

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.

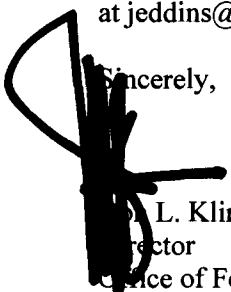
EPA has advised the ACHP and others that it complied with the NHPA to the extent required by CERCLA through its consultations with the Indian tribe and execution of an agreement with EIC. In a letter to EPA from the EIC tribal chairman, dated February 22, 2007, Chairman Ray Brown acknowledges that EPA 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,



L. Klima
Director
Office of Federal Agency Programs