KEWEENAW BAY INDIAN COMMUNITY

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2012 TRIBAL COUNCIL

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September 4, 2012

Melanie Haveman
U.S. Environmental Protection Agency (EPA)
WW-16J
17 W. Jackson Blvd
Chicago, IL 60604-3590

Re: Permit Application for CR 595 - Marquette County Road Commission, File No. 11-52-0075-P

via US Mail and email: rd.county@epa.gov

Dear Ms. Haveman,

The Keweenaw Bay Indian Community (Community), a federally-recognized Indian tribe, submits the following attached comments related to the Marquette County Road Commission's (MCRC) application for proposed wetland fill associated with County Road 595 (CR 595) in relation to corresponding mining related operations.

Under the Treaty with the Chippewa of 1842, our Community reserved subsistence and cultural rights to hunt, fish, trap and gather on traditional homelands ceded to the United States of America. The proposed road is located within this treaty territory.

Large scale threats to habitats and ecosystems that support treaty-reserved resources upon the lands and waters of the 1842 Treaty territory are of great concern to the Community. The proposed activities associated with CR 595 are of significant concern to the Community and would result in substantial adverse impacts to the watersheds that CR 595 would cross, including waters of the Yellow Dog Plains, Michigamme Highlands and the Mulligan Plains. Unacceptable and unnecessary destruction and degradation of these resources would negatively impact treaty reserved rights of the Community.

The applicant has failed to adequately study and consider the many viable alternatives to CR 595 and demonstrate that the preferred route is the least environmentally damaging practical alternative to avoid and minimize irreversible impacts. Objections to CR 595 raised by the EPA should be maintained in compliance with the nation's Clean Water Act Section 404 and federal treaty obligations to our Community.

In support of the foregoing, the Community hereby submits the attached comments and asks the EPA to maintain its objection to proposed CR 595.

Respectfully submitted,

Warren C. Swartz
President, Keweenaw Bay Indian Community

cc: Tinka Hyde, EPA, Director, Water Div.
Susan LaFernier, Council Secretary
Charles Brumleve, Environmental Mining Specialist
Jessica Koski, Mining Technical Assistant
Jean Battle, USACE

Keweenaw Bay Indian Community
Comments on
Proposed County Road 595
September 4, 2012

The Keweenaw Bay Indian Community offers the following comments on Permit Application File Number 11-52-0075-P by the Marquette County Road Commission (MCRC), Marquette County, Michigan. Our comments are provided for Region 5 EPA who is providing oversight review of this application under Section 404 of the Clean Water Act and pursuant to EPA's delegation requirements under Michigan's wetland statute, Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended.

Inaccurate Description of Project Purpose

Under the authority of Michigan law to provide and maintain the public road infrastructure for Marquette County, the *stated* purpose for proposed CR 595 is "to construct a primary county north-south road that (1) connects and improves emergency, commercial and recreational access to a somewhat isolated but key industrial, commercial and recreational area in northwest Marquette County to US-41, and (2) reduces truck travel from this area through Marquette population centers."[1]

However, there is no sufficient reference or evidence of emergency, commercial or recreational need provided by the applicant to support the stated purpose. The applicant largely claims access needs for a flood that occurred in the Silver Lake Basin almost 10 years ago, that has since been managed to accommodate potential future flooding events through the construction of a $4.5 million dollar 100-foot high bridge that was installed in 2010 over the Dead River system on County Road 510.[2] The applicant's claimed recreational benefits are also questionable as they would substantially compromise current recreational opportunities. In regards to commercial needs, the Powell Township Supervisor testified at the August 28, 2012 Public Hearing that the applicant's preferred route has neglected commercial access needs for some communities, and in fact may bring serious economic harm to the township if commercial traffic is no longer allowed on CR 550 once CR 595 is built. The substantial wetland impacts that would result from proposed CR 595 for the applicant's questionable benefits should not be considered justifiable.

On the other hand, there is ample evidence of Kennecott Eagle Minerals Corporation's (Kennecott) interest and primary beneficial use of proposed CR 595. In fact, CR 595 is a known partnered project that would directly connect and service mining activities at the Eagle Mine and Humboldt Mill.[3] The proposed project and its application materials have changed very little since initially proposed as Woodland Road in 2010 by Kennecott.

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[1] Permit Application Form, p. 2, *available at* <http://www.michigan.gov/documents/deq/wrd-595-application_393733_7.pdf>.
[2] Pepin, John. June 7, 2010. 510 Bridge Replacement. The Mining Journal, *available at* <http://www.miningjournal.net/page/content.detail/id/545021.html>.
[3] Kennecott Transportation Plan, attached.

Allowing a public entity to utilize its authority to apply for permits in the name of public interest primarily for the direct benefit of a private mining interest sets a dangerous precedent for other similar industrial projects that may affect our Community and treaty resources. Kennecott should be required to apply for their own projects and comply with federal Clean Water Act requirements to avoid and minimize impacts to some of our last remaining natural wetland resources. The U.S. Army Corps of Engineers' comments to the EPA on March 29, 2012 stated that "if the road is for the Kennecott mine, the purpose should reflect that."[4] In this regard, the EPA should question the legitimacy of the applicant's stated project purpose and object as necessary in accordance with federal law. Furthermore, the unequivocal connection between the Humboldt Mill, Eagle Mine and proposed CR 595 should compel a more thorough and holistic review of the project and its cumulative impacts.

Inadequate Alternative Analysis

A previously considered city bypass[5] and/or upgrades to current county approved trucking routes would improve access to northwest Marquette County and better serve the public with fewer adverse environmental impacts. Upgrading the Triple A County Road could improve emergency access as an alternative to CR 595. Any of the CR 510 – Red Road alternatives utilize existing roads and appear to have far less environmental impact while meeting the two MCRC objectives. In addition, rail system options, including CR 550 to a railroad loading location outside of Marquette, which is the route currently approved by the State of Michigan, were not considered in the CR 595 application and should be analyzed as a viable alternative. Again, without an accurately stated project purpose, it is difficult to conclude that the applicant's preferred alternative is the least environmentally damaging practical alternative. It makes it problematic to properly consider and evaluate viable alternatives that could possibly achieve the purposes of industry and community while significantly reducing environmental impacts.

At the recent EPA Public Hearing in Marquette on August 28, comments were expressed that alternatives to CR 595 were not practical simply because Kennecott would not commit funding towards them. In 2011, Rio Tinto (parent company of Kennecott) claimed to make $27.4 billion.[6] This should indicate that Kennecott could likely afford to pay for a least environmentally damaging alternative for Marquette County, if required to do so.

Kennecott's expected mine production schedule starting in 2013 seems to have led to a rushed permit application process that has left out important analyses into viable alternatives. Some alternatives, particularly the CR 510-Red Road alternatives, do not appear to have been reassessed since 2010 when Kennecott initially proposed Woodland Road specifically for hauling ore. In fact, the applicant simply attached these previous application file materials prepared by Kennecott consultants from their Woodland Road application.[7]

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[4] U.S. Army Corps of Engineers. March 29, 2012. Comments to the EPA regarding proposed Marquette County Road 595, p. 2.
[5] Township Master Plan 2008.
[6] Rio Tinto. 2011 Full Year Results. North America teleconference and Q&A transcript. *Available at* http://www.riotinto.com/documents/FinancialResults/Rio_Tinto_2011_Full_Year_Results-NA_QA_transcript.pdf
[7] King and MacGregor Environmental, Inc. August 31, 2010. Evaluation of the Red Road-Gold Mine Lake Road, Callahan Road, and Sleepy Hollow Routes. *Available at* http://www.michigan.gov/documents/deq/wrd-595-app-e-red-road-south-routes_393967_7.pdf

Again, Kennecott should be required to apply and pay for their own projects that meet Clean Water Act Section 404 standards for the least environmentally damaging practical alternative. Additionally, more updated and thorough analysis should be given to potential alternatives, especially rail options.

Unacceptable Level of Wetland Impact

Wetlands are considered one of the most valuable environmental resources on earth, providing rich habitat and travel corridors for numerous plants and wildlife species that migrate long distances to fulfill food, shelter, territorial, and reproductive needs. Eighty percent of America's breeding bird population and more than fifty percent of the eight hundred species of protected migratory birds rely on wetlands.[8]

Unfortunately, over half of the United States wetlands have been destroyed[9] and nearly 75% (about 11 million acres) of original Great Lakes wetlands of Michigan have been drained for agriculture and development.[10] Any proposed additional wetlands impact in Michigan should be demonstratively avoided and minimized, and mitigation should only be considered a last resort—in accordance with federal guidelines and widely reported research and literature that has found mitigated wetlands often fail to replace equivalent functions and values of natural wetlands due to their inherently complex ecosystems.[11]

CR 595 would cause immense harm to area wetlands, wildlife and many rare and sensitive plants. The road bed is expected to directly cover about 172 acres of habitat, of which 26 are wetlands and 146 are upland forest. However, many additional acres of land outside the road's immediate footprint would be directly and indirectly affected. In addition, construction of CR 595 as a completely new 21-mile primary road would require mining of gravel pits for construction material, the impacts of which do not appear to have been considered. Of more concern, CR 595 would lead to additional mining and logging in the area that would lead to even greater cumulative impact on area watersheds. For example, the applicant states that "without the new road the full economic benefits to the logging and mining industries cannot be realized."

Loss of Treaty Resources

The significant impacts associated with the development of this mine haul road in a relatively pristine area (along with additional foreseeable secondary development associated with it) within our 1842 Treaty territory poses a considerable threat to treaty reserved resources still used and being revitalized by tribal members for subsistence, cultural and medicinal purposes.

In 1993, the Great Lakes Indian Fish & Wildlife Commission (GLIFWC) published "Plants Used by the Great Lakes Ojibwa" which provides detailed data and information about traditional plant use and occurrence in the northern Great Lakes region, including within the proposed CR 595 corridor. Many of these essential culturally significant plants occur specifically in wet areas and wetlands. Rights to access

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[8] Mitsch, William J. and J.G. Gosselink. 1993. Wetlands, second ed. New York: Van Nostrand Reinhold.
[9] U.S. Environmental Protection Agency, *available at* <http://water.epa.gov/type/wetlands/vital_status.cfm>.
[10] Michigan Department of Natural Resources, *available at* <http://www.michigandnr.com/publications/pdfs/wildlife/viewingguide/eco_wetland.htm>.
[11] Kozich and Halvorsen. 2006. Compliance with Wetland Mitigation Standards in the Upper Peninsula of Michigan, USA. Environmental Management Vol. 37(1).

harvest and use these resources are protected through treaty-reserved usufructuary rights within the project area.

CR 595 and additional foreseeable potential developments would have significant impact on important remaining wetland plant resources and habitat. Many culturally important plants were not adequately documented by the applicant, some of which may be threatened species. The Community's Cultural Committee and Historic Preservation Office have expressed concern with the level of impact proposed by CR 595 that would directly, and indirectly, have on cultural resources in the project area.[12]

Wetland Mitigation Concerns

The applicant initially proposed to create 40 acres of forested wetlands. However, creation of forested wetlands are very difficult to restore and in many cases fails to provide functional values equal to those provided by natural wetlands which can take thousands of years to evolve into complex ecosystems. Existing research evidence suggests that constructed wetlands generally fail to replace benefits lost.[13]

High quality and biologically diverse wetlands would be replaced by low quality ones situated alongside paved roads. Further, the 5 year monitoring proposed in the application is inadequate given the long time required for the establishment and development of forested wetlands and their functional values.

More recently, the applicant has additionally proposed to preserve about 650 acres of nearby wetland adjacent to the McCormick Wilderness Area.[14] However, it isn't clear how legally protected this area would remain. It is also unclear whether dredge and fill material associated with CR 595, and potential foreseeable expanded development would degrade the quality of the proposed preservation area. More importantly, such additional information and proposed revisions to the permit application should have been made more available for tribal and public review and comment, as these very recent revisions were posted on August 27, 2012—immediately one day prior the EPA Public Hearing on CR 595.

Nevertheless, this preserve would simply protect existing wetlands and do nothing to replace or compensate for many miles of irreplaceable natural and cultural resources, and a wildlife corridor, that would be lost by construction of CR 595. Wildlife and birds require undisturbed expansive areas for safe travel between seasonal habitat resources. Habitat fragmentation on the scale proposed by the applicant could have an irreversible effect on large mammal species, including wolf, bear, moose and possibly the endangered Canada lynx.[15] These wildlife impacts and potential Endangered Species Act issues raised by the U.S. Fish & Wildlife Service must be addressed.

Great Lakes Ecosystem Goals

Ecosystem impacts resulting from this project would be severe, disruptive and destructive. Permitting of this project is contrary to established ecological values, goals, and objectives for the Great Lakes ecosystem. Natural resources in the Great Lakes basins and the public interest in protection and preservation of these resources have been variously quantified and discussed in many forums on local, State and National levels. Significant time and effort have been invested by various federal government

[12] Cultural Impacts of Proposed Marquette County Road 595, *see attached.*
[13] National Research Council. 2001. Report entitled "Compensating for Wetland Losses under the Clean Water Act."
[14] Draft Wetland Mitigation Plan for the CR 595 Project, Marquette County Road Commission. August 21, 2012, p. 3.
[15] U.S. Fish & Wildlife Service. April 5, 2012. Comments to the EPA in reference to permit application number 11-52-0075, Marquette County Road Commission, p. 6.

agencies, tribal nations, state and local governments, community groups, private organizations, non-profit organizations, and the general public on quantifying and categorizing existing natural resources, determining natural resource threats, developing preventative measures for protection of natural resources, and reaffirming the public interest in protection, preservation, and restoration of the Great Lakes ecosystems. Guidance documents and forums relevant to this project include:

- The Lake Superior Lake-wide Management Plan
- The Great Lakes Regional Collaboration
- The Great Lakes Fish Community Objectives for Lake Superior
- The Great Lakes Fish and Wildlife Restoration Act
- The Great Lakes Restoration Initiative Framework
- Michigan's Great Lakes Restoration Strategy
- The Michigan Strategic Framework for the 2010 Great Lakes Restoration Initiative
- The Michigan Wildlife Action Plan

Common themes within the above referenced plans, initiatives and acts include the recognition of the negative impacts of habitat fragmentation, pollutant additions to the Great Lakes ecosystems, contamination of waters, invasive species introduction and spread, habitat destruction, wetland destruction, and other impacts which will result from this proposed project. Considering that the proposed project is contradictory to nationally identified values and natural resource goals and that there are perfectly viable alternatives to this proposed road, EPA Region 5 must maintain their objections to issuance of this permit by the State of Michigan.

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September 4, 2012

Melanie Haveman
U.S. Environmental Protection Agency
WW-16J
17 W. Jackson Blvd
Chicago, IL 60604-3590

Re: Cultural Impacts of Proposed Marquette County Road 595

To Whom It May Concern:

The Keweenaw Bay Indian Community is the successor in interest of the L'Anse and Ontonagon Bands of Lake Superior Chippewa Indians, signatories to the 1842 Treaty with the Chippewa (7 Stat. 591), and the 1854 Treaty with the Chippewa (10 Stat. 1109). The Keweenaw Bay Indian Community (KBIC) has a concern for the welfare of its Tribal membership and is committed to preservation and protection of its natural resources on the L'Anse Reservation and within the Treaty territories.

Our Comprehensive and Strategic Management Plan, approved by the Tribal Council in 2005, identifies one of the tradition/culture goals "to protect and preserve our oral traditions and history, medicines and plants..." Methods of gathering are one of the goals specifically cited. The Tribal Council also adopted a Bureau of Indian Affairs approved Integrated Resources Management Plan (IRMP) on February 12, 2003. The IRMP is a holistic planning tool which identifies protecting and enhancing native and culturally significant species and control of exotic plants as goals towards sustaining the Anishinaabe life ways. The IRMP vision statement reads "*To live in harmony while enhancing and sustaining the resources of the Keweenaw Bay Indian Community for the Seventh Generation.*"

A critical tribal resource for the KBIC is medicinal gathering areas which require protection of various habitats, especially highly diverse and healthy areas. There are 384 plant species traditionally used by the Ojibwa listed in "Plants Used by the Great Lakes Ojibwa" and one of the largest threats to the survival and collectability of these traditionally used plants is continued loss of habitat required by these species. Many of these essential culturally significant plants occur specifically in wet areas and wetlands, including within the proposed Marquette County Road 595 corridor.

Seasonal gathering opportunities are supported by locating wild plots of culturally significant species as well as the propagation and preservation of native species. Invasive non-native plants can change the base of area ecosystems, degrade habitat quality, reduce forage availability, stress key wildlife species populations, result in degraded water quality, and reduce the availability of culturally significant plants upon which tribal members depend. Disturbed areas such as frequently used roads are significant mechanisms that promote the spread of invasive plants. The disturbed area includes not only the road itself through the wetland, but the roadside ditches and alterations of water running through this system that collectively cause changes that alter the quality of plant communities and water quality.

We have a Traditional Medicinal Clinic which utilizes plant species gathered locally. It is very important to have medicinal plants gathered, instead of cultivated, due to enhanced healing properties. Gathered plants must be high quality to ensure the health of our people, and it is important to gather away from roads where vehicle pollutants affect the plants. The McCormick Wilderness tract is one of the two pristine wilderness areas recognized within our ceded territory that would be affected by the building of this road. With the limited number of wilderness areas remaining to collect from, it is especially important for us to make sure this area is protected. We believe it important to spend time on an inventory of the area between the proposed road and wilderness tract. We also ask the National Forest Service with respect towards their Memorandum of Understanding to help us with the protection of traditional gathering areas, both realized and potential.

Because this proposed road would destroy and affect such a wide corridor though a large, undeveloped area in the Tribe's Treaty territory when there are so many viable road alternatives, we ask the EPA to maintain their objections to the wetlands permit proposed by the State of Michigan.

Respectfully submitted,

Gerry Mantila
Chairwoman, KBIC Cultural Committee

Chris Chosa
KBIC Tribal Historic Preservation Officer

cc: Warren C. Swartz, President
Susan LaFernier, Secretary
Charles Brumleve, Environmental Mining Specialist
Jessica Koski, Mining Technical Assistant
Evelyn Ravindran, Natural Resource Specialist