

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
NORTHERN DIVISION**

HURON MOUNTAIN CLUB)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. _____
)	
UNITED STATES ARMY CORPS OF)	
ENGINEERS, LIEUTENANT COLONEL)	
MICHAEL C. DEROSIER, District Commander,)	
Detroit District, U.S. Army Corps of Engineers,)	
UNITED STATES DEPARTMENT OF THE)	
INTERIOR, KEN SALAZAR, Secretary of the)	
United States Department of the Interior,)	
UNITED STATES FISH AND WILDLIFE)	
SERVICE, DANIEL M. ASHE, Director of the)	
United States Fish and Wildlife Service, and)	
KENNECOTT EAGLE MINERALS COMPANY)	
)	
Defendants.)	

**COMPLAINT FOR DECLARATORY JUDGMENT, TEMPORARY RESTRAINING
ORDER, AND OTHER INJUNCTIVE RELIEF**

Plaintiff Huron Mountain Club, Inc. files this Complaint for Declaratory Judgment, Temporary Restraining Order, and Other Injunctive Relief under the Administrative Procedures Act and Mandamus and Venue Act, to compel federal agency compliance with mandates and requirements under the Rivers and Harbors Appropriations Act, Federal Water Pollution Control Act, National Environmental Policy Act, Endangered Species Act, and National Historic Preservation Act; and to restrain, enjoin, and stop Defendant Kennecott Eagle Minerals Company’s ongoing, illegal construction and unauthorized operation of a nickel and copper mine in Marquette County, Michigan:

I. Parties

1. Plaintiff Huron Mountain Club (“HMC,” or the “Club”) is a not-for-profit entity incorporated in Michigan, with its principal place of business in Marquette County, Michigan.

2. HMC was formed in 1889 as a retreat and wildlife preserve, and since that time, a core function of HMC has been to study and protect the forests, water resources, and wildlife of Huron Mountain for the benefit of its members, science, and future generations.

3. Defendant United States Army Corps of Engineers (the “Corps”) is an agency within the United States Department of the Army, which in turn is a department within the United States Department of Defense; thus, a Department of the Executive Branch of the United States of America. The Corps has been delegated responsibility for, *inter alia*, issuing permits to conduct certain activities in or “affecting” lakes, rivers, streams, wetlands, and other water bodies considered “waters of the United States” or “navigable waters of the United States.”

4. Defendant Lieutenant Colonel Michael C. Derosier is sued in his official capacity as the District Commander of the Detroit District of the Corps, which has jurisdiction to issue Rivers and Harbors Appropriations Act and Federal Water Pollution Control Act permits related to “waters” and “navigable waters” of the United States in Marquette County, Michigan. Pursuant to 5 U.S.C. § 702, Colonel Derosier consequently is the “Federal officer . . . personally responsible for compliance” with laws and regulations at issue in this litigation.

5. Defendants Corps and Colonel Derosier have waived sovereign immunity pursuant to 5 U.S.C. § 702.

6. Defendants Corps and Colonel Derosier may be served by: (1) sending a copy of this Complaint by certified mail to the United States Attorney General, Department of Justice,

950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001; (2) sending a copy of this Complaint by certified mail to the Civil-Process Clerk, United States Attorney's Office, P.O. Box 208, Grand Rapids, MI 49501-0208; (3) sending a copy of this Complaint by certified mail to the United States Army Corps of Engineers, 441 G. Street, N.W., Washington, D.C. 20314-1000; *and* (4) sending a copy of this Complaint by certified mail to Lieutenant Colonel Michael C. Derosier, 477 Michigan Ave., Detroit, MI 48226.

7. Defendant Department of the Interior ("Interior Department") is a Cabinet-level agency of the Executive Branch of the United States of America responsible for, *inter alia*, managing and sustaining America's lands, water, wildlife, and energy resources. The Interior Department delegates responsibilities for implementing certain mandates under the federal Endangered Species Act to the United States Fish and Wildlife Service ("FWS"). Any further reference to FWS's duties, responsibilities, or obligations, shall operate as a reference to the Interior Department responsibilities under the ESA carried out through the FWS.

8. Defendant Ken Salazar is sued in his official capacity as the Secretary of the Interior Department, and Defendant Daniel M. Ashe is sued in his official capacity as the Director of the FWS. Pursuant to 5 U.S.C. § 702, Defendants Salazar and Ashe consequently are the "Federal officer[s] . . . personally responsible for compliance" with laws and regulations at issue in this litigation.

9. Defendants Interior Department, FWS, Ken Salazar, and Daniel M. Ashe respectively have waived sovereign immunity pursuant to 5 U.S.C. § 702.

10. Defendants Interior Department and Ken Salazar may be served by: (1) sending a copy of this Complaint by certified mail to the United States Attorney General, Department of

Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001; (2) sending a copy of this Complaint by certified mail to the Civil-Process Clerk, United States Attorney's Office, P.O. Box 208, Grand Rapids, MI 49501-0208; (3) sending a copy of this Complaint by certified mail to the Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240; (4) *and* sending a copy of this Complaint by certified mail to Ken Salazar, 1849 C Street, N.W., Washington, D.C. 20240.

11. Defendants FWS and Daniel M. Ashe may be served by: (1) sending a copy of this Complaint by certified mail to the United States Attorney General, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001; (2) sending a copy of this Complaint by certified mail to the Civil-Process Clerk, United States Attorney's Office, P.O. Box 208, Grand Rapids, MI 49501-0208; (3) sending a copy of this Complaint by certified mail to the United States Fish and Wildlife Service, 1849 C Street, N.W., Washington, D.C. 20240; *and* (4) sending a copy of this Complaint by certified mail to Daniel M. Ashe, 1849 C Street, N.W., Washington, D.C. 20240.

12. Defendant Kennecott Eagle Minerals Company ("Kennecott") is an entity incorporated under the laws of Delaware, with its principal place of business in Marquette County, Michigan.

13. Kennecott may be served through its registered agent for service of process, CSC-Lawyers Incorporating Service Company, 601 Abbot Road, East Lansing, MI 48823.

14. Kennecott has begun construction of a nickel and copper mine located in an area commonly known as the "Yellow Dog Plains," in Marquette County, Michigan.

15. The mine hereinafter will be referred to as, the "Eagle Mine."

16. Significant portions of the Eagle Mine will be located directly underneath a navigable water of the United States known as the “Salmon Trout River” (sometimes referred to herein as, the “River”) and corresponding wetlands, which are headwaters to the River and fall within the River’s “ordinary high water mark.”

17. Construction and operation of the Eagle Mine otherwise will affect “jurisdictional” waters in that it will drawdown water from the Salmon Trout River and wetlands, decrease the River’s flow and change its temperature, and decrease the River’s reach as well as the reach of the adjacent wetlands.

18. Kennecott otherwise will engage in excavation, and re-deposit, various materials in a manner that will alter the condition of the River and wetlands.

19. Kennecott has not obtained permits under the Rivers and Harbors Appropriations Act (“RHA”), 33 U.S.C. § 403, or Federal Water Pollution Control Act, hereinafter “Clean Water Act” (“CWA”), 33 U.S.C. § 1344, to engage in these activities, or submitted to *federal* environmental and cultural assessments that are legally mandated corollaries to the required RHA and CWA permits.

20. Both the permits and assessments are *absolute* preconditions to Kennecott’s ability to legally construct or operate the Eagle Mine.

21. In addition to Kennecott’s own illegal conduct warranting relief requested herein, Kennecott is a necessary and indispensable party to ensure HMC can obtain complete relief against Defendants Corps, Interior Department, FWS, Derosier, Salazar, and Ashe (collectively, the “Federal Defendants”), within the meaning of Federal Rule of Civil Procedure 19.

II. NATURE OF ACTION

22. The Corps is required under the RHA to issue a “permit” *before* any person can begin construction on a project that will “affect” a “navigable” water of the United States.

23. The Corps likewise is required under the CWA to issue a “permit” *before* any person can discharge “dredge or fill” into a water of the United States.

24. Significant portions of the Eagle Mine will be located directly underneath the Salmon Trout River and corresponding wetlands, all of which are “navigable” within the meaning of the RHA.

25. As a matter of law, Kennecott’s subsurface excavation and construction work, subsurface facilities, and proposed mining activities underneath the River and adjacent wetlands constitute activities that will “affect” these “waters” within the meaning of the RHA.

26. Kennecott’s drawdown of water from the River and corresponding wetlands also is activity that will “affect” these waters within the meaning of the RHA.

27. Kennecott’s technical consultants have admitted the mining also will reduce the flow of the River, will change its temperature, and will reduce its reach.

28. The excavation, construction, facilities, proposed mining, water drawdown, and other alterations are illegal in the absence of a RHA *preconstruction* permit issued by the Corps.

29. Otherwise, Kennecott’s excavation and re-deposit of subsurface materials underneath the Salmon Trout River and connected wetlands during construction and operation of the Eagle Mine, constitutes “dredge or fill” activity within the meaning of the CWA.

30. These activities, in their own right, are illegal in the absence of a CWA permit.

31. Kennecott neither has obtained a RHA permit for tunneling and excavation work it *already* has begun to construct a mineshaft and other subsurface facilities underneath the Salmon Trout River and corresponding wetlands, nor has it obtained a CWA permit authorizing dredge or fill activities that will alter the River and wetlands.

32. Kennecott's unauthorized construction work and proposed operation of the Eagle Mine consequently are illegal.

33. The Corps has a mandatory duty established by Congress to administer the permitting program under section 403 of the RHA, as well as the permitting program mandated by 33 U.S.C. § 1344, which hereinafter will be referred to as section "404" of the CWA.

34. The Corps is wholly abdicating these statutory responsibilities by allowing Kennecott's ongoing construction without the necessary *preconstruction* permits under the RHA and CWA.

35. Kennecott's illegal construction, combined with the Corps' inaction, in turn are enabling Kennecott to proceed with unauthorized construction activities without first submitting to detailed environmental and cultural investigations, consultations, and assessments, as well as other prerequisites, that *must* be completed by *federal agencies before* a RHA or CWA permit can be issued.

36. These assessments specifically are mandated by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332; Endangered Species Act ("ESA"), 16 U.S.C. § 1531; National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470a; and their related regulations.

37. HMC owns property approximately 3.3 miles from the Eagle Mine site, downstream, and bordering the Salmon Trout River, as well as Lake Superior.

38. Kennecott's illegal construction and proposed operation of the Eagle Mine in such close proximity to HMC's property without submitting to RHA and CWA permitting, irreparably interferes with HMC's and its members' *corresponding*, congressionally mandated "procedural" rights under NEPA, ESA, and NHPA intended to safeguard their interests in matters including, but not necessarily limited to, the aesthetic, wildlife, environmental, and cultural value of HMC's property and the surrounding area.

39. The illegal activities otherwise may diminish the value of HMC's property.

40. HMC therefore brings this action on behalf of its members seeking: (1) a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Salmon Trout River as well as its adjacent wetlands are "navigable" waters of the United States under the RHA, and that Kennecott's construction and proposed operation of the Eagle Mine underneath the River and wetlands is illegal in the absence of a RHA permit; (2) a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Salmon Trout River as well as its adjacent wetlands are waters of the United States under the CWA, and that Kennecott's dredge and fill activities are illegal without a permit required by the CWA; (3) a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Corps has not complied with its duty under the RHA to require Kennecott to submit to permitting procedures and requirements mandated by the RHA; (4) a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Corps has not complied with its duty under the CWA to require Kennecott to submit to permitting procedures and requirements mandated by the CWA; (5) a declaratory judgment, pursuant to 28 U.S.C. § 2201, that any putative RHA permit from the Corps related to the Eagle Mine constitutes "major federal action" mandating compliance with all applicable provisions and regulations under NEPA; (6) a declaratory judgment, pursuant to 28

U.S.C. § 2201, that any putative CWA permit from the Corps related to the Eagle Mine constitutes “major federal action” mandating compliance with all applicable provisions and regulations under NEPA; (7) a declaratory judgment, pursuant to 28 U.S.C. § 2201, that pursuant to the ESA, the Corps and FWS must engage in an appropriate species “consultation” to assess all impacts potentially permitted activities at, or related to, the Eagle Mine may have on covered species; (8) a declaratory judgment, pursuant to 28 U.S.C. § 2201, that no RHA or CWA permit can be issued unless the Corps undertakes a proper evaluation of cultural resources as required by the NHPA; (9) injunctive relief pursuant to 28 U.S.C. § 2202, the Administrative Procedures Act (“APA”), 5 U.S.C. § 702—or, in the alternative, the Mandamus and Venue Act (“Mandamus Act”), 28 U.S.C. § 1361, directing the Corps to fulfill its permitting responsibilities under the RHA; (10) injunctive relief pursuant to 28 U.S.C. § 2202, the APA—or, in the alternative, Mandamus Act, directing the Corps to fulfill its permitting responsibilities under the CWA; (11) injunctive relief pursuant to 28 U.S.C. § 2202, the APA—or, in the alternative, Mandamus Act, directing the Corps to fulfill its obligations to conduct a proper environmental evaluation mandated by NEPA; (12) injunctive relief pursuant to 28 U.S.C. § 2202, the APA—or, in the alternative, Mandamus Act, directing the Corps and FWS to fulfill their responsibilities regarding protection of regulated species under the ESA; (13) injunctive relief pursuant to 28 U.S.C. § 2202, the APA—or, in the alternative, Mandamus Act, directing the Corps to fulfill its obligations to conduct a proper cultural evaluation mandated by the NHPA; (14) injunctive relief pursuant to the All Writs Act (28 U.S.C. § 1651), or this Court’s inherent powers, prohibiting Kennecott’s continued, illegal construction of the Eagle Mine without first submitting to permitting procedures mandated by the RHA; (14) injunctive relief pursuant to the All Writs Act,

or this Court's inherent powers, prohibiting Kennecott's continued, illegal construction of the Eagle Mine without submitting to permitting procedures mandated by the CWA; (15) injunctive relief pursuant to the All Writs Act, or this Court's inherent powers, forbidding Kennecott's construction or proposed operation of the Eagle Mine unless the Corps completes an appropriate environmental evaluation pursuant to NEPA, and thereafter authorizes any such construction or operation; (16) injunctive relief pursuant to the All Writs Act, or this Court's inherent powers, forbidding Kennecott's construction or proposed operation of the Eagle Mine unless the Corps and FWS fulfill ESA obligations, and thereafter authorize any such construction or operation; (17) injunctive relief pursuant to the All Writs Act, or this Court's inherent powers, forbidding Kennecott's construction or proposed operation of the Eagle Mine unless the Corps completes a cultural evaluation pursuant to the NHPA, and thereafter authorizes any such construction or operation; and (18) an award of HMC's litigation fees and costs to the extent recoverable under substantive or applicable law.

III. JURISDICTION AND VENUE

41. The Court has subject matter jurisdiction over this lawsuit under 28 U.S.C. § 1331, because this action arises under the laws of the United States, as HMC assert claims actionable through the APA, or 28 U.S.C. § 2201, to declare rights regarding, remedy Defendants' respective violations of, or compel mandatory duties under, the federal RHA, CWA, NEPA, ESA, and NHPA.

42. The Court otherwise has subject matter jurisdiction over this lawsuit under 28 U.S.C. § 1331, because the Mandamus Act, in itself, operates as a basis for this Court's jurisdiction over claims asserted against the Federal Defendants.

43. The Court has personal jurisdiction over the Federal Defendants because their actions or omissions regarding the Eagle Mine's ongoing construction and proposed operation in Marquette County, Michigan are bases for HMC's claims in this lawsuit.

44. The Court has personal jurisdiction over Kennecott, because Kennecott is illegally constructing, and proposes to operate, the Eagle Mine in Marquette County, Michigan.

45. Kennecott otherwise has systematic and continuous contacts with the state of Michigan to support personal jurisdiction.

46. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) and 1391(e)(1), because a substantial part of the events and omissions that give rise to HMC's claims have occurred and are occurring in this judicial district and construction of the Eagle Mine is occurring in this judicial district.

IV. BACKGROUND FACTS

A. HMC'S Property

47. HMC owns approximately 19,000 acres of land within the Huron Mountains, including an eleven-mile stretch of the Salmon Trout River, which runs through HMC's property and empties into Lake Superior at the northeast corner of HMC's property.

48. The Salmon Trout River is a direct tributary to Lake Superior; frequent focus of federally, state, and joint-funded scientific research; is considered a "world-class" trout stream; otherwise is a popular fishing and boating destination; and historically was used for commercial activities such as transportation of timber extracted from the surrounding forests, which was floated downstream and processed at sawmills bordering Lake Superior.

49. HMC's property is approximately 3.3 miles downstream on the Salmon Trout River, at its closest point from Kennecott's ongoing, illegal construction of the Eagle Mine.

50. The Club currently has approximately 250 members.

51. The members, their families, and guests live in private cabins located on the property, recreate in other facilities on the property, or otherwise engage in recreational activities such as hunting, boating, swimming, fishing, bird watching, photography, hiking, camping, and general repose on and around the Club's property.

52. HMC's bylaws expressly enshrine it, and its members', commitment to protect and preserve the natural resources within and otherwise surrounding HMC's property.

53. For instance, HMC's members have formed a "Land and Forest Committee," whose duties include monitoring the availability of rights in neighboring or inheld property, and advising HMC's Board of Directors (the "Board") regarding how the Club may consolidate or expand its lands and waters to enhance ecological integrity.

54. All areas of HMC's property otherwise are separated into one of the following three categories to maximize the ecological integrity of the environment and protect wildlife: a "Preserved Area," a "Managed Area," and a "Residential Use Area."

55. The "Preserved Area" is subject to restrictions including, but not limited to, the following:

- a) No natural resources of any kind shall be sold or otherwise commercially exploited.
- b) No timber or vegetation shall be cut or cleared except as necessary to maintain existing trails and roads, to provide modest quantities of dead timber for on-the-spot use as firewood, *to accomplish scientific research of a character and extent that are in harmony with retention of the*

wilderness character of the area, or to deal with an emergency involving forest fire or danger to life or limb.

- c) No new road shall be opened and no existing road shall be substantially widened or extended except where and to the extent necessary to deal with an emergency involving forest fire or danger to life or limb.
- d) No new site shall be established for a permanent camp, boathouse or other facility, and no existing site or facility shall be substantially enlarged.
- e) Except with the express prior approval of HMC's Board, *the water level of any lake or stream on the property cannot be artificially altered.*

56. The "Managed Area" is subject to similar restrictions including, but not limited to, the following:

- a) Except to deal with an emergency involving forest fire or danger to life or limb, no new road or trail shall be opened, and no existing road or trail shall be extended or widened, without the express prior approval of the Board.
- b) Except in case of emergency involving forest fire or danger to life or limb, trees may be cut only (1) *for the purpose of fostering healthy regeneration of the forest with a view to preserving the Managed Area as a buffer area to protect the Preserved Area*; (2) *for scientific research that is consistent with preserving the Managed Area as a buffer to protect the Preserved Area*; (3) for clearing existing roads or trails; or (4) to provide firewood or building materials for necessary use on the Club property.
- c) Trees shall be cut only by the most careful selective methods, *except to improve wildlife habitat as recommended by HMC's Land and Forest Committee and approved by the Board.* Moreover, all cutting must take into consideration *conservation, safety, and aesthetic* considerations and must fully protect *the shorelines of lakes and streams* and areas that are of particular *scientific or scenic* interest on HMC's property.

57. The Club's By-laws otherwise impose environmentally conscious protections, such as the following, on all areas of the property (including the "Residential Use Area"):

- a) Except in case of emergency involving forest fire or danger to life or limb, and except as the Board may authorize on Pine River for direct transit to or from Lake Superior, no power driven craft shall be operated *on any inland lake or stream* in any part of Club property.

- b) Except in case of emergency involving forest fire or danger to life or limb, and except as authorized on the main Club road by the Board, no motorcycle, motor scooter, snowmobile or similar power-driven vehicle shall be operated on Club property.
- c) The use on Club property of power-driven craft and other prohibited vehicles may be authorized by the Board at specified times, by specified responsible individuals, *where necessary for the purpose of managing wildlife* or for the purpose of maintaining existing facilities or patrolling Club property.

58. The eleven-mile stretch of Salmon Trout River that runs through the Club's property is within the Club's "Preserved Area."

59. Consistent with the Club's commitment to scientific research and preservation, it has allowed more than 200 scientific studies at the property.

60. Flora and fauna inventoried at or surrounding HMC's property include more than 5,000 separate species, including, but not limited to, species expressly protected under Michigan or federal law, or which have unique significance to the area.

61. Those species include, but are not necessarily limited to, the Coaster Brook Trout, Canada Lynx, the Narrow-leaved Gentian, the yellow pond water lily, and Kirtland's Warbler.

B. HMC'S Membership

62. Consistent with HMC's corporate purpose to protect the forests, water resources, and wildlife of Huron Mountain, HMC brings this lawsuit on behalf of its members, including, but not limited to, Dr. Mary O'Boyle, John R. Dykema, Jr., and Philip Power (collectively, the "HMC Representatives" or "Representatives"), any of whom would have standing, individually, to bring this lawsuit for the below reasons.

63. The HMC Representatives either hold ownership interests in HMC or a general membership interest, and none has held such ownership interest or otherwise been associated with the Club for less than forty years.

64. The Representatives recreate in areas at and around HMC's property, including, but not limited to, the Salmon Trout River and the virgin and old growth forest on and around the property.

65. As stated above, these recreational activities include, but are not limited to, hunting, swimming in, boating on and fishing in the Salmon Trout River and other water bodies within and beyond HMC's property, bird watching, photography, hiking, camping, and general repose at or around the property.

66. The HMC Representatives are concerned their use of HMC's property, the Salmon Trout River within and beyond the property, and other surrounding areas, will decrease and be diminished because of discharges, pollution, and emissions that will originate from the Eagle Mine's construction and proposed operation.

67. For instance, the Representatives are concerned water quality in the portion of the Salmon Trout River they access downstream from the Eagle Mine, in wetlands they access that are hydrologically connected to the Salmon Trout River, and generally within the Salmon Trout River watershed, will be diminished by discharges, pollution, and emissions that will originate from the Eagle Mine's construction and proposed operation.

68. Indeed, the Representatives are horror-struck with concern that the integrity, if not very existence, of the Salmon Trout River and connected waters could be catastrophically compromised based on the acknowledged risk that Kennecott's subsurface tunnels underneath

these waters could collapse due to a novel, and unproven method Kennecott intends to use to construct and operate the mine.

69. The Representatives further are concerned discharges, pollution, and emissions from the Eagle Mine's construction and proposed operations will interfere with their use and aesthetic enjoyment of the natural resources on HMC's property, the Salmon Trout River within and beyond the property, and the surrounding areas, by contaminating game, fish, waterfowl, and other wildlife with chemicals and pollutants originating from the Eagle Mine.

70. The Representatives also are concerned discharges, pollution, and emissions from the Eagle Mine will harm and adversely impact HMC's property, such that the value of HMC's property may be diminished, and any ownership interest held by respective Representatives consequently will be diminished.

71. Representatives otherwise are concerned that valuable cultural resources, such as an ancient, Native-American worship site known as "Eagle Rock," are being and will be desecrated and destroyed by Kennecott.

72. Representatives have visited Eagle Rock in the past because of its historical and cultural significance, intend to visit the site in the future but for its proposed control and future destruction by Kennecott, would like for the site to be preserved and protected so they can share the experience of this one-of-a-kind cultural treasure with others, and otherwise believe preservation of the site is invaluable for the historical and cultural character of the Yellow Dog Plains.

73. HMC, on behalf of the Representatives and other members, therefore seeks to enforce the Corps' mandatory duties to initiate *preconstruction* permitting proceedings mandated

by the RHA and CWA, as well as the Federal Defendants' mandatory, corresponding *procedural* obligations to undertake proper environmental and cultural assessments under NEPA, ESA, and NHPA, before allowing any further construction, or Kennecott's proposed operation, of the Eagle Mine.

74. The rights HMC seeks to vindicate, specifically include the Representatives and members' rights to have the Federal Defendants determine through mandatory permitting proceedings and corresponding assessments, whether Marquette County, Michigan (in general), and Salmon Trout River (specifically), are even permissible locations for the Eagle Mine.

75. HMC, on behalf of the Representatives and remaining members, further seeks to enjoin Kennecott's ongoing, illegal construction of the Eagle Mine to preserve the status quo pending resolution of HMC's claims against the Federal Defendants, and to preserve this Court's jurisdiction over the matters in dispute.

C. The Eagle Mine Project

76. Through operation of the Eagle Mine, Kennecott intends to extract approximately 4,000,000 metric tons of a "sulfide" ore body and rock located directly underneath the headwaters of the Salmon Trout River and adjacent wetlands.

77. "Sulfide" mining is conducted by extracting rock constituted of large quantities of sulfide, and smaller quantities of valuable minerals; in this case, primarily nickel and copper.

78. An acknowledged, and expected, consequence of sulfide mining is that when sulfide ore is exposed to air and water, the ore produces sulfuric acid that leaches toxic metals from the ore and releases the toxins.

79. This phenomenon commonly is known as “acid rock drainage” or “acid mine drainage.”

80. In total, Kennecott projects that it will excavate the approximately 4,000,000 tons of rock during an approximately eleven-year operational life of the Eagle Mine.

81. The facilities Kennecott has constructed, and intends to construct, to facilitate these mining operations can be categorized as “surface facilities” and “subsurface facilities.”

82. The subsurface facilities are the component of Kennecott’s ongoing, illegal construction that have triggered RHA and CWA permitting mandates at issue in this litigation.

The Eagle Mine Surface Facilities

83. Kennecott’s surface facilities span approximately ninety-two acres and include, *inter alia*, a compressor plant to generate compressed air for mining operations, a generator plant for powering operations at the facilities, a propane storage and mine heater, a loading dock and warehouse, fuel storage area, septic system, office buildings, parking areas, an assay lab to test for metal content in extracted ore, a maintenance shop, a truck wash and scales, storage buildings to house explosives, a 110-ton fly ash silo to store “Class C fly ash,” a 110-ton cement silo to store Portland cement, a treated water infiltration system that will act as a “drainfield” for the disposal of treated wastewater from mining operations, a soil stockpile area, an aggregate storage area for clean aggregate, a construction staging area, a crusher ramp to aid in transporting crushed ore to storage bins, a crusher conveyor and crushed ore storage area, and holding ponds and waste water treatment facilities that will collect, treat, and discharge wastewater generated during development, operation, and closure of the Eagle Mine and ancillary facilities.

84. Surface facilities also will include a “Mine Ventilation Air Raise,” which is an exhaust stack that will extend 65 feet above ground to emit exhaust containing toxic, metallic dust from underground mining operations.

85. Kennecott has not yet obtained an appropriate air permit under either state or federal law, such as a “Prevention of Significant Deterioration” permit, required prior to commencing construction of the exhaust stack under the Clean Air Act.

86. To construct the “subsurface facilities” (discussed below), Kennecott will need to excavate approximately 378,914 tons of sulfide waste rock, which must be brought to the surface and stored in a six-acre “Temporary Development Rock Storage Area” at the site.

87. That waste rock eventually will be re-deposited subsurface, along with additional pollutants such as fly ash, lime, and Portland cement, to fill voids created during excavation and mining operations.

88. A fleet of forty, 56-ton ore trucks otherwise will transport crushed sulfide ore daily from the subsurface facilities to the surface of the Eagle Mine, then to another facility (the “Humboldt Mill”) located in Marquette County for further processing.

Subsurface, “Permit-dependent” Facilities

89. Within the past several months, Kennecott has begun excavation and construction of the subsurface portion of the Eagle Mine, and it is these activities that trigger the RHA and CWA permitting requirements, and in turn, NEPA, ESA, and NHPA obligations.

90. The “portal,” or opening, to the Eagle Mine’s subsurface mineshaft is the threshold that has transitioned Kennecott’s construction work from private conduct subject

primarily to state-based regulation and limited federal involvement, to activity that demands extensive federal oversight and approval.

91. The portal is the entrance to the tunnel that will descend approximately a half-mile subsurface into Kennecott's mineshaft.

92. The portal is located near the base of the more than 1,000 year old, sacred, Native-American worship site, Eagle Rock.

93. To supplement the portion of the portal that already has been constructed, Kennecott intends to blast an opening at the base of Eagle Rock.

94. Kennecott already has cordoned off access to Eagle Rock and will continue to do so during the life of the Eagle Mine operations.

95. In addition to degrading, desecrating, and destroying substantially all of Eagle Rock, Kennecott's activities will prevent the Keweenaw Bay Indian Community, indigenous to the area, as well as interested persons like the HMC Representatives, from accessing what's left of Eagle Rock during the life of the Eagle Mine operations.

96. Kennecott's actual mineshaft "tunnel" will span approximately one mile subsurface.

97. The circumference of the tunnel will be approximately 15' x 15'.

98. Whereas the portal opening, at ground surface, is located near the surface waters of the Salmon Trout River, the subsurface tunnel actually will intersect (at portions) and run parallel (at other portions) directly underneath the Salmon Trout River or adjacent wetlands that are within the ordinary high water mark of the River.

99. Kennecott otherwise will conduct excavation and mining to access ore, essentially all of which is located directly underneath the River and wetlands.

100. A map, depicting the location of the subsurface ore body and Eagle Mine subsurface facilities directly underneath the Salmon Trout River and wetlands is attached as Exhibit A.

101. The subsurface facilities at the Eagle Mine otherwise will include, *inter alia*, a cement plant where trucks will be loaded with cement for backfilling mined-out areas, automated ore collection equipment, drilling equipment, and other vehicles.

102. Kennecott proposes to use the “longhole stope” method of mining, which involves the removal of ore in vertical sections from the bottom of the ore body upward.

103. A series of primary voids, called “stopes,” which will be approximately 33 feet wide, 98 feet high, and 164 feet long, and separated by sections of intact rock, will be created by sequential blasting to create the voids.

104. Kennecott eventually will backfill these “primary” stopes with cemented fill, including imported aggregate.

105. Explosives then will be used to remove the remaining rock, located between the backfilled primary stopes.

106. Some of these “secondary” stopes eventually will be backfilled with a mixture of limestone and “development rock,” which is the waste rock that will be excavated during construction of the mine tunnel and stored at the surface during mine operations.

107. Notwithstanding this general process, several miles of bored-out space (which will correspond with several million cubic feet in volume), intentionally will not be backfilled by

Kennecott, on the assumption those spaces will remain as open, empty voids—assuming they do not collapse.

108. During excavation and construction of the subsurface facilities, and as a result of excavation and mining operations, Kennecott will drawdown water in a manner that will lower the water table of the Salmon Trout River, as well as wetlands and other water bodies within the Salmon Trout River watershed.

109. It also will reduce the flow of the River as well as change its temperature and water chemistry, while reducing its reach.

110. Because the subsurface work Kennecott has begun is the activity that triggers the RHA and CWA permitting requirements discussed below, that work hereafter will be referred to as the “Permit-dependent work.”

111. Given the effects the Permit-dependent work will have on the Salmon Trout River and wetlands, as well as Kennecott’s draining, dredging, and filling of these waters, the Permit-dependent work is illegal in the absence of RHA and CWA permits.

V. Regulatory Background

112. It is illegal for Kennecott to have begun *any* Permit-dependent work without first obtaining RHA and CWA permits from the Corps.

113. The Corps’ permitting obligations in turn trigger mandatory obligations to conduct environmental and cultural evaluations under NEPA and NHPA, as well as a mandatory ESA “consultation” with the FWS; all of which must occur *before* the Corps can determine whether Kennecott’s construction and proposed operation of the subsurface facilities at the Eagle Mine even is permissible.

114. None of the Defendants have fulfilled, nor submitted to, these absolute preconditions to the Permit-dependent work.

A. RHA Obligations

115. Section 403 of the RHA provides: “The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . and it shall not be lawful to *excavate* or *fill*, or *in any manner to alter* or *modify* the course, location, *condition*, or *capacity* . . . of the channel of any *navigable water of the United States*, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army *prior to beginning the same.*” (emphasis added).

116. “Navigable waters” of the United States include those, which “have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” *See* 33 C.F.R. § 329.

117. The Salmon Trout River, in the past, has been used for commercial activities such as logging; currently is, and in the past has been, used for commercial and recreational activities such as boating and fishing; and otherwise is a direct tributary to Lake Superior.

118. The River consequently is “navigable” within the meaning of the RHA. *See* 33 C.F.R. §§ 329.4, 329.8.

119. The River’s “navigable” status under the RHA, and the Corps’ corresponding regulatory duties, “extend laterally to the entire water surface and bed of [the] navigable waterbody, which includes all the land *and waters below the ordinary high water mark*” 33 C.F.R. § 329.11(a) (emphasis added).

120. By operation of this standard, the headwaters and wetlands that border and feed the Salmon Trout River at the Eagle Mine site are “navigable,” and within the Corps’ RHA jurisdictional responsibilities.

121. Under the plain language of section 403, Congress has delegated to the Secretary of the Army the duty to authorize or prohibit work related to navigable waters. *See also* 33 C.F.R. § 322.3(c)(2).

122. The Secretary of the Army in turn has delegated to the respective District Engineers of the Corps (here, Defendant Derosier), responsibility for administering section 403 mandates. *See* 33 C.F.R § 325.8(b).

123. The Corps executes its obligations under section 403 by issuing “permits,” *see* 33 C.F.R. § 320.2(b), which hereafter will be referred to as “403 Permits.”

124. The Corps has promulgated regulations found at 33 C.F.R., Part 322, to identify specific activities that trigger the Corps’ duty to issue 403 Permits *before* a person can engage in regulated activities.

125. Under subpart 322.3(a), the Corps mandates that “[Department of the Army (“DA”)] permits are required under [the RHA] for *structures* and/or *work* in or *affecting* navigable waters of the United States” (emphasis added).

126. Subpart 322.2(b) then expansively defines “structures” to include all physical structures, “without limitation.”

127. Subpart 322.2(c) in turn expansively defines “work,” “without limitation,” to include “excavation” “or other modification.”

128. Excavation and tunneling “work” underneath a navigable water, construction of any “structure” underneath a navigable water, and any activities that otherwise affect the capacity of a navigable water are activities that require a 403 Permit.

129. Specifically, 33 C.F.R. § 322.3(a) provides: “Structures or work” not physically *in* a “navigable water,” nonetheless require a 403 permit, “if these structures or work *affect* the course, location, or condition of the waterbody in such a manner *as to impact on its navigable capacity*. For purposes of a [403] permit, a *tunnel* or other *structure* or work *under* . . . a navigable water of the United States *is considered to have an impact on the navigable capacity of the waterbody.*” (emphasis added).

130. Notwithstanding that Kennecott is engaging in “tunneling” work underneath the Salmon Trout River and adjacent wetlands that fall within the River’s ordinary high water mark, is creating a mine “structure” underneath the Salmon Trout River and corresponding wetlands, will excavate and mine ore located directly underneath the Salmon Trout River and wetlands, and otherwise will alter the navigable capacity of the River and wetlands by drawing down the water table and changing flow, Kennecott does not have, and has failed even to seek, a 403 Permit authorizing these regulated activities.

B. CWA Obligations

131. Under the CWA, the “Secretary of the Army, acting through the Chief of Engineers” is the federal officer charged with assessing whether to issue a “permit” “for the discharge of *dredged or fill* material into the navigable waters at specified disposal sites.” 33 U.S.C. § 1344(a) (emphasis added).

132. The Secretary of the Army in turn has delegated responsibility for administering the section 404 permitting program to respective District Engineers of the Corps, *see* 33 C.F.R. § 325.8(b); here, Defendant Derosier.

133. Such activities consequently are permissible only if a person obtains a “dredge and fill” permit authorized by section 404 of the CWA, which hereafter will be referred to as a “404 Permit.”

134. Although section 404 of the CWA refers to discharges into “navigable waters of the United States,” common practice is to refer to section 404 jurisdiction in terms of discharges affecting “waters of the United States.” *See* 33 C.F.R. § 328.1

135. This difference in nomenclature reflects a distinction without a difference, *in this case*, because the Corps defines the scope of CWA jurisdiction in a manner that makes CWA jurisdiction coextensive with the RHA “navigable waters” at issue.

136. For instance, the Corps’ CWA regulations mirror RHA regulations by defining jurisdictional waters to include, *inter alia*:

- a) “All waters which are currently used, or were used in the past, or may be susceptible to use in interstate . . . commerce” *See* 33 C.F.R. § 328.3(a)(1).
- b) “All other waters such as intrastate lakes, rivers, streams . . . , wetlands, . . . , or natural ponds, the use, degradation or destruction of which could *affect* interstate . . . commerce. *See* 33 C.F.R. § 328.3(a)(3) (emphasis added).
- c) “Tributaries” of interstate waters. *See* 33 C.F.R. § 328.3(a)(5).
- d) “Wetlands adjacent to” jurisdictional waters. *See* 33 C.F.R. § 328.3(a)(7).

137. RHA and CWA jurisdiction consequently are coextensive for purposes of the Salmon Trout River and corresponding wetlands that will be alerted and otherwise adversely affected by Kennecott's excavation, mining, and eventual backfill activities.

138. These waters fall within the Corps' section 404-permitting jurisdiction not only because they collectively are within the ordinary high water mark of the Salmon Trout River, but because under section 404, wetlands adjacent to a water of the United States are by default jurisdictional: "When adjacent wetlands [to non-tidal waters] are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands." *See* 33 C.F.R. § 328.3(c)(2).

139. Kennecott's excavation (i.e. "dredge") and intent to redeposit backfill (i.e. "fill") consequently fall within the scope of section 404.

140. Notwithstanding that Kennecott is engaging, and intends to engage, in these activities, Kennecott does not have, and has failed even to seek, a 404 Permit authorizing the activities.

141. As a part of the 404 Permit process, Kennecott must overcome the *presumption* that a practicable, less environmentally damaging alternative site exists, which is outside special aquatic sites such as wetlands. *See* 40 C.F.R. § 230.10.

C. NEPA Obligations

142. Congress enacted NEPA based on its recognition of "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth . . ., resource exploitation . . . and new and expanding

technological advances, and . . . the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man” 42 U.S.C. § 4331(a).

143. Congress declared it would be “the continuing policy of the Federal Government . . . to use all practical means and measures . . . to create and maintain conditions under which man can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.” 42 U.S.C. § 4331(a).

144. Consistent with this purpose, NEPA establishes “action-forcing” provisions to ensure that federal agencies evaluate potential environmental impacts *before* approving activities within the agencies’ jurisdiction.

145. NEPA therefore mandates that such agencies must include in every recommendation for, or report on, “major federal actions” that will significantly affect the quality of the human environment, a detailed statement on:

- a) the environmental impact of the proposed action,
- b) the adverse environmental effects which cannot be avoided should the proposal be implemented,
- c) alternatives to the proposed action,
- d) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- e) any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C).

146. Pursuant to NEPA, and presidential Executive Orders Nos. 11514 and 11991, the White House Council on Environmental Quality (“CEQ”) has promulgated regulations implementing NEPA.

147. Relevant CEQ regulations are found at 40 C.F.R., Part 1500.1 - 1508.28, and they unequivocally provide that they operate to “tell federal agencies what they *must do* to comply with the procedures and achieve the goals of NEPA.” 40 C.F.R. § 1500.1(a) (emphasis).

148. The regulations specify that the class of activities that will trigger NEPA mandates are those that constitute, “major federal action.”

149. Such activities generally include, *inter alia*: “actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18.

150. Such “actions” expressly include those “new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, *regulated*, or *approved by federal agencies . . .*” 40 C.F.R. § 1508.18(a) (emphasis added).

151. The 403 and 404 Permits Kennecott needs (but has failed to request, much less obtain) constitute “major federal action” within the meaning of NEPA, because Kennecott’s Permit-dependent work is “regulated” by the Corps and must be “approved by” the Corps.

152. The Corps consequently must initiate, and Kennecott must submit to, a proper NEPA evaluation *before* any RHA section 403 or CWA section 404 Permit can be issued.

153. To complete the required evaluation, the CEQ regulations mandate that the Corps *must* prepare an “Environmental Assessment” (“EA”) and potentially an “Environmental Impact Statement” (“EIS”), which constitute formal analyses of the potential environmental impacts of proposed actions.

154. These general requirements normally are executed in three major steps:

- a) Preparation of an EA, which is defined as a “concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for

determining whether to prepare an [EIS]” 40 C.F.R. § 1508.9. The preparation of an EA may be omitted, however, if the agency decides at the outset the proposed action merits preparation of an EIS. *See* 40 C.F.R. § 1501.4.

- b) If an agency prepares an EA and determines that the proposed federal action will not significantly affect the environment, it may prepare a Finding of No Significant Impact (“FONSI”), which is defined as a document briefly presenting the reasons why an action will not have a significant effect on the environment and for which an EIS therefore will not be prepared. *See* 40 C.F.R. § 1508.13.
- c) If, however, an agency determines that proposed federal action *may* significantly affect the environment, the agency must commence a “scoping” process as the initial step in preparation of a comprehensive EIS. *See* 40 C.F.R. § 1501.4.

155. Regardless of the specific mechanisms the Corps employs to fulfill its NEPA obligations, as a matter of law, the NEPA evaluation *must* be completed *before* the agency can consummate agency action; here, issuance of potential permits to Kennecott.

156. For instance, 40 C.F.R. § 1501.1(b) mandates: “NEPA procedures *must* insure that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken.” (emphasis added).

157. The EA, and potentially the EIS, must evaluate not only the Eagle Mine, but all “Connected Actions,” such as the “Humboldt Mill” and any related transportation facility Kennecott intends to operate or use in connection with the Eagle Mine. *See* 40 C.F.R. § 1508.25.

D. ESA Obligations

158. The United States Supreme Court has characterized the ESA as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

159. The purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b).

160. Congress intended this objective to be carried out, “whatever the costs.” *Hill*, 437 U.S. at 184.

161. As such, “all [f]ederal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities [to further] the purposes of [the ESA].” 16 U.S.C. § 1531(c)(1).

162. The ESA therefore imposes substantial, continuing, and affirmative obligations on federal agencies.

163. Specifically, under the ESA, all federal agencies must ensure that any action they authorize, fund, or carry out is not likely to “jeopardize” a listed species or adversely modify its critical habitat.

164. The word “jeopardize” is defined as agency action that “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species . . . by reducing the reproduction, numbers, or distribution.” 50 C.F.R. § 402.02.

165. The ESA therefore requires a “procedural consultation” when any agency proposes an action that *may* affect an endangered species. *See* 16 U.S.C. § 1536; 50 C.F.R. § 402.14(a).

166. As part of this process, an agency, such as the Corps, must use the best scientific and commercial data available, *and consult with the FWS*, if it has reason to believe an

endangered species *may be* present in the area of a proposed action. *See* 16 U.S.C. § 1536(a)(3) and 1536(c)(1).

167. For purposes of these provisions, the “action area” is the area that is affected directly *or* indirectly by the proposed agency action. *See* 50 C.F.R. § 402.02.

168. As such, during consultation with the FWS, a federal agency must expansively characterize a project’s “action area”—not just the “immediate area involved”—when evaluating the potential for jeopardy to covered species. *See* 50 C.F.R. § 402.02.

169. This process is carried out through an incremental approach, including establishing:

- a) the presence of a species,
- b) potential effects on the species,
- c) adverse effects, and
- d) whether a species will be jeopardized by the adverse effects.

170. ESA regulations provide several different means to make these determinations, including: Biological Assessment, Informal Consultation, and Formal Consultation.

171. A “Biological Assessment” is a study prepared under the direction of the FWS, which evaluates the potential effects of a project on an endangered species. *See* 50 C.F.R. § 402.02.

172. Such an assessment is to be performed when a major construction project *is about to take place*, and the assessment must be completed *before* the project begins. *See* 50 C.F.R. § 402.12(b)(2).

173. If the Biological Assessment leads to the conclusion that there may be adverse impacts on a species, then an agency must submit to “Formal Consultation” with the FWS before authorizing any action.

174. “Informal Consultation” is an alternative, preliminary step in the ESA process.

175. An agency therefore can engage in an Informal Consultation with the FWS, in lieu of a Biological Assessment. *See* 50 C.F.R. § 402.12(k).

176. Like the Biological Assessment, if during Informal Consultation, it appears an endangered species is likely to be affected by a project, Formal Consultation is required. *Id.*

177. Formal Consultation requires an in-depth analysis of a project’s possible impact.

178. The FWS must fulfill clearly articulated duties, and at the end of the process, must provide a “Biological Opinion” that contains precise, in-depth information regarding its findings related to the species at issue. *See* 50 C.F.R. § 402.14(g); 50 C.F.R. § 402.14(h).

179. Here, because Kennecott has proceeded with Permit-dependent work without seeking the permits required under RHA section 403 and CWA section 404, it has undermined the ESA consultation process by improperly narrowing the scope of the required evaluation.

E. NHPA Obligations

180. Section 106 of the NHPA, which is found at 16 U.S.C. § 470f, imposes upon federal agencies an absolute duty to evaluate the impact federally authorized activities will have on historical sites *before* any such authorization can be given.

181. Pursuant to the section:

the head of any Federal department or independent agency having authority to *license* any undertaking shall . . . *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 in *or eligible for inclusion in the National Register*.

(emphasis added).

182. The “National Register” is the “National Register of Historic Places,” which is a listing maintained by the Interior Department identifying “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture. . . .” 16 U.S.C. § 470a(a)(1).

183. Because section 106 evaluations apply to sites already listed in the National Register, as well as sites “eligible for inclusion,” the inclusion criteria *must* be considered by a responsible agency to determine whether NHPA obligations apply.

184. The criteria operate as follows:

The quality of significance in American *history*, architecture, *archeology*, engineering, and *culture* is present in districts, *sites*, buildings, *structures*, and *objects* that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) *that are associated with the lives of persons significant in our past*; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) *that have yielded, or may be likely to yield, information important in prehistory or history*.

36 C.F.R. § 60.4 (emphasis added).

185. Eagle Rock currently is not listed within the “National Register,” but under the foregoing criteria, it is “eligible,” because it is a one-of-a-kind, naturally occurring geographic feature, which has been used as a religious and worship site by indigenous Native American tribes *for more than a millennium*.

186. The Corps consequently cannot “license” any activity that will affect Eagle Rock without first undertaking a NHPA evaluation.

187. The evaluation requires the Corps to, *inter alia*:

- a) Consult with the “Advisory Council on Historic Preservation” regarding the potential effect on Eagle Rock. *See* 36 C.F.R. §§ 800.1(a), 800.16(g).
- b) Complete the consultation and evaluation *before* issuing any requested permit. *See* 36 C.F.R. §§ 800.1(c), 800.2(a).
- c) Include interested parties in the consultation process, such as members of the general public, affected Native American tribes, and other agencies. *See* 36 C.F.R. §§ 800.2(a)(4), 800.2(c).
- d) Determine whether the proposed activity will have “adverse effects” on the site, which are defined to include, *inter alia*, “[p]hysical destruction of or damage to all *or part* of the property.” *See* 36 C.F.R. §§ 800.3(a), 800.5(a)(1), 800.5(a)(2)(i) (emphasis added).
- e) Complete a consultation regarding the “adverse effects” that requires the Corps “to develop and evaluative alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects” *See* 36 C.F.R. § 800.6(a).

188. Although a federal agency, like the Corps, *must* complete the NHPA evaluation before issuing a permit, it is permissible for the Corps to incorporate the evaluation in a NEPA evaluation. *See* 36 C.F.R. §§ 800.2(a)(4), 800.3(b), 800.8.

F. Agency Inaction Subject to Judicial Review and Enforcement

189. The Corps' failure to administer the RHA and CWA permitting programs related to Kennecott's unauthorized Permit-dependent work constitutes agency "inaction" or action "unlawfully withheld" within the meaning of, and actionable through, the APA.

190. Section 702, 5 United States Code, provides: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or *failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." (emphasis added).

191. Moreover, pursuant to 5 U.S.C. § 706(1), a "reviewing court shall . . . compel agency action unlawfully *withheld* . . ." (emphasis added).

192. In the alternative, the Mandamus Act provides the remedial basis for HMC to compel the Federal Defendants to fulfill their congressionally mandated duties under the RHA, CWA, NEPA, ESA, and NHPA.

193. To ensure the relief HMC seeks against the Federal Defendants will not be rendering meaningless by Kennecott's ongoing, illegal activities, and to preserve this Court's ability to adjudicate the impropriety of Kennecott's ongoing construction without the risk of mootness, HMC is entitled to equitable relief against Kennecott pursuant to the All Writs Act or, in the alternative, this Court's "inherent powers."

COUNT I

RHA VIOLATION

194. Paragraphs 1 through 193 of this Complaint are incorporated herein by reference.

195. For the reasons pleaded above, Kennecott's "tunneling" work underneath the Salmon Trout River and adjacent wetlands within the ordinary high water mark of the River, creation of a mine "structure" underneath the Salmon Trout River and wetlands, intent to mine and excavate ore located underneath the Salmon Trout River and wetlands, and alteration of the navigable capacity of the River by drawing down the water table and altering flow, all are activities that require a RHA section 403 Permit.

196. Alternatively, these activities at minimum require invocation of the Corps' jurisdiction, to identify some basis to justify a finding that the activities do not require a section 403 Permit.

197. Kennecott neither has applied for, nor obtained, a section 403 Permit.

198. Its ongoing construction activities consequently are illegal and unauthorized.

199. The Corps is abdicating its congressionally mandated duties under the RHA and implementing regulations by failing to require Kennecott to submit to RHA permitting proceedings before continuing any further Permit-dependent work at the Eagle Mine.

200. By so doing, the Corps not only violates its responsibility set forth in the RHA, but also HMC's procedural rights.

WHEREFORE, HMC respectfully requests this Honorable Court to: (1) enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Salmon Trout River and corresponding wetlands within the ordinary high water mark of the River are navigable waters of

the United States, and Kennecott's construction and proposed operation of the Eagle Mine underneath, or otherwise affecting the River and wetlands, is illegal in the absence of a RHA permit; (2) enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Corps has not complied with its obligation under the RHA to require Kennecott to submit to permitting procedures mandated by the RHA; (3) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to 28 U.S.C. § 2202, the APA—or, in the alternative, the Mandamus Act, directing the Corps to fulfill its permitting responsibilities under the RHA; (4) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to the All Writs Act, or this Court's inherent powers, prohibiting Kennecott's continued, illegal construction of the Eagle Mine without first submitting to permitting procedures mandated by the RHA; and (5) grant HMC all other relief, at law or in equity, to which it may be entitled.

COUNT II

CWA VIOLATION

201. Paragraphs 1 through 200 of this Complaint are incorporated herein by reference.

202. For the reasons pleaded above, Kennecott's "dredge and fill" activities related to its ongoing construction and potential operation of the Eagle Mine are activities that require a CWA section 404 Permit.

203. Alternatively, these activities at minimum require invocation of the Corps' jurisdiction, to identify some basis to justify a finding that the activities do not require a section 404 Permit.

204. Kennecott neither has applied for, nor obtained, a section 404 Permit.

205. Its ongoing construction activities consequently are illegal and unauthorized.

206. The Corps is abdicating its congressionally mandated duties under the CWA and implementing regulations by failing to require Kennecott to submit to CWA permitting proceedings before continuing any further Permit-dependent work at the Eagle Mine.

207. By so doing, the Corps not only violates its responsibility set forth in the CWA, but also HMC's procedural rights.

WHEREFORE, HMC respectfully requests this Honorable Court to: (1) enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that Kennecott's dredge and fill activities are illegal without a permit required by the CWA; (2) enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Corps has not complied with its obligation under the CWA to require Kennecott to submit to permitting procedures mandated by the CWA; (3) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to 28 U.S.C. § 2202, the APA—or, in the alternative, the Mandamus Act, directing the Corps to fulfill its permitting responsibilities under the CWA; (4) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to the All Writs Act, or this Court's inherent powers, prohibiting Kennecott's continued, illegal construction of the Eagle Mine without first submitting to permitting procedures mandated by the CWA; and (5) grant HMC all other relief, at law or in equity, to which it may be entitled.

COUNT III

NEPA VIOLATION

208. Paragraphs 1 through 207 of this Complaint are incorporated herein by reference.

209. For the reasons pleaded above, the RHA section 403 Permit and CWA section 404 Permit the Corps would need to issue to Kennecott *before* Kennecott could continue any

further Permit-dependent work, each constitute “major federal action” triggering the Corps’ mandatory obligations under NEPA.

210. No such permits consequently can be issued unless the Corps completes a proper NEPA evaluation, and even then, only if upon completion of the evaluation, the Corps determines Kennecott should in fact be allowed to construct and operate the Eagle Mine underneath the Salmon Trout River, and corresponding wetlands, in Marquette, County Michigan.

211. The Corps’ failure to conduct a NEPA evaluation is not merely academic, because notwithstanding the state of Michigan has independent state-based regulatory schemes that were triggered when Kennecott previously began construction of the Eagle Mine’s surface facilities, those state regulatory schemes do not excuse the Corps’ failure to conduct its own, *federal* evaluation triggered by the Permit-dependent work.

212. A state-based permit related to the Eagle Mine even provides: “Compliance with the provisions of [state mining law] does not relieve the permittee of the obligation to comply . . . with all other applicable . . . federal . . . statutes, regulations, or ordinances.”

213. Additionally, Congress expressly legislated that even in narrow circumstances when state-based actors are authorized to prepare environmental materials that correspond with NEPA, responsible federal agencies still must: (a) furnish guidance and participate in such preparation, (b) *independently* evaluate such material prior to approval and adoption, and (c) retain responsibility for the scope, objectivity, and content of the material and any other responsibilities under NEPA. *See* 42 U.S.C. § 4332(D).

214. Here, the Corps has not played any role, at the state, federal, or any other level, with an evaluation mandated by NEPA.

215. Because the Corps has played no such role, no regard has been given for NEPA mandates the implicate whether Kennecott even should be allowed to construct or operate the Eagle Mine.

216. For instance, the Corps is obligated, but has not, determined whether there is an adequate “purpose and need” for the Eagle Mine. *See* 40 C.F.R. § 1508.9.

217. In failing to do so, the Corps has not determined whether there are other, more acceptable, “alternatives” to the Eagle Mine. *See* 40 C.F.R. § 1502.13; 40 C.F.R. § 1508.9.

218. Any proper analysis of the “alternatives” would have to include “the alternative of no action,” which means the Corps must explore the possibility that the Eagle Mine should not be constructed at all. *See* 40 C.F.R. § 1502.14(d).

219. None of these, or the remaining, requirements under NEPA have been satisfied.

220. The Corps consequently is violating its responsibilities set forth in NEPA, which in turn violates HMC’s procedural rights.

WHEREFORE, HMC respectfully requests this Honorable Court to: (1) enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that any putative RHA 403 Permit related to the Eagle Mine constitutes “major federal action” mandating compliance with all applicable provisions and regulations under NEPA; (2) enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that any putative CWA 404 Permit related to the Eagle Mine constitutes “major federal action” mandating compliance with all applicable provisions and regulations under NEPA; (3) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to

28 U.S.C. § 2202, the APA—or, in the alternative, Mandamus Act, directing the Corps to fulfill its obligations to conduct a proper environmental evaluation mandated by NEPA; (4) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to the All Writs Act, or this Court’s inherent powers, forbidding Kennecott’s construction or proposed operation of the Eagle Mine unless the Corps completes an environmental evaluation pursuant to NEPA, and thereafter authorizes any such construction or operation; and (5) grant HMC all other relief, at law or in equity, to which it may be entitled.

COUNT IV

ESA CONSULTATION VIOLATION

221. Paragraphs 1 through 220 of this Complaint are incorporated herein by reference.

222. For the reasons pleaded above, the Corps has not engaged in an environmental consultation with the FWS, which is adequate to account for the scope of the Permit-dependent work.

223. The United States Environmental Protection Agency (“EPA”) and FWS did engage in an ESA consultation related to narrow components of the Eagle Mine known as “underground injection wells,” which Kennecott and the EPA previously thought would require a permit under the EPA-administered “Unground Injection Control Program.”

224. For purposes of that limited consultation, the EPA assumed the “action area,” which defined the scope of the ESA evaluation, was limited to only the surface facilities at the Eagle Mine.

225. The FWS slightly expanded the “action area” during the consultation process, to include the underground portions of the injection wells, but neither the EPA nor FWS conducted

a consultation that accounts for the expansive Permit-dependent work subject to the Corps' 403 and 404 permitting jurisdiction, or indirect species impacts in and around the Salmon Trout River watershed related to Kennecott's Permit-dependent work and operation of the Eagle Mine.

226. By way of example only, no consideration was given to the impacts subsurface construction activities will have on water drawdown, or alteration of the flow and temperature of the River, and how those impacts may affect covered species.

227. The EPA's prior, narrow ESA consultation consequently was not sufficiently broad in scope to alleviate the *Corps'* obligation to consult with the FWS regarding the Permit-dependent work and Eagle Mine operations.

228. This failure infringes upon HMC's procedural rights.

WHEREFORE, HMC respectfully requests this Honorable Court to: (1) enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that pursuant to the ESA, the Corps and FWS must engage in an appropriate species "consultation" to assess all impacts Permit-dependent work at, or related to, the Eagle Mine *may* have on covered species; (2) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to 28 U.S.C. § 2202, the APA—or, in the alternative, Mandamus Act, directing the Corps and FWS to fulfill their obligations to conduct an ESA evaluation regarding and related to the Permit-dependent work; (3) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to the All Writs Act, or this Court's inherent powers, forbidding Kennecott's construction or proposed operation of the Eagle Mine unless the Corps and FWS complete a proper ESA evaluation, and thereafter authorize any such construction or operation; and (4) grant HMC all other relief, at law or in equity, to which it may be entitled.

COUNT V

NHPA VIOLATION

229. Paragraphs 1 through 228 of this Complaint are incorporated herein by reference.

230. For the reasons pleaded above, Eagle Rock is a site eligible for inclusion in the National Register.

231. Kennecott's intent to destroy and cordon off Eagle Rock are adverse effects, which must be evaluated by the Corps before it can authorize construction or operation of the Eagle Mine.

232. The Corps has not engaged in the required NHPA evaluation.

233. Kennecott's Permit-dependent work at the Eagle Mine is impermissible absent the evaluation, and HMC's procedural rights are being impaired by the Corps' inaction.

WHEREFORE, HMC respectfully request this Honorable Court to: (1) enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the Corps must engage in an appropriate NHPA evaluation to assess and address impacts Permit-dependent work will have on Eagle Rock; (2) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to 28 U.S.C. § 2202, the APA—or, in the alternative, Mandamus Act, directing the Corps to fulfill its obligations to conduct a NHPA evaluation regarding Eagle Rock; (3) grant a temporary restraining order and preliminary and permanent injunctive relief pursuant to the All Writs Act, or this Court's inherent powers, forbidding Kennecott's construction or proposed operation of the Eagle Mine unless the Corps completes a NHPA evaluation regarding Eagle Rock, and thereafter authorizes any such construction or operation; (4) award HMC fees and

costs pursuant to 16 U.S.C. § 470w-4; and (5) grant HMC all other relief, at law or in equity, to which it may be entitled.

May 6, 2012

Respectfully submitted,

s/ Steven A. Harr

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