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April 4, 2010

Kathleen Salyer
Assistant Director, Superfund Division
California Site Cleanup Branch
United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

RE: EPA's noncompliance with the National Historic Preservation Act.

Dear Ms. Salyer,

Thank you for responding to my December 8, 2009 letter to President Barack Obama¹. There is no question that the removal of contaminated mine waste from the Elem Reservation was a very important and necessary project that will benefit future generations of the Elem community. Also of importance and benefit to the Elem community was the historical and cultural information buried in the ground immediately beneath the contaminated fill. Your letter indicates that the EPA had to balance the need to "protect Elem Pomo cultural resources" with the "need to protect human health from the effects of contamination."

This is simply not true. It was not necessary to "balance" these two priorities. If the EPA had complied with Section 106 of the National Historic Preservation Act (NHPA), the mine waste cleanup project could have proceeded as scheduled without damaging or destroying the information contained in the underlying resources.

For readers who may be unaware of the EPA's Elem Indian Colony project, here are the main points regarding National Historic Preservation Act compliance:

- During the 4-year preconstruction planning period, EPA did not conduct any Section 106 consultation as required by the NHPA.

¹ Listed on <http://www.wolfcreekarcheology.com/EPA%20Disaster.htm>

- EPA designed and carried out a mine waste removal action without acknowledging the fact that significant cultural resources existed immediately beneath and around the contaminated fill².
- EPA field staff and contractors failed to halt work and call in a qualified archaeologist when the first significant prehistoric artifacts were discovered in the field on 6-21-06 (a violation of the agreement between EPA and the Elem Tribe). More than a month passed before an archaeologist was called in. During that month, ~7,000 cubic meters of historic resource soils were destroyed with no mitigation.
- Halfway through the project, the Tribe brought in a qualified archaeologist and excavation protocols were agreed upon to stem the destruction of historic resources.
- During the balance of the project, the EPA and its contractors violated the excavation protocols on 12 separate days, causing another 900 cubic meters of unmitigated damage to historical resources.
- To date, the EPA has failed to conduct a “Resource Damage Assessment” and restoration plan for cultural resources damaged by their action. ³
- Neither the Tribe nor the general public have been reimbursed for the value of the resources damaged by the project.

In your March 30, 2010 letter, you indicate that the EPA disagrees with my “characterization of the EPA’s 2006-2007 Elem Indian Colony mine waste removal action.”

I am sorry that the EPA disagrees with my “characterization” of the events that took place during the Elem Indian Colony mine waste removal action.

As the archaeologist⁴ brought in by the Tribe to deal with the resource damage, my characterization was based on first-hand experience. In addition, my characterization of the EPA’s removal action is shared and supported by the

² Some of the prehistoric sites within the project area had been recorded as early as 1949 and revisited by archaeologists in 1975 and 1988. In 2000, Elem Tribal Chairman Jim Brown wrote a letter to the EPA indicating archaeological sensitivity of the area and requesting that an archaeological inspection be conducted.

³ As required by Title 43 Code of Federal Regulations Part 300.165

⁴ Having 38 years of professional expertise in historic and prehistoric archaeological resource management.

Federal Advisory Council on Historic Preservation (ACHP), the Society for American Archaeology, and the Society for California Archaeology⁵.

In your letter, you indicate that the EPA has responded to my claims of damage to Elem Pomo cultural resources in the letter from Keith Takata (Director EPA Region IX Superfund Division) to the ACHP (3-13-07).

Perhaps you should read the Advisory Council's response to Mr. Takata's letter (see attached). The ACHP clearly states:

“Prior to the start of cleanup, EPA did not initiate a formal Section 106 consultation as required by the National Historic Preservation Act (NHPA) for all undertakings that have the potential to affect historic properties.”

The ACHP response goes on to state:

“In the case of the Elem Colony CERCLA cleanup, a location-specific requirement that should have been adhered to was the NHPA.”

“Regrettably, EPA's reluctance to follow the procedures set forth in our regulations to comply with Section 106 resulted in confusion and disagreements among the consulting parties and the public regarding the appropriate measures to effectively identify and evaluate historic properties and to consider measures to avoid, minimize, or mitigate potential adverse effects.”

The ACHP response to the EPA concludes:

“Based on the issues raised by this undertaking, and the need for EPA to better document how it fulfills its Section 106 responsibilities, we encourage you to review your internal guidance about how to better integrate historic preservation into the planning process.”

No only did the EPA's "reluctance to follow procedures" result in "confusion and disagreements between consulting parties and the public", it resulted in the destruction of ~8,000 cubic meters of historic and prehistoric cultural deposits that contained a 12,000-year history of the Elem Community's past. This

⁵ To see the responses of both the SAA and SCA as well as a detailed list of the damage that occurred go to <http://www.wolfcreekarcheology.com/EPA%20Disaster.htm>

archaeological library of historical information is now gone, lost to the Elem Tribe and to the public.

Also distressing is the knowledge that the project could have proceeded as scheduled without damaging or destroying these resources, if only the EPA had followed Section 106 procedures. If these had been followed, the EPA would have known that intact historical resources existed immediately beneath the mine waste. EPA removal plans would have required the contractor to use equipment that would remove the contamination without damaging the underlying soils. The designs for reconstructing roads, water system, drainage system, and house pads would have been engineered to avoid additional damage to those underlying resources.

Your letter talks about correspondence⁶ I have received from the EPA that lists “steps the regional office is currently implementing to assure NHPA compliance during Superfund cleanups.”

That correspondence did not indicate that the EPA has any intention of complying with the NHPA. The letter you discuss outlined a new Region IX policy that stipulates:

1. EPA staff will be periodically trained on NHPA requirements.
2. EPA will develop a stronger relationship with the State Office of Historic Preservation.
3. EPA will explore the feasibility of tapping into historic resource experts from other federal agencies.

Although these “informational” policies look good on paper, none of them require Region IX (or any other EPA region) to comply with Section 106 of the NHPA.

As I indicated in my letter to President Obama and Congress,

“At least 170,000 jobs could be created nationwide right now by bringing the EPA into compliance with the National Historic Preservation Act.

⁶ Letter to John Parker from EPA’s John Kennedy dated 1-14-2010, available online at <http://www.wolfcreekarcheology.com/EPA%20Disaster.htm>.

The EPA routinely neglects its responsibilities under the National Historic Preservation Act as required by EPA's own regulations (40 CFR 300.5, 300...310 and 36 CFR 800). For years, the EPA has destroyed countless historic and prehistoric sites across the U.S. without conducting inventories or impact mitigation as required by the above referenced codes.

Each of the 8,000+ EPA Superfund and infrastructure projects that take place annually across the U.S. would put to work between 20 and 25 historic preservation professionals (including Native Americans, historians, archaeologists, lab technicians and support personnel). This figure doesn't include all the service people needed to house and feed these workers (hotels, restaurants, equipment rentals, hardware stores, etc.)."

Thank you again for responding to my letter, however, your response did not solve the problem of EPA's non-compliance with the National Historic Preservation Act. Nor did your response reimburse the Elem community and the public for the loss of 12,000 years of historical and cultural knowledge caused by the EPA during their mine waste removal project.

Feel free to contact me if you have any comments or concerns.

Sincerely,

John Parker

CC: Barack Obama (President)
Lisa Jackson (EPA Administrator)
House Appropriations Committee
Senate Environment and Public Works Committee
Senate Appropriations Committee
Representative Mike Thompson
Senator Barbara Boxer (Chair, Environment/Public Works Committee)
Senator Dianne Feinstein (Chair Appropriations Subcommittee on Interior, Environment, and Related Agencies)
Keith Takata (Director Superfund Division, EPA Region IX)
Dan Hall (BIA Western Region)
Elem Tribal Council
David Lindsay (Government Affairs, Society for American Archaeology)
Margaret Conkey (President, Society for American Archaeology)
Kristina Roper (President, Society for California Archaeology)
Richard Moe (President, National Trust for Historic Preservation)
John Fowler (Director, Advisory Council on Historic Preservation)



Preserving America's Heritage

December 11, 2007

Mr. Keith A. Takata
Director, Superfund Division
Environmental Protection Agency
75 Hawthorne St. SFD-1
San Francisco, CA 94105

Ref: *Elem Indian Colony Mine Waste Removal Action (CERCLA),
Sulphur Bank Mercury Mine Superfund Cleanup,
Clearlake Oaks, California*

Dear Mr. Takata:

In October 2006, the Advisory Council on Historic Preservation (ACHP) sent you a letter of inquiry regarding the referenced undertaking. The letter was prompted by expressions of concern by a member of the Elem Pomo tribe about the effects of the undertaking on historic properties to which they might attach religious or cultural significance. Since your response to us in March 2007, we have received submittals from other consulting parties and the public expressing concerns about this undertaking. The ACHP, therefore, is providing comments for your consideration regarding the overall coordination of this undertaking by the Environmental Protection Agency (EPA), and suggestions on how to avoid a recurrence of the issues raised by this case.

According to the information we have reviewed, EPA funded and managed a cleanup of contaminated mine wastes deposited by the Bureau of Indian Affairs (BIA) in the 1970s during an improvement project at the Elem Indian Colony (EIC). The BIA improvement project included grading and placement of fill for construction of level house pads, build-up of the base for gravel roadways, and construction of a new paved roadway system. Mine wastes, which were contaminated with high levels of mercury, arsenic, and antimony, were used as fill in the improvement project. The purpose of the EPA cleanup project was to remove the mine wastes and intact soils impacted by leached contaminants, and also to carry out infrastructure repairs and improvements necessitated by the cleanup process. The latter have included reconstruction of the EIC water supply system, reconstruction of paved roadways, installation of a number of new modular homes, and the cleaning and refurbishing of a number of existing homes.

In June 2006, the actual cleanup was initiated. The last of contaminated mine wastes were removed from residential areas at the EIC in October 2006. Prior to the start of the cleanup, EPA did not initiate a formal Section 106 consultation as required by the National Historic Preservation Act (NHPA) for all undertakings that have the potential to affect historic properties. As we understand, EPA concluded that it's obligation to comply with the NHPA was limited given the provisions of the Comprehensive Environmental Response, Compensation, and

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Liability Act (CERCLA), the authorizing legislation for the cleanup. EPA's regulations and guidance for CERCLA actions mandate that CERCLA removal actions comply, *to the extent practicable*, with the applicable or relevant and appropriate requirements (ARARs) of certain other environmental laws as identified on a case-by-case basis (40 CFR §300.415(j)).

In the case of the Elem Colony CERCLA cleanup, a location-specific requirement that should have been adhered to was the NHPA. Based upon EPA's internal guidance, the applicable requirements of the NHPA include those that are substantive, rather than those portions of the law that are procedural or administrative. Accordingly, EPA has concluded that it has complied with the requirements of the NHPA, to the extent required by CERCLA, by consulting with the tribe about cultural resources, protecting sites of religious and cultural significance that were identified by the tribe, establishing a monitoring program in coordination with the tribe to identify significant archaeological deposits encountered during the cleanup, and calling in a professional archaeologist to develop excavation protocols when concerns about the efficacy of the monitoring program were expressed. EPA's actions were influenced by the consensus reached with some members of the tribal government that the probability was low that archaeological deposits with integrity would be encountered during the cleanup given the previous disturbance to the original soil strata in the areas where the mine wastes had been deposited.

EPA guidance (ARARS Q's & A's: General Policy, RCRA, CWA, SDWA, Post-ROD Information, and Contingent Waivers, Pub. 9234.2-01/FS-A, July 1991) indicates that consultation under CERCLA removal actions is broadly interpreted to be an administrative requirement rather than a substantive one. Nonetheless, the guidance strongly encourages consultation with the State Historic Preservation Officer (SHPO) and ACHP. Since the implementing regulations for Section 106, "Protection of Historic Properties" (36 CFR Part 800), establish the procedures for an agency to assess the potential effects of an undertaking on historic properties, it is reasonable to expect that EPA would be guided by these regulations during consultations with the SHPOs/Tribal Historic Preservation Officers (THPOs), Indian tribes, and other consulting parties. Since Section 106 is a consultative process defined as *seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process* (36 CFR §800.16(f)), EPA, ideally, would have been mindful of how to use this process to balance remediation requirements with historic values.

Regrettably, EPA's reluctance to follow the procedures set forth in our regulations to comply with Section 106 resulted in confusion and disagreements among consulting parties and the public regarding the appropriate measures to effectively identify and evaluate historic properties and to consider measures to avoid, minimize, or mitigate potential adverse effects. While the arrangements negotiated between EPA and the EIC may have been appropriate to EPA, they were not formalized into a Section 106 agreement document. It should be noted that the agreed upon arrangement did not effectively specify the responsibilities of parties or establish the process for addressing actions that might have an effect on historic properties.

EPA has advised the ACHP and others that it complied with the NHPA to the extent required by CERCLA through its consultations with the Indian tribe and execution of an agreement with EIC. In a letter to EPA from the EIC tribal chairman, dated February 22, 2007, Chairman Ray Brown acknowledges that EPA worked with the tribal government to address their concerns about the importance of the cleanup and also about impacts to cultural and natural resources. He stresses that the major concern of the tribal government was always the present and future health and safety of the community and a thorough and successful cleanup. The EIC's acceptance of this

arrangement, however, did not include the SHPO or the ACHP, nor was this arrangement formalized as a Section 106 agreement.

Based upon the issues raised by this undertaking, and the need for EPA to better document how it fulfills its Section 106 responsibilities, we encourage you to review your internal guidance about how to better integrate historic preservation into the planning process. We are particularly concerned about how and when consulting parties are notified, what opportunities they have to recommend mitigation measures, and how EPA might balance the requirements of Section 106 with its primary mission under CERCLA, the preservation and enhancement of public health and the environment through its cleanup actions. In the event that EPA concludes that CERCLA and Section 106 review are difficult to coordinate as set forth in 36 CFR Part 800, we would welcome from you an alternative approach for compliance as provided for in 36 CFR Section 800.14 of our regulations.

We appreciate the efforts of your staff to be responsive to our inquiries. Should you have any questions regarding future actions, please contact Dr. John Eddins at 202-606-8533, or via e-mail at jeddins@achp.gov.

Sincerely,

A large, dark, handwritten signature in black ink, appearing to be 'L. Klima', is written over the typed name and title.

L. Klima
Director
Office of Federal Agency Programs