

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

	)	
In re:	)	
	)	
Excelsior Mining Arizona, Inc.	)	Appeal No. UIC 18-04
Gunnison Copper Project	)	
	)	
UIC Permit No. R9UIC-AZ3-FY16-1	)	
	)	
	)	

**JOINT STIPULATED MOTION TO DISMISS APPEAL WITH PREJUDICE**

Petitioners Dragoon Conservation Alliance, Arizona Mining Reform Coalition, Grand Canyon Chapter of the Sierra Club, Center for Biological Diversity, and Patagonia Area Resource Alliance (“Petitioners”), Excelsior Mining Arizona, Inc. (“Excelsior”), and Respondent Region 9 of the United States Environmental Protection Agency (“EPA Region 9”) (collectively, the “Parties”), jointly move the Environmental Appeals Board to dismiss this appeal of Underground Injection Control (“UIC”) Class III In-Situ Production of Copper Permit No. R9UIC-AZ3-FY16-1 (“UIC Permit”) for Excelsior’s Gunnison Copper Project (“Project”) with prejudice in accordance with 40 C.F.R. § 124.19(k).

Petitioners request dismissal of this appeal based on the substantive actions Excelsior will take pursuant to a separate Settlement Agreement (“Agreement”) between Petitioners and Excelsior, which is attached as an exhibit to this motion. Excelsior has agreed to submit requests to EPA Region 9 to modify the UIC Permit to add additional groundwater monitoring wells, to provide Petitioners access to groundwater monitoring data through a website or portal, and to take steps to minimize lighting during night drilling and wellfield operations.

EPA Region 9 is not a party to the Agreement made between Excelsior and Petitioners.

However, EPA Region 9 anticipates it would expeditiously process Excelsior's submissions to modify the UIC Permit to add the additional groundwater monitoring wells, as outlined in the Agreement, as either a major or minor modification of the UIC Permit, pursuant to EPA's UIC regulations at 40 CFR §§ 144.39 and 144.41. Should EPA approve Excelsior's UIC Permit modification requests to add more monitoring wells, Excelsior will be obligated to comply with any and all of the federally enforceable UIC Permit conditions applicable to these wells.

All parties acknowledge that dismissal of this matter based on the Agreement is a better use of resources than continuing a permit appeal where petitioners and the permit applicant have come to agreement on a proposed course of action that would resolve their differences.

Upon the Board's grant of this motion to dismiss with prejudice, EPA Region 9 intends to take action to lift the August 1, 2018 stay of the UIC Permit, and to provide notice of the lifting the stay, and the effective date of the UIC Permit, to the EAB, the applicant (Excelsior), Petitioners, and all other interested parties.

There being no further issues for the Board to decide in this appeal, the Parties request that the appeal be dismissed with prejudice.

Date: October 4, 2018

Respectfully submitted,

WESTERN MINING ACTION PROJECT

*/S/ Jeffrey C. Parsons*

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*Counsel for Petitioners*

U.S. ENVIRONMENTAL PROTECTION  
AGENCY

*/S/ Rich Campbell*

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*Attorneys for EPA Region 9*

EXCELSIOR MINING ARIZONA, INC.

*/S/ Stephen A. Owens*

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*Counsel for Excelsior Mining Arizona, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached **JOINT STIPULATED MOTION TO DISMISS APPEAL WITH PREJUDICE** to be served upon the following persons listed below in the manner indicated:

*By Electronic Submission:* Eurika Durr  
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1200 Pennsylvania Ave, N.W.  
Mail Code 1103M  
Washington, DC 20460-0001

*By electronic mail:* Jeffrey C. Parsons  
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*Counsel for Excelsior Mining Arizona, Inc.*

Dated: October 4, 2018

*/S/ Rich Campbell*

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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In Re:	)	
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Excelsior Mining Arizona, Inc.	)	
Gunnison Copper Project	)	Appeal No. UIC 18-04
	)	
UIC Permit R9UIC-AZ3-FY16-1	)	

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**SETTLEMENT AGREEMENT**

This Settlement Agreement (“Agreement”) is entered into by and between Excelsior Mining Arizona, Inc., an Arizona corporation (“Excelsior”), and Dragoon Conservation Alliance, Arizona Mining Reform Coalition, Grand Canyon Chapter of the Sierra Club, Center for Biological Diversity, and Patagonia Area Resource Alliance (collectively “Petitioners”). Petitioners and Excelsior may at times be referred to herein individually as a “Party” or jointly as “Parties.”

**1. Definitions**

“**Additional Monitoring Wells**” has the meaning given to such term in Section 3(c) of this Agreement;

“**ADEQ**” means the Arizona Department of Environmental Quality;

“**AP Permit**” means Aquifer Protection Permit No. P-511633 issued by ADEQ to Excelsior, as the same may be amended, restated, supplemented, replaced or otherwise modified from time to time;

“**Aquifer Exemption**” means the aquifer exemption issued by EPA to Excelsior in connection with the UIC Permit, as the same may be amended, restated, supplemented, replaced or otherwise modified from time to time;

“**Baseline Sampling**” has the meaning given to such term in Section 3(b)(1) of this Agreement;

“**Business Day**” means a day other than a Saturday, Sunday or Federal or State of Arizona holiday;

“**EAB**” means the EPA Environmental Appeals Board;

“**EAB Appeal**” has the meaning given to such term in Section 2(b);

“**EPA**” means the United States Environmental Protection Agency;

“**Existing Wells**” has the meaning given to such term in Section 3(b);

“**Groundwater Flow Model Report**” means the groundwater flow model evaluation and update report referred to in Section 2.7.4.8 of the AP Permit and that will be delivered in the sixth year of production from the Project;

“**HCWs**” means the hydraulic control wells that are set out in the AP Permit;

“**North Additional Monitoring Wells**” has the meaning given to such term in Section 3(c)(1) of this Agreement;

“**Permits**” means the AP Permit, UIC Permit and Aquifer Exemption;

“**Project**” has the meaning given to such term in the AP Permit;

“**Petition**” means the July 25, 2018 Petition for Review of the UIC Permit and the Aquifer Exemption filed by Petitioners with the EAB, which has been docketed by the EAB as Appeal No. UIC 18-04;

“**South Additional Monitoring Wells**” has the meaning given to such term in Section 3(c)(2) of this Agreement;

“**Southernmost Hydraulic Control**” means the area where the HCWs that are located on the southernmost perimeter of the Project are placed;

“**UIC Permit**” means the Class III In-Situ Production of Copper Permit No. R9UIC-AZ3-FY16-1 issued June 22, 2018 by the EPA to Excelsior.

## **2. Background.**

(a) On June 22, 2018, EPA issued the UIC Permit and the Aquifer Exemption to Excelsior for the Project. The UIC Permit was to be effective August 1, 2018.

(b) On July 25, 2018, Petitioners filed the Petition with the EAB, which has been docketed by the EAB as Appeal No. UIC 18-04 (the “**EAB Appeal**”).

(c) On August 9, 2018, Excelsior filed a Notice of Appearance in the EAB Appeal.

(d) Excelsior and Petitioners have agreed to settle the EAB Appeal without admission of fact or law, which the Parties consider to be a just, fair and equitable resolution of the claims raised in the EAB Appeal.

## **3. Terms of Settlement.**

(a) **Withdrawal of the Petition.** Upon execution of this Agreement, the Parties will submit to the EAB a Stipulated Joint Motion to Dismiss the EAB Appeal, with a copy of this Agreement attached, requesting that the EAB enter an order dismissing the Petition with prejudice. Petitioners further covenant not to sue or commence any other form of administrative or judicial action challenging the UIC Permit or the Aquifer Exemption.

(b) **Submission of UIC Permit Modification for Existing Wells.** Within 30 days after the EAB enters an order dismissing the Petition with prejudice, Excelsior shall submit to

EPA an application to modify the UIC Permit to add three wells owned by Excelsior that currently exist south of the Project near Dragoon, Arizona (the “**Existing Wells**”).

(1) After EPA’s approval to add the three Existing Wells to the UIC Permit, Excelsior shall clean out and modify the Existing Wells and sample them for specific conductance and water level, for the purpose of establishing baseline water quality in each of the Existing Wells (the “**Baseline Sampling**”). After the baseline water quality has been determined pursuant to the Baseline Sampling, the Existing Wells shall be measured for the specific conductance and water level on a schedule as determined by EPA.

(2) In the event that an Existing Well is not available or Excelsior determines it is not suitable for use, to the extent allowed under existing law and applicable permits, Excelsior shall drill a replacement well that is as close as reasonably practical to the location of the Existing Well that is not available or determined to be unusable.

(c) **Submission of UIC Permit Modification for Additional Monitoring Wells.**

Within one (1) year after the EAB enters an order dismissing the Petition with prejudice, Excelsior shall submit to EPA a second application to modify the UIC Permit to add six (6) additional monitoring wells (the “**Additional Monitoring Wells**”) as follows:

(1) Three (3) Additional Monitoring Wells to be constructed on a line approximately three hundred (300) feet south of the Southernmost Hydraulic Control and on land controlled by Excelsior (the “**North Additional Monitoring Wells**”). The exact location of the North Additional Monitoring Wells shall be determined, and their installation shall occur, after Excelsior submits the Groundwater Flow Model Report to ADEQ.

(2) Three (3) Additional Monitoring Wells to be constructed on a line approximately three hundred (300) feet south of the North Additional Monitoring Wells and

on land controlled by Excelsior (the “**South Additional Monitoring Wells**”). The exact location of the South Additional Monitoring Wells shall be determined, and their installation shall occur, after Excelsior submits the Groundwater Flow Model Report to ADEQ.

(3) Following installation of each Additional Monitoring Well, the baseline water quality in each well will be determined in the same manner as for the Existing Wells.

(d) **EPA Determination on UIC Modification Submissions; Appeal.**

Excelsior and Petitioners believe and expect that EPA will approve the UIC Modification Submissions for additional monitoring wells as described in Sections 3(b) and 3(c) herein. If, for any reason, EPA makes a determination on Excelsior’s applications to modify the UIC Permit that results in the denial of the applications or otherwise fails to provide for the addition of the monitoring wells referenced in Sections 3(b) and 3(c) herein to the UIC Permit, Petitioners and Excelsior shall have the right to file a petition for review with the EAB or subsequent judicial review challenging that determination consistent with applicable EPA regulations. Excelsior agrees to join in or otherwise support a petition filed by Petitioners with the EAB to review EPA’s denial of the inclusion of the additional wells, to the extent that Petitioners’ petition is not inconsistent with a petition for review filed by Excelsior.

(e) **Website.** Within thirty (30) days after the EAB issues an order to dismiss the Petition with prejudice, Excelsior shall establish a website or portal for the Project accessible to the general public (the “**Website**”) and shall provide to Petitioners the Website IP address. Petitioners may share the IP address of the Website with other interested people. Excelsior shall post on the Website copies of all quarterly and annual technical reports, and the Groundwater Flow Model Report, that are submitted to EPA or ADEQ (“**the Agencies**”) by Excelsior with respect to the Permits, including appendices and exhibits, and summaries of all quarterly and annual technical reports submitted to the Agencies, which are related to the Project, within 30 days of submission to

EPA or ADEQ. Excelsior need not post on the Website all of the technical data its consultants generate to support submittals to the Agencies with respect to the Permits, but will make electronic copies of such technical data available to Petitioners upon 30 days prior written request from Petitioners.

(f) **Light Pollution.** Contracts between Excelsior and its contractors that provide lighting to the Project during drilling operations shall include a provision for shading the light from view to the south, and with lights oriented to the north (to the extent practical taking into consideration safety standards), and to minimize effects of lighting on area residents during night drilling and wellfield operations.

**4. Parties Bound.** The Parties agree that the provisions of this Agreement shall apply to and be binding upon the Parties and each Party's officers, employees, contractors, agents, successors, and assigns.

**5. No Admission.** This Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of any Party or its respective officers and agents, or any person affiliated with each Party.

**6. Enforcement.** This Agreement shall be enforceable by either Party in state or federal court sitting in Maricopa County, Arizona. Solely with respect to an action to enforce this Agreement or the terms thereof, the Parties waive any and all objections and defenses they might have as to the jurisdiction of a state or federal court sitting in Maricopa County, Arizona.

**7. Breach.** If any Party breaches any provision of this Agreement, and fails to cure the asserted breach within fourteen (14) days of written notice from the non-breaching party, the non-breaching party shall have the right to enforce the terms of this Agreement in state or federal court sitting in Maricopa County, Arizona. Monetary damages shall not be allowed for any breach of this Agreement. In addition to any other remedy for breach of this

Agreement available in law or equity, the non-breaching party shall be entitled to recover its reasonable attorney's fees and costs associated with having to enforce the terms of this Agreement.

**8. Successors in Interest.** This Agreement shall inure to the benefit of and bind the Parties and their respective successors, heirs and assigns. Any contract conveying the Party's rights and obligations to such successor shall contain a provision that discloses this Agreement and requires the succeeding entity to agree to be bound by the terms of this Agreement.

**9. Authority.** Each Party warrants and represents that it has the authority and right to enter into this Agreement, and each person executing this Agreement warrants and represents that he/she is fully authorized to do so.

**10. Notices.** All notices required or permitted to be given hereunder shall be in writing and may be given in person or by United States mail, by local or nationwide delivery/courier service or by electronic transmission (for instance, telecopy/fax to the telecopies/fax numbers indicated below or e-mail to the e-mail addresses indicated below). Such notices and other communications shall be deemed to be given and received as follows: (i) upon actual receipt, if delivered personally; (ii) on the date of transmission, if transmitted by facsimile or e-mail on a Business Day before 5:00 p.m. (Arizona time); (iii) on the next Business Day following transmission if transmitted by facsimile or e-mail on a day which is not a Business Day or if transmitted after 5:00 p.m. (Arizona time) on a Business Day; (iv) on the next Business Day, if delivered by overnight courier; or (v) three (3) days following deposit in the mail, if delivered by mail postage prepaid, addressed to that Party at his/her/their/its designated address. The designated address of a Party shall be the address of that Party shown below or such other address within the United States of America that any Party from time to time may specify by written notice to the other Parties at least ten (10) days prior to the

effective date of such change, but no such notice of change shall be effective unless and until received by the other Parties. Rejection or refusal to accept, or inability to deliver because of changed address or because no notice of changed address is given, shall be deemed to be receipt of any such notice. Any notice to an entity shall be deemed to be given on the date specified in this Section without regard to when such notice is delivered by the entity to the individual to whose attention it is directed and without regard to the fact that proper delivery may be refused by someone other than the individual to whose attention it is directed. If a notice is received by an entity, the fact that the individual to whose attention it is directed is no longer at such address or associated with such entity shall not affect the effectiveness of such notice. The Parties agree that any notice sent on their behalf by their attorney, if listed below, shall serve as notice by the Party to the other Parties.

To Excelsior:                    Stephen Twyerould, President & CEO  
Excelsior Mining Corp.  
2999 N. 44<sup>th</sup> Street, Suite 300  
Phoenix, Arizona 85018-7246  
Telephone No: (602) 559-5579  
Facsimile No: (604) 681-8039  
E-mail: stwyerould@excelsiormining.com

To Petitioners:	Jeffrey C. Parsons Senior Attorney Western Mining Action Project Post Office Box 349 Lyons, Colorado 80540 Telephone No: (303) 823-5758 Facsimile No: (303) 823-5732 E-mail: wmap@igc.org	Aaron Isherwood Coordinating Attorney Sierra Club 2101 Webster St. Suite 1300 Oakland, CA 94612 Telephone No.: 415-977-5680 aaron.isherwood@sierraclub.org
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**11. Time of Essence; Acceptance.** Time is expressly declared to be the essence of this Agreement. Nothing contained herein is intended to obligate or bind any Party until this Agreement has been fully executed by all Parties and delivered.

**12. Entire Agreement.** This Agreement contains the entire agreement between the Parties, and there are no other terms, conditions, promises, undertakings, statements or

representations, express or implied, concerning the obligations contemplated by this Agreement. This Agreement supersedes any prior agreements, written or oral, in respect of the subject matter of this Agreement.

**13. No Private Right of Action for Third Parties.** Nothing in this Agreement creates, or is intended to create, a private right of action or defense in any person or entity other than Excelsior or Petitioners. No person or entity may assert any claim or right as a third-party or other beneficiary, or as a member of a protected class, under this Agreement in any civil, criminal, or administrative action, against Excelsior or Petitioners.

**14. Headings.** The headings to the Sections hereof have been inserted for convenience of reference only and shall in no way modify or restrict any provisions hereof or be used to construe any such provisions.

**15. Modifications.** The terms of this Agreement may not be amended, waived, or terminated orally, but only by an instrument in writing signed by all Parties.

**16. Governing Law.** This Agreement shall be governed by and interpreted pursuant to the laws of the State of Arizona.

**17. Conflicts.** In the event of a conflict between this Agreement and any Permit, the terms of the Permit shall govern.

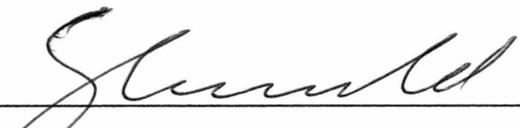
**18. Joint Responsibility; Construction.** Each Party assumes joint responsibility for the form and composition of each and all of the contents of this Agreement, and each Party agrees that this instrument shall be interpreted as though each of the Parties participated equally in the composition of this instrument and each and every part hereof. In particular, the rule of construction that, in the event of ambiguity, the contract shall be interpreted against the Party responsible for the drafting or preparation of the Agreement, shall not apply.

19. **Legal Counsel.** By signing this Agreement, each Party acknowledges they have read this Agreement and understand the terms contained herein or have sought the advice of their respective legal counsel.

20. **Counterpart, Email and Electronic Signatures.** This Agreement, and any other instrument relating to this Agreement, may be executed utilizing more than one counterpart of the signature page, and all such executed counterpart signature pages shall be attached to one Agreement and read having the same force and effect as though all the signatories had signed a single page. This Agreement and any signed instrument entered into in connection with this Agreement, and any amendments hereto or thereto, to the extent ink signed, scanned and delivered by means of electronic mail or electronic signature in accordance with the Arizona Electronic Transactions Act, A.R.S. § 44-7031, shall be treated in all manner and respects as an original agreement or instrument and shall be considered to have the same binding legal effect as if it were the original signed version thereof delivered in person. No Party shall raise the use of a facsimile machine or electronic mail to deliver a signature or the fact that any signature or agreement or instrument was transmitted or communicated through the use of a facsimile machine or electronic mail as a defense to the formation of a contract and each such Party forever waives any such defense.

Dated and entered this 3<sup>rd</sup> day of October, 2018.

EXCELSIOR MINING ARIZONA, INC.

By:   
Title: PRESIDENT & CEO

DRAGOON CONSERVATION ALLIANCE

By: Ellen Cohen 10/3/18  
Title: Representative Member

ARIZONA MINING REFORM COALITION

By: \_\_\_\_\_  
Title: \_\_\_\_\_

GRAND CANYON CHAPTER OF THE  
SIERRA CLUB

By: \_\_\_\_\_  
Title: \_\_\_\_\_

CENTER FOR BIOLOGICAL DIVERSITY

By: \_\_\_\_\_  
Title: \_\_\_\_\_

PATAGONIA AREA RESOURCE ALLIANCE

By: \_\_\_\_\_  
Title: \_\_\_\_\_

DRAGOON CONSERVATION ALLIANCE

By: \_\_\_\_\_

Title: \_\_\_\_\_

ARIZONA MINING REFORM COALITION

By:  \_\_\_\_\_

Title: Director \_\_\_\_\_

GRAND CANYON CHAPTER OF THE  
SIERRA CLUB

By: \_\_\_\_\_

Title: \_\_\_\_\_

CENTER FOR BIOLOGICAL DIVERSITY

By: \_\_\_\_\_

Title: \_\_\_\_\_

PATAGONIA AREA RESOURCE ALLIANCE

By: \_\_\_\_\_

DRAGOON CONSERVATION ALLIANCE

By: \_\_\_\_\_

Title: \_\_\_\_\_

ARIZONA MINING REFORM COALITION

By: \_\_\_\_\_

Title: \_\_\_\_\_

GRAND CANYON CHAPTER OF THE  
SIERRA CLUB

By:  \_\_\_\_\_  
Title: Chapter Director

CENTER FOR BIOLOGICAL DIVERSITY

By: \_\_\_\_\_

Title: \_\_\_\_\_

PATAGONIA AREA RESOURCE ALLIANCE

By: \_\_\_\_\_

Title: \_\_\_\_\_

DRAGOON CONSERVATION ALLIANCE

By: \_\_\_\_\_

Title: \_\_\_\_\_

ARIZONA MINING REFORM COALITION

By: \_\_\_\_\_

Title: \_\_\_\_\_

GRAND CANYON CHAPTER OF THE  
SIERRA CLUB

By: \_\_\_\_\_

Title: \_\_\_\_\_

CENTER FOR BIOLOGICAL DIVERSITY

By: \_\_\_\_\_ *R*

Title: *Southwest Conservation Advocate*

PATAGONIA AREA RESOURCE ALLIANCE

By: \_\_\_\_\_

Title: \_\_\_\_\_

DRAGON CONSERVATION ALLIANCE

By: \_\_\_\_\_

Title: \_\_\_\_\_

ARIZONA MINING REFORM COALITION

By: \_\_\_\_\_

Title: \_\_\_\_\_

GRAND CANYON CHAPTER OF THE  
SIERRA CLUB

By: \_\_\_\_\_

Title: \_\_\_\_\_

CENTER FOR BIOLOGICAL DIVERSITY

By: \_\_\_\_\_

Title: \_\_\_\_\_

PATAGONIA AREA RESOURCE ALLIANCE

By: Carolyn Shapiro

Title: Board Member