



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

March 13, 2007

Mr. John Eddins
Office of Federal Agency Programs
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 809
Washington, DC 20004

Re: Sulphur Bank Mercury Mine Superfund Site; Elem Indian Colony Mine Waste Removal Action, near Clearlake Oaks, California

Dear Mr. Eddins:

I am pleased to respond to your October 18, 2006 letter to provide information to you regarding the current status of the Elem Indian Colony Mine Waste Removal Action and the steps that EPA has taken to comply with Section 106 of the National Historic Preservation Act and its implementing regulations (36 C.R.F. Part 800) in carrying out this undertaking. (See also Attachment 1.) The information that you have requested is provided with this letter to support your response to the concerns expressed by Mr. Jim Brown III, Elem Tribal Administrator.

On September 27, 2006 EPA excavated the last of the contaminated mine wastes from residential areas at the Elem Indian Colony. The mine wastes that were removed contained high levels of mercury, arsenic and antimony. The high levels of mercury in these mine wastes are particularly harmful to young children and women of child bearing age. EPA is now very near the completion of this phase of the Sulphur Bank Mercury Mine Superfund cleanup. We have completed the reconstruction of the water supply system, rebuilt the paved roadways, installed five new modular homes and cleaned and refurbished seven existing homes. EPA will replace two additional trailers before completing this project.

The Elem Indian Colony Mine Waste Removal Action is a very complex contaminant cleanup action that is unusual in the scope of the excavations of contaminated mine waste that were located on tribal lands currently occupied and used by Elem Tribe members. The Mine Waste Removal Action has had a long history of interactions between EPA and the Tribe to deal with the mine wastes at this site. (See Attachment 2.) The project required EPA and the Tribe to balance a number of important goals including protecting the health and safety of tribal

members, removal of contaminated mine wastes, protection of cultural resources and construction of necessary infrastructure improvements. (See Attachment 3.)

EPA's cleanup project required the excavation of 28,000 cubic yards of contaminated mine wastes from these occupied tribal lands. The contaminated mine wastes were deposited there as construction materials in the early 1970s by the Bureau of Indian Affairs when they performed significant earthmoving construction efforts to build level housing pads above the flood plain, build up existing gravel roadways, and construct a new paved roadway system.

Because of the past use of heavy construction equipment to prepare the foundations for roadways and housing pads in this area, EPA had no expectation that cultural resources would be encountered in these previously disturbed areas. However, because there were no records of this earlier construction phase to guide EPA's design efforts, EPA proposed to the Elem Tribal leadership that the project include construction monitoring to be performed by a trained Elem cultural monitor to identify and protect any artifacts that might inadvertently be discovered during mine waste excavation activities. EPA agreed to bring in an archaeologist if significant artifacts or remains were inadvertently discovered. This approach was discussed with Chairman Ray Brown, Sr. and the Elem Executive Committee. They accepted EPA's proposed cultural resource monitoring approach. EPA also discussed this approach with Elem Indian Colony residents, including Jim Brown III, during the planning stages for this cleanup action. Eagle Brown was hired as the primary cultural monitor because of his past experience as a cultural monitor at the request of the Elem Environmental Office.

During the course of the first phase of excavation activities, after a number of obsidian artifacts and three bone fragments (later identified as animal in origin) were identified and recovered by Elem cultural monitors, several members of the Elem Tribe became concerned that the construction monitoring approach that was agreed upon initially may not be protective of their cultural resources. Chairman Ray Brown, Sr. agreed with their concerns, and instructed EPA to bring in an archaeologist, Dr. John Parker, who was known to the Elem Tribe, and who the Elem Tribe felt confident would be able to guide the remaining excavation activities.

EPA agreed to bring in Dr. Parker, and worked to do so as expeditiously as possible. (See Attachment 4.) Because Dr. Parker was not available immediately to inspect the progress of EPA's work at the Elem Indian Colony, EPA tasked John Holson, Principal Archaeologist with Pacific Legacy, to perform the initial inspection of the mine waste removal excavations and to make recommendations to assure the protection of Elem cultural resources. (See Attachment 5.) EPA hired Dr. Parker to provide oversight of EPA's excavation and backfill activities for the remainder of the project as soon as he became available to begin work. EPA also initiated consultation with the State Office of Historic Preservation, and provided project information for their review. (See Attachment 6.) EPA informed them regarding our ongoing consultation with the Elem Tribe and the commitments that EPA had made to bring in an archaeologist acceptable to the Tribe.

Dr. Parker developed a Cultural Resource Monitoring and Mitigation Plan for the Elem Indian Colony Soil Remediation Project. (See Attachment 7.) EPA agreed to perform the remaining mine waste excavation and clean soil backfill activities in accordance with a set of "Earth Moving Protocols" developed by Dr. Parker. (See Attachment 8.)

In a conference call conducted between EPA and State Office of Historic Preservation staff on August 17, 2006, the State Historic Preservation Officer concluded that the Elem artifacts that had been identified and recovered were an inadvertent discovery that was made during excavation activities to remove contaminated mine wastes. The State Office of Historic Preservation staff indicated that although it would have been preferable for EPA to formally consult with their office prior to the inadvertent discovery, they recognized that EPA had consulted with the Elem Tribe throughout the planning, decision-making, and design process for this important cleanup project. The State Historic Preservation Officer concluded that the best way forward was for EPA to continue to consult with the Elem Tribe, pursuant to 36 C.F.R. Section 800.13(d), to develop and agree upon an acceptable monitoring and mitigation plan for the remaining work.

Based upon EPA's consultation with the Elem Tribe, Chairman Ray Brown, Sr. authorized EPA to recommence contaminated mine waste excavation activities in accordance with our agreements. (See Attachment 9.) All of the remaining excavation work that was performed in culturally sensitive areas at the Elem Indian Colony was conducted in accordance with the "Earth Moving Protocols" and guided either by Dr. Parker himself, an Elem cultural monitor designated by Dr. Parker, or on occasion by the additional archaeologist hired by EPA, Mr. Holson of Pacific Legacy. Dr. Parker also developed and implemented two data recovery and mitigation plans for excavation activities that were necessary to construct the storm water drainage pipeline, the new water supply system, and the excavation of mine wastes from an old gravel roadbed.

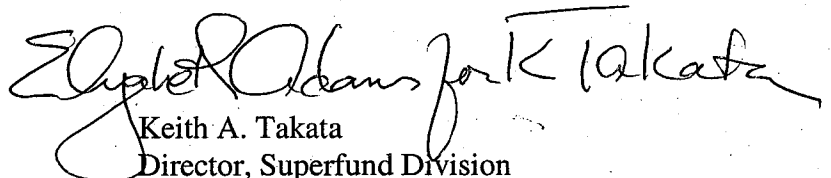
The Elem Tribe has long demanded that EPA completely remove the contaminated mine wastes from the Colony in order that their children would be protected from the contamination. The Tribe was also concerned that capping and leaving the wastes in place could pose a problem to future generations should the capping materials erode or not be maintained. Even as EPA commenced its cleanup, many Tribal members expressed doubt that EPA would in fact completely remove the contaminants. The mine wastes have now been removed from the Elem Indian Colony, leaving only some small amounts of mine wastes beneath the roadway, and two other locations to protect Elem cultural resources at the direction of Dr. Parker and in consultation with the Elem Tribe. Since the completion of the excavation Chairman Brown, the Elem Environmental Office and many individual Tribal members have expressed their thanks to EPA for our efforts to complete this important project while respecting their cultural traditions. (See Attachment 10.)

Understandably, the contaminated mine waste removal project has caused great concern among Elem tribal members. However, I assure you that EPA has conducted the field investigations, planning, design and construction activities that were necessary to successfully implement this important contaminated Mine Waste Removal Action at the Elem Indian Colony in close coordination with the Elem Environmental Office and the leadership of the Elem Tribe. Throughout the planning and implementation of this project, EPA was very aware of the importance that the Elem Tribe places on its cultural heritage and religious practices. EPA worked closely with the Elem Environmental Office, the Chairman and the Executive Committee of the Elem Tribe to develop an appropriate plan to identify, recover and protect Elem cultural resources that may inadvertently be discovered during necessary contaminated mine waste

excavation activities, while balancing the need to protect human health from the effects of contaminated mine wastes that underlay the homes of many tribal members and the roads that provide tribal members access to their homes. (See Attachment 11.)

I hope that this information will assist you in your reply to Mr. Jim Brown III. Please feel free to contact Rick Sugarek of my staff with any technical questions at (415) 972-3151, or Larry Bradfish of the Office of Regional Counsel at (415) 972-3934 with any legal questions.

Sincerely,



Keith A. Takata
Director, Superfund Division
Environmental Protection Agency

Attachments

cc. Dwight Dutschke, State Office of Historic Preservation

List of Attachments

- Attachment 1 Summary of EPA actions to comply with the substantive requirements of Section 106 of the National Historic Preservation Act and its implementing regulations (36 C.R.F. Part 800) to assure the protection of Elem cultural resources while carrying out the contaminated Mine Waste Removal Action.
- Attachment 2 Detailed chronology of the coordination and communication efforts that took place between EPA, the Elem Tribe and others during the performance of field investigations, the development and evaluation of cleanup alternatives, decision making to select the preferred cleanup approach, and performance of the cleanup itself.
- Attachment 3 Summary of the EPA Superfund cleanup goals for the Elem Indian Colony Mine Waste Removal Action.
- Attachment 4 Letter dated August 22, 2006 from Keith Takata, Director of EPA Superfund Division to Chairman Raymond Brown, Sr. responding to Chairman Brown's July 29, 2006 letter request for an archaeologist.
- Attachment 5 Memorandum dated August 2, 2006 from John Holson, Pacific Legacy, Inc. to Jim Brown, III, Elem Tribe, Rick Sugarek, EPA, Mike Umbrello, Elem Pomo Tribe regarding cultural resource protection recommendations.
- Attachment 6 Letter dated August 6, 2006 from Rick Sugarek, EPA to Susan K. Stratton, Office of Historic Preservation, initiating consultation.
- Attachment 7 Cultural Resource Monitoring and Mitigation Plan for the Elem Indian Colony Soil Remediation Project, prepared by Dr. John Parker, Parker & Associates Archaeological Research (August 17, 2006).
- Attachment 8 Earth Moving Protocol for the Elem Soil Remediation Project
- Attachment 9 Letter dated August 17, 2006 from Chairman Raymond Brown Sr. to Keith Takata, EPA authorizing EPA to recommence cleanup activities on tribal lands.
- Attachment 10 Letter dated February 22, 2007 from Chairman Ray Brown, Sr. to Keith Takata, EPA, discussing his views on the manner in which EPA coordinated with the Elem Tribe during the cleanup action to assure that the goal of protecting human health was properly balanced with the goal of protecting Elem cultural resources.
- Attachment 11 Elem Environmental Office newsletter describing the cleanup action and the coordination efforts between EPA and the Elem Tribe (Oct. 2006).

ATTACHMENT 1

Summary of EPA Actions to Comply with the Requirements of Section 106 of the National Historic Preservation Act and its Implementing Regulations (36 C.F.R. Part 800) to Assure the Protection of Elem Cultural Resources While Carrying Out the Contaminated Mine Waste Removal Action.

EPA closely coordinated the planning and implementation of the Elem Indian Colony Mine Waste Removal Action with the Elem Executive Committee, Chairman Brown, the Elem Environmental Office, Elem cultural leaders, and individual residents of the Elem Indian Colony.

Before commencing removal of the contaminated mine wastes, EPA coordinated moving Elem Indian Colony residents into transitional housing in April 2006 and delayed the start of the removal action until June 2006 in order that the May 2006 religious dances could be held as planned. EPA coordinated with the Elem Environmental Office to set criteria for hiring Elem cultural monitors, and hired Eagle Brown, Jim Brown III's son, to be the primary cultural monitor, because the Elem Tribe believed that he was the most capable, trained cultural monitor. EPA's design required "an Elem Tribal monitor onsite at all times that the Subcontractor ... personnel are present at the EIC." The design also required that the construction subcontractor stop work at the location of an archaeological or paleontological find and notify the EIC Tribal monitor and Engineer.

In May 2006, Chairman Brown signed an agreement that approved access to the Elem Indian Colony for EPA and their representatives to perform the Elem Indian Colony Mine Waste Removal Action. Under the terms of this agreement, EPA agreed to "(m)onitor construction activities with qualified personnel to address any Native American artifacts or graves that may be unexpectedly encountered during the construction".

In June 2006, EPA's contractors (CH2M Hill and TN&A, their construction subcontractor) mobilized to the site and began construction. One of the first tasks implemented was the effort to place signage and cordon off certain culturally sensitive areas at the Elem Indian Colony that were identified by the Elem cultural monitors and the Elem Environmental Office. EPA informed the construction contractor and their personnel that no construction activity was to take place within these areas and that these areas were off limits to any visitation by any of their personnel. These areas included the round house, rigging room, the cemetery, the sweat lodge, and several areas directly adjacent to work areas that were identified by the Elem Environmental Office and Elem cultural monitors as being known to contain culturally significant resources. Many of these areas were considered to be confidential and the rationale for their protection was sometimes not shared with EPA. EPA also worked with the Elem Environmental Office to implement training sessions to inform CH2M Hill and TN&A personnel regarding Elem cultural practices and culturally sensitive areas at the Elem Indian Colony. Elem Tribal members held several training/information sharing sessions as part of the morning

meeting at the start of the construction day during the first week.

EPA coordinated with Chairman Brown and the Elem Environmental Office regarding cultural issues raised during the progress of the removal action. As construction started, Elem Tribal workers raised the concern that certain trees slated for removal under the approved design were culturally significant, and they demanded that EPA alter the design. The Chairman reiterated the decision he reached during design to remove these old oak trees. EPA accommodated the need for several Tribal members to access the round house to begin preparation for an unexpected July 2006 dinner and an August 2006 "Call Dance." At one point, the construction subcontractor was applying too much water to the excavation to prevent creating contaminated dust. The over-watering was creating wet/muddy conditions that made it difficult for Eagle Brown, the Elem cultural monitor, to observe the excavation and to assure that he could identify any artifacts as the excavation proceeds. The subcontractor was instructed to establish better control on the use of water to control hazardous dust by keeping the material moist, but not muddy.

On July 19, 2006, Keith Takata, Superfund Director, met with Chairman Brown and other Tribal members at the Elem Environmental Office to review the progress of the cleanup action. Jim Brown III, Tribal Administrator (an unelected position, manages the staff of the Tribal administrative office), was also present. Two cultural resource protection issues were discussed. Chairman Brown expressed concern that the excavation has been too wet on occasion to be able to readily identify artifacts as the construction progressed. Jim Brown III expressed a lack of confidence in the Elem cultural monitor and asked if EPA had considered bringing in an archaeologist to monitor the ongoing excavation. At the meeting EPA project manager, Rick Sugarek, reminded Jim Brown III that although EPA's plan, that had been reviewed with Chairman Brown, the Elem Executive Committee and the Elem Environmental Office prior to starting construction, called for EPA to rely on Elem cultural monitors to observe the excavation activities, EPA's plan also agreed to call in an archaeologist in the case of a significant find. Mr. Sugarek asked Jim Brown III if he felt that the discoveries of artifacts in the excavations to date warranted an archaeologist's presence onsite full time. Neither Chairman Brown nor Jim Brown III responded to this question at the meeting.

On July 21, 2006 Keith Takata recommended that Rick Sugarek, EPA project manager, loop back with the Chairman to reassess his perspective on the cultural monitoring issues that were raised at the meeting, and to be sure that EPA is doing everything that the Chairman needs EPA to do to protect these resources. Mr. Sugarek contacted Chairman Brown and discussed the issues briefly. They agreed to set up a meeting for the following week.

On July 26, 2006 three bone fragments were found by a construction surveyor in an area in which excavation activities had been completed one or two days previously. Initially all were concerned that the bone fragments may have been human. An archaeologist was called in and later in the day identified the bones as animal in origin. This event raised concerns with several Elem Tribal workers that the cultural resource monitoring approach may need to be revised to assure that resources are identified as the construction effort

progresses. Jim Brown III contacted the State Office of Historic Preservation to complain that EPA had encountered human remains (later he called to correct his earlier message and informed them that the bones were identified as animal bones), and may not be following appropriate procedures to assure protection of the Elem Tribe's cultural resources.

EPA was contacted by the State Office of Historic Preservation and they indicated that they did not have a record of EPA's project. EPA agreed to provide information to the State Historic Preservation Officer (SHPO) on the substantive efforts that EPA undertook as part of the Elem Indian Colony Mine Waste Removal Action to work with the Tribe to develop the planned approach to identify and protect Elem cultural resources during excavation activities. EPA also agreed to coordinate with the SHPO regarding EPA's plans for moving forward with the cleanup.

On July 29, 2006 Chairman Brown sent a letter to Keith Takata directing EPA to stop all "excavating, backfilling, grading, landfill, and any type of disruption to our sacred lands" until an archaeologist can be brought onto the project to "record and preserve the rich cultural and traditional Pomo remains that are being uncovered." EPA ordered its contractors to stop work. EPA coordinated with Chairman Brown and the Elem Environmental Office regarding the Tribe's cultural resource protection concerns. EPA agreed to have an archaeologist monitor the remainder of the excavation activities to assure the protection of Elem cultural resources, and to develop and document the revised cultural monitoring procedures in a monitoring and mitigation plan. Chairman Brown agreed that this approach would address their concerns. EPA agreed to identify an archaeologist acceptable to the Elem Tribe. EPA worked with the Elem Environmental Office over the weekend to identify an archaeologist that could be available as soon as possible to provide the necessary project oversight, assure protection of Elem cultural resources, and minimize the impacts of delay to this important project for the Elem Indian Colony.

On July 30, 2006 Dr. John Parker submitted a draft Cultural Resource Monitoring and Mitigation Plan for the Elem Indian Colony Soil Remediation Project for review and comment by the Elem Tribe and EPA. EPA agreed to hire Dr. Parker as the Project Archaeologist at the request of the Elem Tribe, but he was not immediately available to inspect the Elem Indian Colony project. Because Dr. Parker was not immediately available, EPA arranged for John Holson, Principal Archaeologist with Pacific Legacy, Inc., to conduct a site inspection on August 1, 2006. Mr. Holson met with Elem Tribal representatives and made recommendations that he believed would be protective and allow the project to re-start backfilling operations on certain lots. He outlined a program of his recommendations for an appropriate monitoring and mitigation plan to assure the protection of Elem cultural resources. The Elem Tribal representatives did not accept Mr. Holson's recommendations, preferring to wait for Dr. Parker's arrival at the end of the week.

On August 4, 2006 Dr. Parker met with Elem Tribal representatives, and conducted a site inspection. Later in the day he met with Chairman Brown. At the end of the day

Chairman Brown and Dr. Parker met with EPA to discuss Dr. Parker's recommendations to move the project forward with appropriate monitoring and mitigation to assure the protection of Elem cultural resources. Chairman Brown gave EPA verbal permission to re-start backfill operations in accordance with Dr. Parker's recommended backfill procedures once Elem cultural monitors complete a comprehensive surface recovery effort to locate and document the artifacts that had been identified to date in the open excavations.

On August 6, 2006 EPA sent a letter to the State Office of Historic Preservation to initiate consultation regarding EPA's Elem Indian Colony Mine Waste Removal Action. EPA had previously provided project information to the State Office of Historic Preservation, and additional project information was attached to this letter. EPA communicated regularly with the State Office of Historic Preservation on the Agency's activities to address the Elem cultural resource protection concerns, and EPA's ongoing consultation with the Elem Tribe. On August 17, 2006 the State Office of Historic Preservation concluded that the artifacts found by EPA during the initial excavation efforts at the Elem Indian Colony were an inadvertent discovery made during construction. Although prior consultation between EPA and the State Office of Historic Preservation would have been preferable, they noted that EPA had consulted with the Tribe throughout the planning and implementation of this project to date. The State Office of Historic Preservation reached the conclusion that the best way forward would be for EPA to continue to consult with the Elem Tribe pursuant to 36 C.F.R. Section 800.13(d).

EPA also took several additional actions to assure the protection of Elem cultural resources during the implementation of the cleanup. On August 8, 2006 EPA brought in John Kennedy, as assistant project manager, to provide for a daily EPA presence onsite during the remaining excavation activities at the Elem Indian Colony. Because of his past archaeological experience, the assistant project manager was specifically requested to facilitate and improve communications between Dr. Parker, the Elem Tribe, and EPA's contractor and subcontractor on any archaeological issues related to the performance of this project. EPA performed a surface recovery effort to protect artifacts identified in the existing open excavated areas, and mapped the recovered artifacts. EPA implemented an extensive geoprobe drilling program to provide additional geologic and cultural soil information to support planning, design and oversight efforts for the remaining excavation activities. EPA re-designed two major elements of the project, the water supply system and the roadbed foundation preparation methodology, to minimize potential impacts on cultural soils identified by Dr. Parker. EPA also directed Dr. Parker to develop data recovery and mitigation plans for several elements of the project for which a re-design was not possible, including the storm drain pipelines, portions of the water supply line (for areas where a re-design was not possible), and the excavation of mine wastes from the gravel roadway on Lot #28.

On August 17, 2006 Chairman Brown authorized EPA to "perform all activities necessary to conduct Phase 1B of the Elem Indian Colony Mine Waste Removal Action provided that EPA follows the Earth Moving Protocols for the Elem Soil Remediation

Project that have been developed by Dr. Parker for the protection of our important cultural and historic resources.” Later in the month EPA requested that Chairman Brown assist EPA to coordinate the project participation of Elem cultural monitors and the Elem construction workforce, to monitor the ongoing construction and assist EPA in decision making to appropriately balance the need for removal of all mine wastes to the full extent practicable while preserving Elem cultural resources, and to identify and assist EPA in the resolution of other Tribal issues related to the progress of the cleanup. Chairman Brown participated in the project through the completion of the mine waste excavation activities to assure that this important cleanup project for the Elem Tribe would go forward while assuring the proper level of protection to the Elem cultural resources.

On August 23, 2006, after a phone conversation with Dr. Parker, EPA's Project Archaeologist, Dan Hall, the BIA Regional Archaeologist, directed EPA to shut down excavation activities at the Elem Indian Colony because EPA did not have an Archaeological Resources Protection Act (ARPA) permit for these activities. EPA and the BIA Regional Archaeologist discussed EPA's legal interpretation that the Superfund cleanup project was required to meet the substantive requirements of ARPA, but was not required to obtain a permit. EPA also indicated that it had recently consulted with the State Office of Historic Preservation, and that they had given EPA approval to work with the Elem Tribe to resolve issues related to the protection of Elem cultural resources and to move this project forward. After discussing this matter with the State Office of Historic Preservation, the BIA Regional Archaeologist indicated that EPA could re-start excavation operations.

On September 14, 2006 BIA issued an ARPA permit to Dr. Parker for the offsite evaluation of pre-historic and historic artifacts recovered at the Elem Indian Colony. The last of the mine waste was excavated from Lot 3 on September 27, 2006. Dr. Parker completed the wet screening operations for the data recovery and mitigation efforts and prepared to return to his home and laboratory for the analysis of the recovered archaeological information.

During the remaining excavation activities to locate and install/repair water and sewer lines, and other necessary excavations to complete the project, EPA relied on the oversight of Elem cultural monitors in areas designated by Dr. Parker where it was unlikely that the workers would encounter cultural soils during the planned construction activities. In cases where there was a potential to impact cultural soils, EPA relied on the oversight of an archaeologist from the local area (staff archaeologists from Pacific Legacy).

The actions summarized above support EPA's position that the Agency appropriately planned and implemented this important contaminated mine waste cleanup action for the Elem Indian Colony residential area to assure the protection of the health of the Elem Tribal residents, and to minimize any adverse impacts to Elem cultural resources. EPA made a conscientious effort to coordinate and consult with Elem Indian Colony residents, Elem Environmental Office staff, and the Elem Tribal leadership throughout the planning and implementation of this cleanup action.