. Stephen Roy
Underground Injection Control Branch
USEPA Region 5
77 West Jackson Boulevard
Mail Code: WU-16J
Chicago, Illinois 60604-3507

Re: **Kennecott Eagle Minerals Company's UIC Permit Application – Timing of NHPA Section 106 Review Relative To Draft Permit**

Gentlemen:

This letter is in response to KBIC's January 20, 2009 letter to EPA, in which KBIC contends that EPA must conclude its review under Section 106 of the National Historic Preservation Act ("NHPA") **before** it may issue a draft permit under the Underground Injection Control Program ("UIC") regulations. We strongly disagree with this contention and with several other incorrect assertions by KBIC concerning the NHPA process and EPA's responsibilities. We agree with EPA's position that it need not complete its NHPA review prior to issuance of a draft UIC permit and can instead conduct its NHPA review on a parallel track, as it has for the past two years.

At the outset, it is important to place this issue in the context of NHPA's purpose. Section 106 of the NHPA requires that a federal agency, "prior to the issuance of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included or eligible for inclusion in the National Register." 16 U.S.C. § 470f. This requirement is purely procedural; it does not dictate a substantive outcome. "[S]ection 106 upholds the NHPA's objectives 'neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them.'" *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006) (quoting *United States v. 162.20 Acres of Land,* 639 F.2d 299, 302 (5th Cir. 1981)). In other words, NHPA never dictates the denial of a permit, nor does it require conditions to be incorporated into such a permit, regardless of what adverse affects the permit may or may not have on historic properties. Section 106 is purely a "stop, look, and listen" provision. *Ill. Commerce Comm'n v. I.C.C.*, 848 F.2d 1246, 1260-61 (D.C. Cir. 1988). Importantly, NHPA Section 106 cannot properly be used by third parties as a means to orchestrate an open-ended delay in the permitting process.

With respect to the timing for completion of NHPA review, Section 106's text is clear – the only requirement is that the agency comply with NHPA "prior to approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." 16 U.S.C. § 470f. The regulations issued by the Advisory Council on Historic Preservation (the "Council") echo this singular restriction. 36 C.F.R. § 800.1(c). Cases examining NHPA have held that EPA timely complies with Section 106 if it completes its review before making an irrevocable commitment to go forward with the undertaking. *See, e.g., United States v. 162.20 Acres of Land*, 733 F.2d 377, 380 (5th Cir. 1984) (holding that, even though the government had already condemned the potentially historic property, it timely completed its Section 106 review before engaging in construction on the property); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt*, 459 F. Supp. 2d 1102, 1124-25 (D.N.M. 2006) (rejecting the argument that BLM must complete Section 106 review before designating certain land as suitable for leasing because it still "retained the ability to protect TCPs" after doing so and holding that the NHPA required BLM to complete Section 106 review "before any concrete action [was] taken to make that specific project a reality," i.e., before actually leasing the property).

In fact, "the regulations implementing NHPA specifically approve of a process in which the Section 106 consultation need not be completed until an irrevocable commitment of resources is to occur." *New Mexico ex rel. Richardson*, 459 F.Supp.2d at 1125. According to those regulations:

> This [requirement to complete the section 106 process prior to the issuance of a license] does not prohibit agency officials from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.

36 C.F.R. § 800.1(c). The agency may even make a final approval of a project or permit pending completion of Section 106 review if that approval is revocable. *City of Grapevine, Texas v. Dep't of Transp.*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) ("In sum, because the FAA's approval of the West Runway was expressly conditioned upon completion of the § 106 process, we find here no violation of the NHPA.")

Thus, NHPA does not require that EPA complete its Section 106 review before issuing a draft UIC permit. A draft permit is not a final agency action, it is not the "issuance of a license," and it does not represent an "irrevocable commitment of resources." NHPA and its regulations clearly contemplate that NHPA Section 106 review will operate on a parallel path with substantive agency review of a permit application.

Moreover, EPA's own regulations require nothing more than compliance with the NHPA procedures. Section 144.4 states that "[w]hen any of these laws [including NHPA] is applicable, its procedures must be followed." 40 C.F.R.§ 144.4 (emphasis added). And the EPA rule simply reiterates the NHPA rule, stating that NHPA requires EPA, "before issuing a license, to adopt measures when feasible to mitigate potential adverse effects of the licensed activity on properties listed or eligible for listing in the National Register of Historic Places." *Id.* § 144.4(b) (emphasis added). Neither this rule, nor any other EPA rule, states that EPA must complete its NHPA review before issuing a draft UIC permit or at any other time except before issuing the final permit.

Through a tortured interpretation of EPA's regulations (some combination of Sections 144.52, 144.4, and 124.6), KBIC nevertheless concludes that EPA must complete the NHPA process before issuing a draft permit. But that is clearly not what the UIC rules contemplate. Under EPA's rules, "the Director shall establish permit conditions as required on a case-by-case basis under . . . § 144.4." 40 C.F.R. § 144.52. As explained above, Section 144.4 merely requires EPA to adopt mitigation measures in accordance with NHPA's procedures before issuing a license if the undertaking is found to have adverse effects on an eligible or listed property. That section does not require any such measures, if necessary, to be established before a draft permit.[1]

KBIC's suggestion that, under Section 124.6, EPA must delay issuance of a draft UIC permit until the NHPA process is complete to allow public comment on the agency's NHPA compliance is also without legal support. EPA's primary obligation under the NHPA is to consult with the State Historic Preservation Office ("SHPO"), the permit applicant, and any interested tribes in the vicinity of the proposed project. *See* 36 C.F.R. § 800.2(c). EPA has been engaged in extensive consultation with those parties for almost two years, and the NHPA consultation is on-going. As for the general public, the Council has left it to the agency to determine the manner of their involvement, when to seek public input, and when to notify the public of proposed actions. 36 C.F.R. §§ 800.2(d), 800.3(e).

There can be no question that EPA has adequately involved the public in its Section 106 review process – its outreach efforts have been extensive. For example, EPA conducted an informational session in Marquette on October 22, 2008, complete with a power point presentation and a document answering frequently asked questions. EPA has also dedicated a website specifically to its review of Kennecott's UIC permit application. The website includes the informational documents presented at the informational session, as well as a host of other general information about the project and NHPA review. In particular, it includes numerous

[1] As discussed in other documents submitted to EPA, Kennecott's position continues to be that EPA need not consider mitigation measures under NHPA because there are no eligible properties within the area of potential effects.

consultation documents that have been submitted over the past two years, including KBIC's NHPA assessment, as well as the NHPA assessment prepared by numerous experts and submitted to EPA by Kennecott. The public has been well-informed of EPA's NHPA review process and its consultation efforts. The public is not somehow deprived of an opportunity to be involved because the NHPA process is not completed before issuance of a draft permit.

KBIC cites to one case, *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127 (D. Mont. 2004), for the proposition that EPA must complete the NHPA process before issuing a draft UIC permit, and that simply including generalized permit conditions does not comply with NHPA. But that case does not reach any such conclusions and does nothing to advance KBIC's argument. In that case, the federal agency tried to avoid Section 106 review altogether by determining on its own, without any consultation, the lease stipulations it thought would mitigate adverse affects on historic properties, and then granted the lease with those stipulations. *See Montana Wilderness Ass'n*, 310 F. Supp. 2d at 1152. But that has not happened here. EPA, in this case, has conducted a thorough and methodical Section 106 review for almost two years, and it proposes nothing more than to publish a draft permit while that review continues.[2] This does not contradict NHPA, the Council's regulations, EPA's regulations, *Fry*, or Region 8's discretionary decision.

We would also like to address a few other issues related to EPA's NHPA review raised by KBIC in their January 20, 2009 letter. First, KBIC suggests that EPA's consultation efforts amount to "only one, very preliminary, consultation meeting on December 13, 2007." That statement grossly misrepresents EPA's extensive consultation efforts (not to mention those of Kennecott and the State of Michigan), which include meetings with KBIC at the proposed Eagle mine site on December 13, 2007, and again in September 2008, as well as a meeting in Chicago on January 29, 2009. Beyond that, the record is clear that EPA has had an ongoing dialogue (letters, emails, phone calls, etc.) with KBIC and other interested tribes since it initiated formal consultation efforts well over a year ago. Indeed, KBIC submitted an NHPA assessment to EPA on February 7, 2008.[3] To suggest, as KBIC does, that the NHPA process is in its infancy, is simply not accurate. Clearly, KBIC is making every effort to elongate the NHPA process, and in turn, the UIC permit process, in order to achieve what it has publicly and persistently articulated as its true goal for several years now – the delay and ultimate prevention of Kennecott's Eagle project.

---

[2] As for the withdrawal letter submitted to Region 8 in *In the Matter of Antelope Creek Steamflood Pilot Project UIC Permit No. UT20960-000*, which is cited by KBIC, it is difficult to draw any conclusions given the cursory nature of the document. It certainly does not cite to or reflect a requirement that EPA complete the NHPA process before issuing a draft permit.

[3] Of course, all of this is layered on top of a state permitting process, and associated consultations with KBIC, that began three years ago.

In furtherance of this goal, KBIC also suggests that the Council's regulations require EPA to send its own archaeologist to survey the project area, even though the applicant, Kennecott, has already hired a professional archaeologist, Dr. Christopher Bergman of URS, who conducted a comprehensive survey of the area over the course of three years and provided the results of that survey to EPA and SHPO, which SHPO has determined to be adequate. The Council's regulations explicitly authorize EPA to rely on Kennecott's archaeological survey and the recommendations of its experts so long as it ensures that the document or study satisfies the Secretary of the Interior's professional standards:

> (1) Professional Standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, **including archeological resources, to ensure that all actions taken by employees or contractors** of the agency shall meet professional standards under regulations developed by the Secretary.
>
> * * *
>
> (3) Use of **contractors**. Consistent with applicable conflict of interest laws, **the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. . . . If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.**

36 C.F.R. § 800.2(a)(1), (3) (emphasis added); *see also* The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs, 63 F.R. 20496; The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, 48 F.R. 44720.[4] NHPA simply does not require that the permitting agency actually conduct the archaeological survey. *See Neighborhood Ass'n of the Back Bay, Inc. v. Fed. Transit Admin.*, 463 F.3d 50, 60 (1st Cir. 2006) (rejecting the plaintiff's contention that it was improper for the federal agency to rely on the report and finding of "no adverse effect" by the consultant hired by the applicant).

[4] Under the Secretary's standards, "[i]dentification and evaluation of historic properties must be conducted by professionally qualified individuals." The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs, 63 F.R. at 20502.

In sum, Kennecott agrees with EPA that it may issue a draft UIC permit prior to the completion of the NHPA review process and that the NHPA process can operate on a parallel path. Further, given the extensive consultation that has already occurred, we see no reason why the NHPA process cannot be completed promptly.

Very truly yours,

Daniel P. Ettinger

via First Class Mail and E-Mail

cc via email: Mr. Brian Grennell, SHPO
Dr. John Eddins, ACHP
Mr. Robert Thompson, EPA Region 5
Ms. Joanna Glowacki, EPA Region 5
Mr. Jon Cherry, KEMC
Ms. Vicky Peacey, KEMC

1634983