September 7, 2011

Nancy Stoner
Deputy Administrator for Water
USEPA East (EPA East) [Old ICC Building]
1201 Constitution Avenue N.W.
Washington, DC 20004

Dear Deputy Administrator Stoner:

Thank you for meeting with us last Tuesday, August 30 to discuss EPA's potential regulatory activities related to Rio Tinto's Eagle Mine and Humboldt Mill in the Upper Peninsula of Michigan; we hope the meeting was beneficial for you. We would like to take this opportunity to clarify and reiterate the *urgent* need for the Environmental Protection Agency (EPA) to act now.

We want you to know that after our meeting, we carried back a glimmer of hope to our community and tribal members. We believe that under your leadership and direction, the EPA has the ability and opportunity to protect the Great Lakes, treaty protected resources and the cultural practices of KBIC members. As we described during our meeting, the State of Michigan has granted permits to Rio Tinto's Kennecott Eagle Mining Company (KEMC) that are inconsistent with federal law. We again ask, *urgently*, that you direct your staff to:

1. Exercise Clean Water Act oversight authority in two ways: a) require a NPDES permit for the Groundwater/Surface water Interface where mine discharge water flows directly into the East Branch of the Salmon Trout River and b) require a NPDES permit for the over-topping of unmonitored holding ponds into the East Branch of the Salmon Trout River.

2. Require that an EIS be performed that includes, particularly: a) a cumulative impacts analysis including transportation (the state has not assessed impacts from transportation) and b) a Health Impacts Assessment (recommended by the International Council on Mining and Minerals of which Rio Tinto is a flagship member; no HIA has been conducted for this project).

3. Reinstate the Safe Drinking Water/Underground Injection Control permit requirement. Rio Tinto's changes to the Treated Water Infiltration System (TWIS) did not change the quality or quantity of the discharge, or its threat to drinking water.

4. Honor the federal government's trust responsibilities to protect treaty resources, and coordinate efforts with the Environmental Justice office to ensure that Eagle Rock and the tribal spiritual uses of it are protected.

5. Request key information from the State of Michigan and Rio Tinto.

*Rio Tinto has indicated that they intend to start blasting into Eagle Rock on or about September 14, 2011. We request your response by Monday September 12, 2011.*

The Clean Water Act Requires at Least Two NPDES Permits at the Eagle Mine

The direct discharge of water from Eagle mine's water holding basins into the Salmon Trout River is regulated by the CWA. It is well established that where mine water runs into streams, as it will in this case, a NPDES permit is required. Courts have held mining operations subject to regulation as point sources, even when the means of conveying pollutants are strictly natural phenomena, such as rainfall or gravity. For example, in *Sierra Club v Abston Constr Co*, 620 F2d 41 (CA 5 1980), the Court held that coal seams exposed by mining operations could be a point source of pollution when rainfall carried pollutants to navigable waters:

> Nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act.

*Id.*, at 45. This is analogous to the situation at Eagle, where water holding basins (at which no monitoring of water quality will occur until there is a release, after the fact) are anticipated by Kennecott to overflow into the Salmon Trout River. (Contested Case Record: TAB 682, p. 052840)

Similarly, a facility must obtain a NPDES permit for indirect discharges into surface waters when the discharges come from the facility as a point source. The record unequivocally demonstrates that water from the mine will indirectly discharge to the East Branch of the Salmon Trout River via groundwater. (Contested Case Record: TAB 697, p. 056962 and s*ee, United States v Earth Sciences, Inc*, 599 F2d 368, 373 (CA 10 1979)) Case law confirms that groundwater discharges necessitate a NPDES permit where, as in this case, it is undisputed that groundwater discharges will reach surface waters. (Record: TAB 702, p. 056962) In *Rapanos v United States*, 547 US 715, 779; 126 S Ct 2208, a plurality decision, Justice Kennedy expressed the view that wetlands sharing a "significant nexus" with surface waters of the United States are within the jurisdiction of the CWA. Justice Kennedy opined that such a nexus exists when the waters in question (groundwater in this case), "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." (*Id.* at 780) Therefore, he reasoned that "certain water-bodies could conceivably constitute both a point source and a water." (*Id*. at 772) In this case, the groundwater which is fed by the mine's Treated Water Infiltration System qualifies as a point source that should be regulated under the CWA.

The interpretive history of the CWA demonstrates that Congress intended to regulate discharges into hydrologically connected groundwater which adversely affects surface water. In *Idaho Rural Council v Bosma*, 143 F Supp 2d 1169, 1180 (D Idaho 2001), the Court held "that the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States." *See also, Washington Wilderness Coalition v Hecla Mining Co*, 870 F Supp 983, 990 (ED Wash 1994) ("[s]ince the goal of the CWA is to protect the quality of surface waters, any pollutant which enters such waters, whether

directly or through groundwater, is subject to regulation by NPDES permit.*")*. Similarly, in *Quivira Mining Co v EPA*, 765 F2d (CA 10 1985), the Tenth Circuit held that the CWA gave the EPA authority to issue NPDES permits to regulate discharges from a uranium mining company into normally dry arroyos in New Mexico. The Court reasoned:

> [S]urface flow occasionally occurs, at times of heavy rainfall, providing a surface connection with navigable waters independent of the underground flow. *Additionally, the waters of the [arroyos] soak into the earth's surface, become part of the underground aquifers, and after a lengthy period, perhaps centuries, the underground water moves toward eventual discharge at Horace Springs or the Rio San Jose.*

*Id.*, at 129 (emphasis added). *See also, Sierra Club v Colorado Refining Co*, 838 F Supp 1428, 1434 (D Colo 1993).

For reference regarding the purity of the Salmon Trout River, please consider its water quality in comparison to that of water leaving the TWIS under Michigan's regulation:

| Pollutant | Salmon Trout background | TWIS discharge |
|---|---|---|
| Boron | < 50 ug/l | 174 ug/l |
| Cadmium | < 0.2 ug/l | 0.6 ug/l |
| Chloride | <1.0 mg/l | 44 mg/l |
| Cobalt | <10 ug/l | 9.3 ug/l |
| Copper | <1.0 ug/l | 7.2 ug/l |
| Mercury | 1.5 ng/l | 2.1 ng/l |
| Nickel | <1.0 ug/l | 4.9 ug/l |
| Selenium | <2.0 ug/l | 1.3 ug/l |
| Sodium | 1.2 mg/l | 30 mg/l |
| Zinc | <10 ug/l | 17 ug/l |

An EIS Should be Performed

As the citizens in our meeting so eloquently described it, nobody is looking out for their health and safety. Rio Tinto's Environmental Assessment submitted under state law did not assess any impacts to citizens of nearest town, Big Bay. Big Bay is downstream and downwind of the mining site. Instead Rio Tinto's EA determined that there would be no potential impacts from the mine facilities outside of the fence line that encompasses the approximately 190 acres of the mine. This is ludicrous. But, the State of Michigan agreed, leaving local citizens completely bereft and without the barest of protections.

UIC Permit is Required

As discussed during our meeting, Rio Tinto's so-called revision of the TWIS was really no revision at all. The below surface grade of the discharge remains identical to when EPA

required a UIC permit. The quantity of the discharge remains identical to when EPA required a UIC permit. The quality and constituents of the discharge remains identical to when EPA required a UIC permit. EPA has the authority and responsibility to require a UIC permit when drinking water is threatened. It most certainly is in this instance. Numerous residential wells are downstream from this project; those citizens deserve and have a right to the protection of the Safe Drinking Water Act.

The Federal Government's Trust Responsibilities and Protection of Eagle Rock and Its Spiritual Uses

During our meeting we described the basic construction and proposed operational characteristics of KEMC's Treated Water Infiltration System (TWIS) and the discharges at the Humboldt Mill. We purposely limited the information we conveyed to simply describe what Rio Tinto claims as the capabilities of this untested system. While there are many experts who disagree with Rio Tinto's claims, we must point out that even if the TWIS operates in the manner by which Rio Tinto has claimed, it still falls short of protecting tribal trust resources from injury for which the KBIC may make damages claims under the provisions of the Comprehensive Environmental Response and Liabilities Act (CERCLA). Now is the appropriate time to prevent such injury unlike dozens of other mine sites where litigation under CERCLA's provisions consumes millions in taxpayer dollars and a substantial amount of EPA resources. The decision of whether or not to require an Underground Injection Control (UIC) permit for KEMC's discharges from the TWIS or a National Pollution Discharge Elimination System (NPDES) permit or both must consider the trust responsibilities that EPA has to Indians. We believe EPA should demand a NPDES permit to regulate discharges at the Humboldt Mill. EPA's discretion in exercising its authorities under the Clean Water Act and the Safes Drinking Water Act should be viewed in context with its trust responsibilities to Indians. *The Yellow Dog Plains is entirely within the ceded lands by which KBIC tribal members were granted the right to hunt, fish and gather under treaties with the United States.*

As we pointed out during our meeting, KBIC tribal member Jessica Koski's first encounter at *Migi zii wa sin* (Eagle Rock) was almost exclusively limited to activities in protest of its eminent destruction whereas older tribal members first traveled to *Migi zii wa sin* to pray and hold traditional Ojibwa cultural ceremonies. We ask that you take into consideration the future of tribal members like Jessica who have a long and bright future and the ability to repair damages to Ojibwa culture – but only if these treaty protected resources are available. This is because these resources and their use by Indian people are ingrained in their traditional cultural practices in a very substantial way.

Today, *Migi zii wa sin* is surrounded by barbed wire and about to be subjected to excavation activities to support the placement of the mine portal into and under the sacred site. Access for any traditional Ojibwa cultural purposes is currently impossible. As we explained during our meeting, these circumstances should be considered in the context of evaluating the effectiveness of Michigan's Part 632 permitting process. It is a fact that the permit was challenged by a number of parties including KBIC, pursuant to the State's processes. In fact, along with other's - KBIC participated, through its attorneys and at a great expense, in a 42-day long hearing. After that hearing, the Administrative Law Judge decided that KEMC should locate their mine portal away from Eagle Rock. However, in the end the State's decision maker

completely ignored the judge's recommendation even though there are many other suitable locations for the mine portal without impacting wetlands or other environmentally sensitive areas.

EPA must also understand that it is a fact that there has been absolutely no assessment or evaluation by any entity to consider the regulatory standards for the discharges of hazardous substances by either the Eagle Mine or the Humboldt Mill that will be protective of the many tribal treaty protected resources that KBIC members depend on for medicinal purposes and subsistence. These treaty resources are directly connected to the purposes for the creation of the L'Anse Indian Reservation and it is the responsibility of the United States government as trustee to ensure that others do not unreasonably pollute or otherwise harm these resources. There are additional considerations that EPA should take into account as it considers how to address this matter. The Eagle Project is located in northwest Marquette County in Michigamme Township. Marquette County is Michigan's largest county, covering 1,841 square miles (approximately 2,192,000 acres). The mine site is east of the Ottawa National Forest's McCormick National Wilderness Area and includes the watersheds of the Yellow Dog, a National Wild and Scenic River, and the Huron, Dead, Mulligan, and Salmon Trout river watersheds. The Yellow Dog Plains aquifer flows north and south into both Lake Superior and Lake Michigan. Water draining into Lake Superior from the Yellow Dog Plains enters near the Huron Islands National Wilderness Area and an extremely important area for supporting Indian subsistence activities by KBIC tribal members.

Basic Scientific Information is Missing and EPA Must Request it From Michigan and Rio Tinto

Essential baseline information has not been made available to the public, or as far as we know, to the State of Michigan either. The most glaring omissions are:

- Lack of complete mineralogical assay
- Deficient hydrology data – *only 1 pump test has been performed*
- Lack of assessment for radioactive materials/uranium or uranium derivatives
- Lack of contingency plans for mine fires, crown pillar collapse and subsidence and Waste Water Treatment Plant shut downs
- No agency (state or federal) has obtained a complete chemical analysis of a representative sample of core samples

This list could go on, but this selection demonstrates the ineptitude of the mine plan and the state's regulation of this mine to date. *At a bare minimum, these sets of information and safeguards must be known, assessed and safe-guarded before mining proceeds.*

Conclusion

We left with your staff, petitions signed by nearly every physician and many of our faith leaders who oppose the mining operations that will soon take place. Moreover, Keweenaw Bay Indian Community (KBIC) tribal members are literally dumbfounded by the fact that despite the fact that their tribe has expended approximately $5 million in legal fees in their effort to challenge the State of Michigan's (State) regulatory failures while Rio Tinto is now excavating

to place the foundation for the mine portal into the side of *Migi zii wa sin* (Eagle Rock). As we informed you during our discussion, key individuals who reviewed and even defended Rio Tinto's permits in their capacity as employees of the State with the Office of the Governor, the Department of Natural Resources and Department of Environmental Quality are now employees of Rio Tinto and have been placed in charge of various aspects of the Eagle Mine and Humboldt Mill. These blatant conflicts of interest and other unethical behavior by State officials, combined with the State's decision to completely ignore the EPA's concerns related to Michigan's Non Ferrous Metals Mining Regulations (Part 632) while they were being developed, have left our community members and KBIC tribal members exasperated with what can only be described as Michigan's utter disrespect of the most basic tenets of law and especially the principles of environmental justice.

In closing, we would submit that it is necessary for EPA to urgently communicate with the State as an immediate first step in addressing the aforementioned failures to regulate Rio Tinto's Eagle Mine and Humboldt Mill. In short, we believe that it is appropriate for EPA to obtain enough information from the State to fully assess the adequacy of the regulatory process that has taken place and to fill the gaping holes. Once armed with this information, EPA can independently consider what action it must take under its regulatory authorities.

Again, thank you for meeting with us on August 30, 2011. Please know that we have placed our trust in your abilities and integrity, and we remain confident that you will uphold the laws and federal trust responsibilities with which you are charged and have the authority to carry out. We request your response by Monday, September 12, 2011.

Sincerely,

Michelle Halley, Attorney and Lake Superior Manager,
National Wildlife Federation/*with permission and on behalf of*:

Jeffery Loman, Member, Keweenaw Bay Indian Community

Laura Farwell, PhD, Marquette community resident

Rev. Jon W. Magnuson, Lutheran (ELCA) Pastor;
Director, The Cedar Tree Institute

Jessica Koski, Member, Keweenaw Bay Indian Community

Babette Welch, Marquette community resident

Emily Whittaker, Executive Director,
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Carla Champagne, Big Bay community resident

c:

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Denis Borum, EPA
Gregory Peck, EPA
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Thomas Fox, Senate Committee on Environment and Public Works
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