Dr. Susan Hedman
Regional Administrator
US EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590.
(Sent Via Certified Mail)

January 10, 2014

Permits Section
Water Resources Division
DEQ, Box 30458
Lansing, Michigan 48909.
Attn: Rick D. Rusz, Chief, Groundwater Permits Unit

Subject:

Dear Dr. Hedman and Mr. Rusz:

By this letter, I respectfully submit comments to the Michigan Department of Environmental Quality (MDEQ) on its proposed revised groundwater discharge permit (GWDP) (Permit Number GW1810162) for industrial mine water discharges and other discharges through a rapid infiltration basin constructed at the Eagle mine in Marquette County, Michigan. Because the revised GWDP is inadequate to enforce federal law under the Clean Water Act (CWA), I hereby petition the U.S. Environmental Protection Agency (EPA) to take certain actions described herein so that these discharges are regulated in a manner that is consistent with the CWA and EPA's trust responsibility to the Keweenaw Bay Indian Community (KBIC) of which I am a member.

Lundin Mining Company, successor to Rio Tinto, is completing construction of a nickel and copper sulfide (hard rock) mining operation within the Yellow Dog Plains of northwestern Marquette County in the Upper Penisula of Michigan. In March of 2006, EPA notified Rio Tinto (D/B/A Kennecott Eagle Minerals Company) that it had to obtain approval from the Underground Injection Control (UIC) Program before construction and operation of any underground injection well at the mining site. However, in July 2010, EPA withdrew the requirement for a UIC permit. According to information on EPA Region 5 website, EPA initially required this approval under the Safe Drinking Water Act (SDWA) to protect underground sources of drinking water.

(See: http://www.epa.gov/r5water/uic/kennecott/)

On the same web page, EPA Region 5 states:

"MDEQ determined that there is no immediate connection between the water discharged underground at the site and local surface water. Therefore, MDEQ did not require the company to apply for a surface water discharge permit. EPA evaluated this decision and concurred."

Unfortunately, as evident by the aforementioned statement, EPA Region 5 has utterly failed to understand the basic functions of this mining operation, the general characteristics of the mine site (affected area) itself and the associated discharges of industrial mine water at the Eagle mine. EPA has also failed to properly oversee the undertakings by the MDEQ while they permitted the mine and clearly paid little attention the communication between the mine owner and EPA officials in Washington, DC.

First, as evident by the record of activities of the MDEQ, there is a connection between the water discharged through the rapid infiltration system at Eagle mine and surface water. The record of activities by MDEQ as they processed permit applications makes this abundantly clear. MDEQ, the mine owners, and numerous experts employed by various plaintiffs who have brought legal challenges to the permitting of this mine have all agreed that these industrial mine water discharges will "vent" to the surface and flow into the East Branch of the Salmon Trout River which eventually flows into Lake Superior. Next, as clearly describe in both Rio Tinto's communication to EPA Region 5, on March 24, 2010, (See: http://www.epa.gov/r5water/uic/kennecott/pdf/2010/2010-03-24_peacey_to_harvey.pdf) and in the July 1, 2010, letter signed by Nancy Stoner, Deputy Assistant Administrator for Water, acting for Peter S. Silva, Assistant Administrator for Water, "the fluid distribution system is above ground and is thus not a subsurface system. (See: http://www.epa.gov/r5water/uic/kennecott/pdf/2010/2010-07-01_silva_to_cherry.pdf)

As a member of the KBIC, born on the L'Anse Indian Reservation more than a half century ago, I understand how EPA officials and others may have assumed that the chief concern related to the construction of the Eagle mine by Indian people is the destruction of Eagle Rock (Migi zii wa sin). It is a fact that Rio Tinto purposely placed the mine portal through Eagle Rock solely for the purpose of drawing attention away from the real environmental issue associated with this and any other hard rock mine – water pollution.

I want to be clear about how Indian people have viewed what is called the Yellow Dog Watershed since the beginning, which is the immediate affected environment of the Eagle mine. It is but one of what we understand to be several "green hearts" of Lake Superior. The water pumped through this "green heart" is the blood and every green heart is essential to the survival of the Lake itself. This water, which presents itself on the surface in the form of hundreds of seeps and springs, is used for traditional ceremonies and medicinal purposes by Indian, and more recently, non-Indian people. We have used it since first arriving at this place more than one hundred generations ago and we use it today. There is nothing more important than the protection of this water. Nothing.

The proposed revised GWDP is inadequate to protect water for the following reasons:

1. The proposed GWDP lacks essential contaminants of concern that must be monitored for and regulated through strict enforceable discharge limits. Part of the reason for this is because MDEQ has not conducted an independent, comprehensive chemical analysis of a representative sample of the mine cores obtained for the purpose of defining the Eagle ore body. Without this information

they are unable to properly establish the contaminants of concern for which limits must be set in order to regulate the discharge of industrial mine water. Even though mining operations have not even commenced, concerns have already arisen as a result of this failure related to the discovery of uranium in a sump basin under the develop rock storage area. This discovery was made by a non-profit organization operating under an agreement that Rio Tinto entered into, because, as it claimed, "the public didn't trust Rio Tinto or the government agencies put in place to regulate mining operations." Under the agreement announced in October 2012, the Superior Watershed Partnership conducts independent monitoring of potential environmental impacts related to Eagle Mine's Eagle mine operations. Results of first quarter 2013 verification monitoring indicated uranium (72.6ug/L) was present in the mine's Temporary Development Rock Storage Area (TDRSA) Leak Detection Sump (secondary liner). Uranium wasn't listed in the original GWDP but is now being proposed as a result this discovery. However the proposed revised GWDP lists uranium, but like most other contaminants, as a "report only" measure.

2. MDEQ has not conducted a comprehensive survey of the hazardous substances used and otherwise released in the mine itself, furthering its independent knowledge necessary to properly establish the contaminants of concern for which limits must be set in order to regulate the discharge of industrial mine water. Fuels, explosives, detonation devices containing toxic chemicals and other hazardous substances are used in mining operations and therefore must be included in the list of contaminants that are monitored for and regulated. They are not.

3. The revised GWDP adjusts parameters to accommodate exceedances. Adjustments for limits on vanadium, pH levels and the refusal to set limits for uranium and make it a "report only" requirement are not only troublesome but inconsistent with the promises MDEQ made to the public when it approved the mine permits in 2007. It is a fact that over 42 exceedances of water quality standards at the Eagle mine have been recorded under the original GWDP and the mine has not even gone into production yet. This pattern of backsliding is forbidden under the anti-backsliding provisions of the Clean Water Act, Section 402(o) and 40 CFR §122.44(l), and for good reason. The pattern of establishing protective measures and then eliminating them is well established in many other aspects of the regulatory processes for the Eagle mine. For example, when MDEQ announced the approval of the suite of permits necessary to commence construction of the Eagle mine it listed a number of changes to the permits made as a result of public comments. Things like fabric filters on the air discharge system – recently eliminated prior to commencement of mining.
(See: http://www.michigan.gov/documents/deq/deq-exe-KEP-PressRelease121407_218609_7.pdf)

   It should be noteworthy that this is typical of the historical pattern of practices seen at nearly every mine site on EPA's National Priorities List (Superfund Sites).

Five years after issuing the original GWDP, MDEQ claims that these actions are now necessary to "adjust for background levels" but incorrectly assumes that background levels are properly establish immediately before construction of the mine but long after drilling occurred to define the Eagle ore body. Background levels are the levels established BEFORE Rio Tinto set foot in this affected environment – not after hundreds of borings deep into the ground took place under what was essentially unregulated exploratory drilling procedures.

4. The revised GWDP is inconsistent with and otherwise falls short of the federal provisions for hard rock mining of metals (ores) covered in the Ore Mining Effluent Guidelines, 40 CFR Part 440.

5. The revised GWDP fails to establish limits consistent with even the SDWA much less limits necessary to protect the surface water these discharges "vent" to that are used for traditional Ojibwa ceremonies, traditional Ojibwa medicinal purposes, habitat for the coaster brook trout, of which only one other exists, and to support many other sensitive aquatic resources which are natural resources appertaining to KBIC under treaty with the United States.

6. MDEQ is proposing to reissue the revised GWDP without government-to-government consultation of with KBIC. This is inconsistent with Michigan's Indian policy, the Memorandum of Understanding that the State of Michigan entered into with tribes, including KBIC, and EPA's mandate under Executive Order to consult. While the GWDP is not a program delegated to Michigan by EPA, these actions have a direct effect on natural resources that appertain to KBIC. If MDEQ and EPA collectively seek to maintain a meaningful relationship with KBIC and other Indian tribes they must consult on a government-to-government basis on actions having a direct effect on Indian tribes.

7. The process that MDEQ used for the reissuance of the GWDP violated basic tenants of both the federal government and Michigan's administrative procedures act. For example, MDEQ hosted at least one meeting with an ad hoc list of environmental advocacy groups prior to the beginning of the public process. While the effort was admirable and I attended the meeting as one of the representatives of Save the Wild UP, the manner in which a select group was allowed the opportunity simply violates the rules. Additionally, the public process was inadequately announced and included in published media conflicting time restrictions for submission of comments with no official action taken to correct the discrepancy.

8. No cumulative affects analysis associated with this permitting activity or any other permit has been achieved. According to Lundin Mining Company, "a little massive sulfide goes a long way." It is true that magmatic sulfide-rich Ni-Cu±PGE deposits typically occur in clusters, and many deposits contain multiple mineralized zones. In their shareholder promotional material, Lundin has indicated that they intend to prosecute other deposits in the immediate area and

conduct exploratory drilling to depths of up to 10,000 feet, which is far below the Eagle ore deposit, for which they obtained permits to mine from the State of Michigan. The Eagle East, Eagle West, Cody Melt and Mag 1-20 show strong potential for additional mining opportunities – none of which were considered in any aspect of any environmental review. This, coupled with dozens of other potential mines in the Upper Peninsula of Michigan's portion of the Great Lakes Basin, give rise for substantial alarm given the lack of any cumulative affects analysis. Furthermore, despite the fact the Rio Tinto, through its premiere membership in the International Council on Mining & Metals, touts the use of health impact assessments at proposed mine sites – absolutely none was prepared to aid in evaluating the Eagle mine or any other mine in the Great Lakes region. Proper permitting requires a comprehensive assessment of activities that are reasonably likely to take place that otherwise have implications to the activities being regulated. This has not been the case.

9. The Proposed GWDP appears to violate a strict interpretation of MDEQ's own setback requirements. When Rio Tinto modified the design of the rapid infiltration system, it moved the actual workings closer to the fence it constructed around the facility. The requirement calls for the discharge to be less than 100 feet from the "boundary."

In addition to the aforementioned shortfalls, the MDEQ GWDP is the wrong regulatory tool. As such, EPA must require a National Pollution Discharge Elimination Systems (NPDES) permit for the industrial mine water discharges and other discharges through the rapid infiltration system at the Eagle mine. The purpose of the Clean Water Act is to regulate the addition of pollutants to the "waters of the United States." A discharge of pollutants into ground waters hydrologically connected to surface waters which directly leads to the addition of pollutants to those surface waters is an addition of pollutants to the waters of the United States. One could not escape the regulatory authority of the Clean Water Act by simply discharging pollutants (from a point source) just short of a surface body of water and not actually directly into the water body. If such were the case, everyone's discharge pipes would end just short of the water body into which they are discharging. Discharges of pollutants into ground waters hydrologically connected with surface waters that directly lead to the addition of pollutants to those surface waters are so factually similar that courts have sometimes viewed them the same way. The use of ground water as the intermediate link between the point source and the water body should not have the effect of placing the discharge outside the scope of the Clean Water Act's regulation.

EPA's knee jerk reaction that resulted in a multi-year effort to issue a UIC permit for the industrial mine water discharges at Eagle mine lacked an adequate assessment of what actually requires protection and which regulatory enforcement tools are best suited to protect the environment at this facility. This effort ultimately ended in failure simply because the mining company placed discharge pipes at the rapid infiltration system under manmade materials instead of dirt. Adding yet another example of regulatory fiasco at the

Eagle mine. It is a fact that currently, there is no comprehensive federal protection for groundwater resources. EPA itself has acknowledged on numerous occasions that groundwater legislation is critical because this is the last part of the hydrological cycle to be regulated, and the hydrological imperatives require it to be integrated into the pattern of management immediately. Despite the critical need for groundwater legislation, only a patchwork of federal legislation currently exists. Several federal statutes have addressed peripherally the protection of groundwater. Congress enacted the Safe Drinking Water Act (SDWA) in 1974 to "assure that water supply systems serving the public meet minimum national standards for protection of public health." The SDWA authorizes the creation of drinking water standards and the establishment of a program to regulate underground injections in order to protect drinking water supplies. The SDWA, however, falls short of protecting all groundwater because it only protects aquifers supplying public water systems.

In the instant case, the MDEQ intends to reissue a backsliding modified groundwater discharge permit without the limits found in the SDWA or "report" requirements where actual limits would be established under the SDWA. Moreover, while courts distinguish between tributary and non-tributary groundwater for the purpose of determining which laws apply, most groundwater, however, does flow into surface waters. Furthermore, it is doubtful whether any groundwater is non-tributary, because all groundwater continually flows toward some point of discharge. Categorizing groundwater as tributary or non- tributary may be a completely artificial distinction, but it is nonetheless a distinction courts make. In order to discharge its trust responsibility, EPA must take a higher ground and act with loyalty to its Indian beneficiary by using the regulatory tools necessary to protect tribal trust resources in full measure. Whatever ambiguity results in the context of CWA authority will ultimately be outweighed by the plethora of case law that clearly clarifies and established the United States Indian trust doctrine.

Courts addressing groundwater within the context of the CWA additionally have looked at whether the groundwater in question was tributary or non-tributary. There is absolutely no doubt that the industrial mine water discharges at Eagle mine, through the rapid infiltration system, have the potential to flow to tributary groundwater. Tributary groundwater is groundwater that discharges into surface waters. Even assuming that all of the discharges from the rapid infiltration system at the Eagle mine flow into groundwater BEFORE reaching the seeps and springs flowing into the East Branch of the Salmon Trout River, EPA risks a breach of trust issue should it decide to wait until it is provided with the answers to the following two-part test: First, a plaintiff will allege with particularity facts that support the direct hydrological connection between the ground water and the surface water body at issue. In this case the East Branch of the Salmon Trout River. Second, the plaintiff will allege that the addition of pollutants to the surface water body is directly traceable back to the discharges into the ground water.

Supreme Court and lower Court decisions require the trust obligation owed by the United States to the Indians be exercised according to the strictest fiduciary standards, United States v. Mason, 412 U.S. 391, 398, 93 S.Ct. 2202, 2207, 37 L.Ed.2d 22 (1973);

Seminole Nation v. United States, 316 U.S. 286, 296-97, 62 S.Ct. 1049, 1054, 86 L.Ed. 1480 (1942). Nance v. EPA,11 ELR 20526No. Nos. 77-3058 et al., 645 F.2d 701/16 ERC 1497/(9th Cir., 05/18/1981). Since there exists a trust relationship between the United States and the KBIC, EPA must act as trustee when taking federal actions, including its oversight of Michigan as it discharges the authorities that EPA delegated to it when these activities have a direct effect on natural resources that appertain to the tribe. In this case, EPA's fiduciary obligation requires it to first protect Indian rights and resources. See Parravano v. Babbitt, 70 F. 3d. 539 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996); Pyramid Lake Paiute Tribe of Indians v Morton, 354 F. Supp. 252 (D.D.C. 1972) rev'd in part in other grounds, 499 F. 2d 1095 (D.C. Cir. 1974), cert denied, 420 U.S. 962 (1975).

The right of an interested party to petition a federal agency is a freedom guaranteed by the first amendment: "Congress shall make no law … abridging the … right of people … to petition the Government for redress of grievances." U.S. Const., Amend I. See also United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967) (right to petition for redress of grievances is among most precious of liberties without which the government could erode rights). For the aforementioned reasons I hereby petition the U.S. Environmental Protection Agency to require a National Pollution Discharge Elimination Systems (NPDES) permit for the industrial mine water discharges and other discharges through the rapid infiltration system at the Eagle mine.

Should you have any questions regarding these comments or request please contact me at 907 720-8680, jefferyloman@mac.com or by mail to: PO Box 142, L'Anse Indian Reservation, MI 49946

Jeffery Loman

Cc: Keweenaw Bay Indian Community Tribal Council