

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

MARQUETTE COUNTY ROAD
COMMISSION,

Plaintiff,

v.

Case No.:

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; SUSAN HEDMAN,
in her official capacity as Administrator of Region
V of the United States Environmental Protection
Agency; and UNITED STATES ARMY CORPS
OF ENGINEERS,

Defendants.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiff, Marquette County Road Commission (“MCRC”), hereby brings this action for declaratory and injunctive relief against the United States Environmental Protection Agency, Susan Hedman, in her official capacity as Administrator of Region V of the United States Environmental Protection Agency (collectively, “USEPA”), and the United States Army Corps of Engineers (the “Corps”) pursuant to the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251, *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551, *et seq.* In support of its Complaint, MCRC alleges as follows:

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INTRODUCTION

1. This case involves the unlawful and predetermined efforts of Defendants USEPA and the Corps to block the permitting and construction of a critical primary county road in northwestern Marquette County (“CR 595”) that, according to detailed traffic studies, would have improved the health, safety, and welfare of the residents of Marquette County by reducing dangerous heavy truck traffic through highly populated residential, commercial, and educational areas of the County’s three largest cities.

2. In order to build CR 595, MCRC needed to obtain a permit to fill approximately 25 acres of wetlands from the Michigan Department of Environmental Quality (“MDEQ”), the state agency responsible for implementing Michigan’s federally-approved CWA wetland program. Because USEPA retains authority to oversee MDEQ’s processing of applications that impact more than one acre of wetland, MCRC also needed to gain approval from USEPA. As such, on August 18, 2011, MCRC formally notified both MDEQ and USEPA of its intention to submit an application for a wetland fill permit and requested a “pre-application” meeting to discuss the project with the state and federal agencies.

3. While MCRC was still preparing its application, however, top USEPA officials in Washington, DC surreptitiously met with a number of environmental activists vocally opposed to the road and determined that MCRC’s forthcoming permit application should be denied and that any attempt by MDEQ to grant the permit application would be blocked by USEPA.

4. Indeed, documents recently released by USEPA pursuant to a Freedom of Information Act (“FOIA”) request reveal that shortly after MCRC submitted its pre-application meeting request -- but before MCRC filed its actual permit application -- USEPA met with several environmental activists and political operatives and “definitively” avowed to oppose MCRC’s forthcoming application no matter what occurred during the application process.

5. In particular, a letter sent to the Office of Senator Barbara Boxer by the prominent environmental activist, Dr. Laura Farwell, recounts the details of an August 30, 2011 meeting held at USEPA Headquarters during which the head of USEPA's Office of Wetlands, Oceans and Watersheds is reported to have "**definitively reiterated EPA's position**" to Farwell and others that "**the haul road [*i.e.*, CR 595] would not happen.**" (See 11/28/12 Farwell Letter, attached as **Exhibit 1** (emphasis added).)

6. On October 6, 2011, unaware that top USEPA officials were already determined to make sure that the construction of CR 595 "would not happen," MCRC submitted a detailed and fully documented permit application (the "CR 595 Application") to MDEQ. The state agency, as required, then sent copies of the Application to USEPA, the Corps, and United States Fish and Wildlife Service ("USFWS").

7. After consulting with the Corps and USFWS, who had also been lobbied by the same group of environmental activists opposed to the road, USEPA followed its predetermined plan and lodged a number of unsupported and vague objections to the CR 595 Application on the ostensible basis that the Application purportedly failed to satisfy Section 404 of the CWA, 33 U.S.C. § 1344, and the 404(b)(1) guidelines, 40 C.F.R. §§ 230.1 *et seq.* Moreover, in contravention of its statutorily imposed duty, USEPA repeatedly refused to identify what permit conditions would be necessary for its objections to be satisfied; leaving MCRC to guess what it needed to do to obtain the requested permit.

8. MCRC, nevertheless, worked diligently with MDEQ in an effort to timely resolve what it perceived to be USEPA's objections. By way of example, MCRC provided numerous detailed explanations of its voluminous Application verbally and in writing, substantially revised its Application several times, and, most notably, increased its wetland mitigation proposal to

preserve in perpetuity, via binding conservation easement, 1,576 acres of high-quality wetlands and uplands, 4.3 miles of streams, and two lakes; representing an unprecedented 63:1 mitigation ratio.

9. Certain that MCRC's revised CR 595 Application complied with all state and federal laws, MDEQ stated, in writing, its intention to grant the permit and urged USEPA to withdraw its objections.

10. On December 4, 2012, in a letter to MDEQ, USEPA withdrew many of its existing objections, but then, in conformance with its predetermined plan, arbitrarily lodged an entirely *new* series of objections that were both intentionally vague and unsupported by law.

11. Despite the fact that USEPA provided only 30 days for MCRC and MDEQ to resolve these new objections and despite the CWA's clear mandate requiring USEPA to list the necessary permit conditions, USEPA again failed to identify what particular permit conditions would be necessary for the proposed permit to issue. Worse yet, USEPA repeatedly ignored, evaded, and/or deflected MCRC's numerous written and verbal pleas for guidance as to what application revisions USEPA deemed necessary for the new objections to be withdrawn.

12. Although there was a substantial amount of uncertainty regarding what revisions and commitments USEPA would accept, MCRC worked diligently over the course of the next three weeks and responded to USEPA's new objections by way of a December 27, 2012 letter. The letter was comprehensive, positively addressed each of USEPA's purported concerns on a point-by-point basis, and demonstrated that the CR 595 Application complied with all applicable state and federal laws.

13. Rather than reply to the detailed letter and provide a reasoned response to MCRC's efforts, USEPA kept good on its promise to the environmental activists to ensure that the "haul road would not happen," and simply let the 30-day deadline expire.

14. As a result, the CR 595 Application transferred, by statute, to the Corps who, contrary to its own regulations, failed to take any action on the pending Application and instead took the position that MCRC would need to file an entirely new permit application with the Corps.

15. In anticipation that MCRC might try to file an entirely new permit application with the Corps, another recently released FOIA document reveals that one of the USEPA officials responsible for the USEPA's denial of the CR 595 Application wrote *sarcastically* to the Corps official who authored the Corps' objections to the CR 595 Application stating that it **"looks like 'they' want to go to the COE for a permit for 595, EPA is such a job killer hope the COE is more reasonable."** (*See* 09/10/13 Elston Email, attached as **Exhibit 2** (emphasis added).)

16. USEPA's December 4, 2012 objection letter and refusal to consider MCRC's timely response thereto (the "Final Decision") had the effect of an outright denial of the CR 595 Application and constitutes in a final reviewable agency action because it: (a) barred MDEQ from granting the requested permit under the CWA; (b) ended MDEQ's assumed authority over the Application; and (c) required MCRC to go through the burdensome, costly, time consuming, and futile exercise of submitting an entirely new permit application to the Corps, who had previously aided in the formation of and in fact joined in the USEPA's Final Decision.

17. As a result of USEPA's unlawful Final Decision, MCRC is unable to construct a critical road aimed at reducing dangerous heavy truck traffic through highly populated

residential, commercial, and educational areas in Marquette County. USEPA's unlawful Final Decision also improperly subjected MCRC to a burdensome and futile permitting process with the Corps.

18. For the following reasons, among others, MCRC now asks this Court to set aside USEPA's Final Decision because it was arbitrary, capricious, an abuse of discretion, in excess of statutory authority, made without observance of congressionally prescribed procedure, unsupported by fact, and/or otherwise not in accordance with law.

19. *First*, the CR 595 Application fully complied with both Section 404 of the CWA and the 404(b)(1) guidelines where it demonstrated, *inter alia*, that:

- a. MCRC's team of seasoned environmental experts properly assessed the proposed road's cumulative direct and secondary effects on the aquatic ecosystem to the extent reasonable and practicable;
- b. CR 595 was the least environmentally damaging practical alternative capable of achieving the project's very legitimate purpose of, *inter alia*, reducing dangerous heavy truck traffic through more highly populated residential, commercial, and educational areas;
- c. The design and route of CR 595 utilized state-of-the-art methodologies and best practices to avoid and minimize aquatic impacts to the greatest extent practicable;
- d. MCRC's stream mitigation proposal to enhance/restore over 11,000 linear feet of stream and make several other stream improvements adequately compensated for the unavoidable impact to approximately 2,300 linear feet of stream; and
- e. MCRC's wetland mitigation proposal to preserve in perpetuity, via binding conservation easement, 1,576 contiguous acres of land, including 647 acres of high-quality wetlands, 929 acres of upland buffers, two lakes, and 4.3 miles of streams, adequately compensated for the unavoidable impact of a mere 25 acres of jurisdictional and non-jurisdictional wetlands.

20. *Second*, USEPA exceeded its congressionally-delegated authority under Section 404(j)(2)(B) of the CWA because none of the terms set forth in the Application were "outside the requirements" of Section 404 of the CWA or the 404(b)(1) guidelines. Rather than focus on the actual "requirements" of Section 404 of the CWA or the 404(b)(1) guidelines, USEPA's Final

Decision was based on impacts *unrelated* to the aquatic ecosystem, optional aspects of the 404(b)(1) guidelines, and clear bias against the project.

21. *Third*, USEPA arbitrarily failed to adequately explain the reasons for its Final Decision or list the conditions which the permit would need to include if it were issued by the USEPA as mandated by Section 404(j)(2)(B) of the CWA. This statutory violation was further exacerbated by USEPA's staunch refusal, despite numerous requests, to advise MCRC what conditions the permit would need to include in order to be issued.

22. *Fourth*, by asserting wholly new grounds in support of its December 4, 2012 decision, but nevertheless demanding that MDEQ either resolve these new objections or deny the permit within 30 days, USEPA failed to comply with the public hearing and temporal requirements of Section 404(j)(2)(B) of the CWA.

23. MCRC thus seeks: (a) a declaration that the USEPA's Final Decision was arbitrary and capricious and issued in violation of Section 404(j) of the CWA; (b) an order setting aside USEPA's Final Decision and restoring MDEQ's assumed authority over the CR 595 Application; and (c) an injunction prohibiting USEPA from further objecting to or interfering with MDEQ's processing of the CR 595 Application.

24. MCRC also seeks review of the Corps' failure to take any action on the CR 595 Application in violation of the mandates of Section 404(j) of the CWA and USEPA's 404 State Program Regulations which required the Corps to process the transferred CR 595 Application as submitted to MDEQ. *See* 33 U.S.C. 1344(j); 40 C.F.R. § 233.50(h)(2), (j).

25. The Corps' failure to take any action on the CR 595 Application constituted an impermissible constructive denial (presumably based upon the Corps' and the USEPA's past objections which were arbitrary and capricious) and violated the Corps' 404 Permit Processing

Regulations which, among other things, require all Corps permit denials to be in writing. *See* 33 C.F.R. §§ 320.1 *et seq.*; 33 C.F.R. §§ 331.4, 331.6, and 331.12.

26. As a result of the Corps' unlawful constructive denial of the CR 595 Application, MCRC is unable to construct a critical road in Marquette County aimed at reducing dangerous heavy truck traffic through highly populated residential, commercial, and educational areas.

27. MCRC thus seeks: (a) a declaration that the Corps' failure to take any action whatsoever with respect to the CR 595 Application violated Section 404(j) of the CWA, the USEPA's regulations, and the Corps' regulations, and constituted an impermissible constructive denial of the CR 595 Application that was arbitrary and capricious; (b) an order setting aside the Corps' constructive denial of the CR 595 Application and directing the Corps to grant the permit in the form previously found sufficient by MDEQ; and (c) an injunction prohibiting USEPA from further objecting to or interfering with the permit as issued.

28. Without this Court's review, the unlawful actions of the USEPA and Corps will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the CWA and APA.

PARTIES

29. Plaintiff MCRC is a body corporate established pursuant to Michigan's County Road Law, MCL 224.1 *et seq.*, responsible for the safe and efficient management of the Marquette County road system, vested by the State of Michigan with the authority to sue and be sued, and located at 1610 North 2nd Street, Ishpeming, Michigan 49849.

30. Defendant USEPA is an agency of the United States established pursuant to Reorganization Plan No. 3 of 1970, 84 Stat. 2086. USEPA is the primary federal agency responsible for overseeing Michigan's assumption of Section 404 of the CWA.

31. Defendant Susan Hedman is the Administrator of Region 5 of the USEPA and, upon information and belief, was one of the USEPA officials directly responsible for USEPA's Final Decision in this case.

32. Defendant Corps is a branch of the Department of the Army and an agency of the United States. The Corps is the primary federal agency responsible for processing wetland permit applications subject to an unresolved USEPA objection.

JURISDICTION AND VENUE

33. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing further "necessary or proper relief"); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA).

34. The property over which the road was to be built and the wetlands which were proposed to be filled are situated in Marquette County, Michigan. Accordingly, venue in this judicial district is proper under 28 U.S.C. § 1391(e)(1)(B).

LEGAL BACKGROUND

A. State Assumption Under Section 404 Of The Clean Water Act

35. In 1972, Congress amended the Federal Water Pollution Control Act, commonly known as the CWA, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

36. To accomplish this goal, Congress prohibited the discharge of any pollutant (including dredge and fill material) into navigable waters of the United States (including certain adjacent wetlands) unless done in compliance with a permit issued under the CWA. *Id.* §§ 1311(a), 1362(7), (12).

37. Congress then authorized the Corps to issue permits for the discharge of dredged and fill material into navigable waters by enacting Section 404 of the CWA. *Id.* § 1344; *see also* 33 C.F.R. § 320.2; 33 C.F.R. § 323.3(a)

38. The CWA imposes heavy civil and criminal penalties on persons who discharge fill into navigable waters without a permit or in violation of a permit. *Id.* § 1319.

39. In 1977, Congress recognized that the States should have the primary right and responsibility over the development and use of land and water resources and thus expressed its intention for States to implement Section 404 of the CWA. *Id.* § 1251(b) (added by P.L. 95-217 §§ 5(a), (December 27, 1977)).

40. Specifically, Congress allowed States desiring to administer their own permit program for the discharge of fill into navigable waters to submit to USEPA a complete description of the program they proposed to establish and administer under State law (“404 Program”). *Id.* § 1344(G) (added by P.L. 95-217 § 67 (December 27, 1977); *see also* 40 C.F.R. 233.1 *et seq.*

41. If a State’s proposed 404 Program met certain prescribed statutory requirements, including that the State had authority to issue permits in compliance with Section 404 of the CWA and the 404(b)(1) guidelines, Congress directed USEPA to approve the State’s 404 Program and notify the Corps. *Id.* § 1344(H)(2)(A) (added by P.L. 95-217 § 67 (December 27, 1977); *see also* 40 C.F.R. § 233.15; 33 C.F.R. § 323.5.

42. Congress nevertheless established a detailed process in Section 404(j) of the CWA for USEPA to oversee State 404 Programs:

- a. *First*, a State administrating its own 404 Program is required to transmit to USEPA a copy of each permit application received by such State and provide notice to USEPA of every action related to the consideration of such permit

application, including each permit proposed to be issued by such State. *Id.* § 1344(j); *see also* 40 C.F.R. § 233.50(a).

- b. *Second*, within 10 days of receiving such permit application, USEPA is required to provide copies of such permit application to the Corps and the USFWS who, in turn, may provide comments to USEPA on the permit application. *Id.*; *see also* 40 C.F.R. § 233.50(b).
- c. *Third*, if USEPA intends to provide written comments on a permit application, USEPA must notify the State within 30 days of receiving the permit application and provide such written comments to the State, after consideration of any comments made in writing by the Corps and/or the USFWS, within 90 days of receiving the permit application. If such State is so notified by USEPA, it may not issue the proposed permit until after the receipt of such comments from USEPA, or after 90 days have elapsed, whichever first occurs. *Id.*; *see also* 40 C.F.R. § 233.50(d).
- d. *Fourth*, a State may not issue a proposed permit if it receives such written comment in which USEPA objects to the issuance of such proposed permit as being outside the requirements of Section 404, including, but not limited to, the guidelines developed under Section 404(b)(1) unless the State modifies such proposed permit in accordance with such comments. *Id.*; *see also* 40 C.F.R. §§ 233.20(b), 50(f).
- e. *Fifth*, whenever USEPA objects to the issuance of a permit, such written objection must contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by USEPA. *Id.*; *see also* 40 C.F.R. § 233.50(e).
- f. *Sixth*, in any case where USEPA objects to the issuance of a permit, on request of the State, a public hearing shall be held by USEPA on its objection. *Id.*; *see also* 40 C.F.R. § 233.50(g).
- g. *Seventh*, if a public hearing is held, USEPA shall, following that hearing, reaffirm, modify, or withdraw its objections and notify the State of this decision. 40 C.F.R. § 233.50(h). *This provision, however, is contained only in USEPA regulations and is inconsistent with Section 404(j) of the CWA. Nothing in the CWA allows USEPA to modify or issue new objections after the deadline for objecting or after public comment.*
- h. *Eighth*, if the State does not resubmit such permit revised to meet USEPA's objection within 30 days after completion of the hearing or, if no hearing is held, within 90 days of the objection, the Corps may issue the permit. 33 U.S.C. § 1344(j); *see also* 40 C.F.R. § 233.50(h)(2), (j).

43. When interpreting Section 404(j) and other provisions within the CWA, Congress demanded that “to the maximum extent possible the procedures utilized for implementing [Section 404] shall encourage the drastic minimization of paperwork and interagency decision

procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.” 33 U.S.C. § 1251(f).

B. The 404(b)(1) Guidelines

44. Section 404(h)(1)(A) of the CWA requires that all State-issued 404 permits assure compliance with the 404(b)(1) guidelines (the “Guidelines”). 33 U.S.C. 1344(h)(1)(A); *see also* 40 C.F.R. § 230.2(a)(3).

1. Assessment Of Direct And Secondary Effects On The Aquatic Ecosystem

45. The 404(b)(1) guidelines require an assessment of a proposed discharge’s cumulative “direct” and “secondary effects” on the physical, chemical, and biological components of the “aquatic ecosystem” to the extent “reasonable and practicable.” 40 C.F.R. § 230.11.

46. “Direct effects” are the short-term and long-term effects of a discharge of dredged or fill material on: (a) the physical substrate at the disposal site; (b) water, current patterns, circulation including downstream flows, and normal water fluctuation; (c) the kinds and concentrations of suspended particulate/turbidity in the vicinity of the disposal site; (d) the introduction of contaminants into the aquatic ecosystem; and (e) the structure and function of the aquatic ecosystem and organisms. *Id.* § 230.11(a)-(f).

47. “Secondary effects” are the effects on an “aquatic ecosystem” that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material. *Id.* § 230.11(h)(1). Examples of secondary effects include fluctuating water levels, septic tank leaching, and surface runoff. *Id.* § 230.11(h)(2).

48. “Direct” and “secondary effects” do not extend beyond the “aquatic ecosystem” or to separate features of a project that are not themselves built upon a “disposal site.”

49. “Aquatic ecosystem” means waters of the United States, including wetlands but not including groundwater, *id.* § 230.3(c), and “disposal site” means the portion of the waters of the United States where specific disposal activities are permitted, *id.* § 230.3(i).

50. To be “reasonable” an action must be non-speculative and feasible of being done. To be “practicable” an action must be “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* § 230.3(q). As such, the Guidelines do not require assessment of speculative effects on the aquatic ecosystem that are not reasonably foreseeable.

2. The Least Environmentally Damaging Practicable Alternative To Achieve The Project Purpose

51. The Guidelines prohibit the discharge of dredged or fill material if there is a “practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” *Id.* § 230.10(a)(1). This requirement is commonly known as the Least Environmentally Damaging Practicable Alternative (“LEDPA”).

52. “An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* § 230.10(a)(2). Thus, in performing a LEDPA analysis, the permitting authority has a duty to consider the applicant’s project purpose, if genuine and legitimate, and may *not* substitute a purpose it deems more suitable.

53. When considering potential practicable alternatives, the permitting authority may base its decision on information exclusively provided by the applicant and consider facts related to reduction of traffic congestion, increased safety, serving local needs, personal accessibility for local residents and communities, and enhancing local economic development.

54. With respect to road and highway projects, federal and state permitting agencies routinely recognize that alternative routes may not be practicable where they are cost prohibitive, create traffic problems, generate safety concerns, run through residential areas, present logistical hauling problems, and pose design, engineering, and maintenance difficulties.

3. Significant Degradation Of Waters Of The United States

55. The Guidelines prohibit discharges that “will cause or contribute to significant degradation of the waters of the United States.” *Id.* § 230.10(c).

56. Because this provision is limited to “degradation of waters of the United States,” the scope of its inquiry is limited to the effects of a discharge on the “aquatic ecosystem.” *Id.*

57. Because the term “significant” means “important, major, or consequential,” this provision trades off some degradation of the aquatic ecosystem for economic, industrial, and recreational development. *Id.*

58. Effects contributing to significant degradation of the aquatic ecosystem include *significantly adverse effects of the discharge of pollutants* on: (a) human health or welfare; (b) life stages of aquatic life and other wildlife dependent on aquatic ecosystem; (c) aquatic ecosystem diversity, productivity, and stability; and (d) recreational, aesthetic, and economic values. *Id.*

59. Findings of significant degradation related to a proposed discharge must be based upon appropriate factual determinations, evaluations, and tests set forth in Subparts B and G of the Guidelines. *Id.*

4. Appropriate And Practicable Minimization Of Impacts On The Aquatic Ecosystem

60. The Guidelines prohibit the discharge of dredged or fill material “unless *appropriate and practicable steps* have been taken which will minimize potential adverse

impacts of the discharge on the aquatic ecosystems” based on the specialized methods of minimization of impacts in Subpart H of the Guidelines. *Id.* § 230.10(d) (emphasis added); *see also* 40 C.F.R. § 230.5(j).

61. Because the Guidelines only require that “appropriate and practicable steps” be undertaken to minimize adverse impacts to the aquatic ecosystem, the Guidelines do not require that adverse effects be “completely offset.”

62. Subpart H of the Guidelines delimit the ways an applicant may minimize adverse impacts on the aquatic ecosystems from discharges. *Id.* §§ 230.70 *et seq.*

63. These minimization mechanisms focus on the location of discharge, material to be discharged, control and dispersion of discharge, technology used to control runoff and avoid filling unique habitat, and reducing obstruction to water flows. *Id.*

64. Such minimization mechanisms do not include long-term monitoring, wildlife crossings and fencing, using conservation easements to prohibit future development in surrounding areas, and other measures that are unrelated to the actual discharge into waters of the United States. *Id.*

5. Compensatory Mitigation

65. Subpart J of the Guidelines govern the standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation. *Id.* § 230.91(a).¹

¹ Section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108-136), directed the Corps to promulgate standards that, to the maximum extent practicable, maximize available opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation.

66. The Guidelines state that “[c]ompensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines.” *Id.* § 230.91(c)(3).

a. The Amount And Type Of Mitigation

67. Compensatory mitigation requirements must be “commensurate” with the amount and type of impact to the aquatic ecosystem that is caused by the permitted activity. *Id.* § 230.93(a)(1).

68. A permitting authority’s determination of what type of mitigation should be required must be based on what is “practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity.” *Id.*

69. In making this determination, the permitting authority must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. *Id.*

70. The permitting authority “shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects.” *Id.* § 230.91(c)(3).

71. “The amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required.” *Id.* § 230.93(f)(1). However, “[i]f a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.” *Id.*

72. Federal courts routinely uphold the use of 1:1 or 2:1 mitigation ratios and the majority of wetland mitigation banks in the United States use a 1:1 ratio. Furthermore, in 2003, the Corps' entire Nationwide 404 Program had the potential to achieve 1.2 acres of wetland creation or restoration for every 1 acre of impacted wetland.

73. A permitting authority, however, must require a mitigation ratio greater than one-to-one where necessary to account for, among other things, the method of mitigation and the likelihood of success. *Id.* § 230.93(f)(2).

74. "The rationale for the required replacement ratio must be documented in the administrative record for the permit action." *Id.*

b. Mitigation By Preservation

75. Mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. *Id.* § 230.93(a)(3).

76. Preservation means the removal of a threat to, or preventing the decline of, aquatic resources through the implementation of appropriate legal and physical mechanisms. *Id.* § 230.92.

77. Preservation may be used when the resources to be preserved: (a) provide important physical, chemical, or biological functions for the watershed; (b) contribute significantly to the ecological sustainability of the watershed; (c) is appropriate and practicable; (d) are under threat of destruction or adverse modifications; and (e) will be permanently protected through an appropriate real estate or other legal instrument. *Id.* § 230.93(h).

78. The permitting authority "may require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources."

Id. § 230.93(i). However, if buffers are included, mitigation credit must be provided for those buffers. *Id.*

79. By way of example, the Corps' own wetland preservation guidance for Wisconsin and Minnesota uses wetland preservation ratios of 8:1 for high-quality preservation wetlands and 10:1 for low-quality preservation wetlands. This guidance also calls for upland preservation ratios of 4:1 for high-quality preservation uplands and 10:1 for low-quality preservation uplands.

c. Mitigation Permit Conditions

80. The Guidelines provide a detailed list of the information which should be included in either a mitigation plan or the mitigation conditions of a final permit. *Id.* §§ 230.93(k), 230.94(c)(1)-(14), and 230.96(a)(1).

81. The level of detail of a mitigation plan or mitigation permit conditions, however, need only be commensurate with the scale and scope of the impacts. *Id.* § 230.94(c)(1)(i).

82. With regard to timing, the Guidelines only suggest that “[i]mplementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts.” *Id.* § 230.93(m).

83. As such, numerous federal courts have held that a complete mitigation plan is *not* required prior to the issuance of a 404 permit. Rather, a permit conditioned on future implementation of a reasonably complete mitigation plan complies with the CWA.

i. Site Protection Measures

84. The Guidelines require that the aquatic habitats, riparian areas, buffers, and uplands comprising the overall mitigation project be provided long-term protection “through real estate instruments or other available mechanisms, as appropriate.” *Id.* § 230.97(a)(1).

85. Appropriate real estate instruments include: (a) conservation easements held by federal, state, or local resource agencies; (b) transfer of title to such entities; or (c) restrictive covenants. *Id.*

86. To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an “appropriate third party” the right to enforce site protections and provide such third party the resources necessary to monitor and enforce these site protections. *Id.*

87. The real estate instrument, management plan, or other mechanism providing long-term protection of the mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses, such as clear cutting or mineral extraction, that might otherwise jeopardize the objectives of the mitigation project. *Id.* § 230.97(a)(2).

88. A real estate instrument, management plan, or other long-term protection mechanism used for site protection need only be approved concurrent with the activity causing the authorized impacts. *Id.* § 230.97(a)(5).

ii. Long-Term Monitoring

89. The Guidelines require that mitigation plans address the monitoring requirements for the project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the permitting authority, and the party responsible for submitting those monitoring reports. *Id.* § 230.96(a)(1).

90. A permitting authority, however, may extend the original monitoring period and/or revise monitoring requirements when remediation and/or adaptive management is required. *Id.* § 230.96(a)(2). As such, final detailed monitoring requirements are not needed prior to permit issuance.

iii. Financial Assurances

91. The Guidelines require that a permitting authority “require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed in accordance with applicable performance standards.” *Id.* § 230.93(n).

92. However, in cases where a “formal, documented commitment from a government agency or public authority” is available to ensure a high level of confidence that the mitigation will be provided and maintained, a permitting authority may determine that financial assurances are not necessary for that mitigation project. *Id.*

93. Any long-term financing mechanisms need only be approved in advance of the activity causing the authorized impacts. *Id.* § 230.97(d)(4).

C. Michigan’s 404 Program

94. In 1979, with the intention of assuming administration of Section 404 of the CWA, the Michigan legislature passed the Geomare-Anderson Wetlands Protection Act, MCL 281.701 *et seq.*, which is now Part 303 of NREPA, MCL 324.30301 *et seq.*

95. On October 16, 1984, Michigan became the first state to receive authorization from USEPA to administer Section 404 of the CWA. 40 C.F.R. § 233.70.

96. Among other laws and agreements, Michigan’s 404 Program consists of a November 9, 2011 Memorandum of Agreement between USEPA and MDEQ (“MOA”). *Id.*

97. The MOA waives federal review of the vast majority of permit applications in areas under Michigan’s 404 jurisdiction. However, the USEPA, Corps, and USFWS must review projects which impact one or more acres of wetland or over 1,000 feet of stream.

98. For reviewable projects, the MOA requires MDEQ to promptly submit to USEPA the complete permit application; any supplemental materials such as project alternatives,

environmental assessments, and mitigation plans; and any public notice and proposed permit so that USEPA has an opportunity to object.

99. If USEPA objects and MDEQ is unable to resolve such objection, the MOA provides that MDEQ may not provide the permit applicant with any authorization under Section 404 of the CWA even if the applicant successfully appeals MDEQ's denial of a permit at a state tribunal or court.

100. At the present time, USEPA reviews about two percent of all wetland permit applications received by MDEQ, and, upon information and belief, has caused only a small number of MDEQ wetland permit applications to be transferred to the Corps for processing in the last 30 years.

101. Relevantly, Michigan Administrative Code Rule 281.925(7)(e), which is also part of Michigan's approved 404 Program, requires use of the following wetland mitigation ratios:

- 5:1 for restoration/creation of rare or imperiled wetlands;
- 2:1 for restoration/creation of forested wetlands and some coastal wetlands;
- 1.5:1 for restoration/creation all other wetlands;
- 10:1 for preservation of wetlands.

102. Michigan's regulation allows the permitting authority to increase the mitigation ratio if the replacement wetland is of a different ecological type than the impacted wetland, or if the adjustment would be beneficial to the wetland resources due to factors specific to the mitigation site or the site of the proposed activity. Mich. Admin. Code R. 281.925(7)(f).

103. The regulation, however, prohibits the permitting authority from increasing or decreasing the mitigation ratio by more than 20 percent on the basis that an adjustment would be beneficial to wetland resources. *Id.*

D. The Corps' Permit Application Processing Regulations

104. Once a complete 404 permit application is received by the Corps, Section 404(a) of the CWA requires the Corps to publish a notice of public hearing within 15 days. 33 U.S.C. § 1344(a); *see also* 33 C.F.R. § 325.3.

105. The Corps then reviews and processes 404 permit applications pursuant to the procedures and authorities set forth at 33 C.F.R. §§ 320, 323, and 325.

106. If the Corps denies an application, such denial is subject to the administrative appeal process contained in 33 C.F.R. § 331.

107. Under this regulatory framework, the Corps is required to provide applicants whose permit applications have been denied with a copy of the decision document, a notification of appeal process fact sheet, and a request for appeal form. 33 C.F.R. § 331.4. The applicant then has 60 days to file its request for appeal. 33 C.F.R. § 331.6.

108. “No affected party may file a legal action in the Federal courts based on a permit denial or a proffered permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies.” 33 C.F.R. § 331.12.

109. The cost of preparing and submitting to the Corps a 404 permit application is often substantial. The United States Supreme Court has reported that the *average* applicant for an individual Corps permit “spends 788 days and \$271,596 in completing the process.”

110. The Corps' processing of 404 permit applications for roads or highways routinely takes several years, and in some instances over a decade, to complete. Moreover, the cost of completing this lengthy process is substantial, and especially with respect to 404 permit applications for roads and highways, can cost millions of dollars.

E. The Administrative Procedures Act

111. Complaints challenging agency action under CWA are subject to judicial review under the APA. 5 U.S.C. §§ 701 *et seq.*

112. Section 702 of the APA creates a right to appeal agency action (including the failure to act) and provides, in relevant part, that: “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.* § 702.

113. Federal courts reviewing final agency action may hold unlawful and set aside agency action, findings, and conclusions found to be: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; and (e) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. *Id.* § 706(2).

114. Federal courts reviewing final agency action may also “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

FACTUAL ALLEGATIONS

A. Woodland Road

1. The Woodland Road Application For Permit

115. In 2007, a group of private property owners, trade associations, local businesses, and others formed Woodland Road LLC for the purpose of constructing a multi-purpose road in Marquette County. (*See* Supporting Documentation for Woodland Road Application for Permit, attached as **Exhibit 3**.)

116. The purpose of this project was to: (a) facilitate the transportation of mining, forest, and aggregate products to and from natural-resource rich areas in northwestern Marquette

County; (b) provide the public, private industries, and emergency responders with safe access to and from that area; and (c) reduce heavy haulage trucking on existing public roads located in more populated areas of Marquette County. (*Id.* at 2.)

117. Over the course of several years, Woodland Road LLC expended significant resources planning and designing a road that would: (a) be the LEDPA capable of achieving the project purpose; and (b) avoid/minimize impacts to wetlands, streams, and wildlife to the greatest practicable extent while utilizing accepted road design standards so as to not compromise public safety. (*Id.* at 1-52, 66-68.)

118. As a result of these efforts, Woodland Road LLC identified a route located primarily on private land that closely followed a set of existing roads and trails and ran 22.3 miles from the Marquette County Triple A Road (“Triple A Road”) in Champion Township south to U.S. Highway 41 (“U.S. 41”) in Humboldt Township (“Woodland Road”). (*Id.* at 2.)

119. Although nearly all of the upland habitats along the proposed road had been repeatedly logged and/or converted into pine plantations over the last 150 years, Woodland Road LLC conducted comprehensive assessments of the wildlife, streams, and wetlands that would be impacted by the project. (*Id.* at 53-65.)

120. Because Woodland Road could not be built without impacting the aquatic ecosystem, on August 4, 2009, Woodland Road LLC applied to MDEQ for a permit to impact a total of 31.09 acres (later reduced to 27.1 acres) of jurisdictional and non-jurisdictional wetlands (“Woodland Road Application”). (*Id.* at 1-132.)

121. The Woodland Road Application was prepared primarily by King & MacGregor Environmental, Inc. (“KME”), in conjunction with dozens of individuals working for several engineering and environmental firms at a cost of millions of dollars.²

122. Jeffery King and Charles Wolverton served as the lead project coordinators for the Woodland Road Application.

- a. Mr. King is a professional wetland scientist certified by the Society of Professional Wetlands Scientists and has been recognized as an expert in the field of wetland delineation and permitting by Michigan courts and administrative tribunals. During his 12-year career with the Michigan Department of Natural Resources (“MDNR”), Jeff served as a District Supervisor in each of MDNR’s Southern Michigan Districts where he oversaw the permitting of hundreds of wetland fill applications. During his 25-year career as a consultant, Jeff has served as a member of Michigan’s Value Stream Mapping Committee, Michigan Wetland Advisory Council, and the Association of State Wetland Managers.
- b. Mr. Wolverton, now retired, is a former professional wetland scientist certified by the Society of Professional Wetlands Scientists and a recognized expert in the field of wetland permitting. During his 16-year career with MDNR, Mr. Wolverton served in several roles including Chief of the Wetland Protection Unit and Project Leader of the National Wetlands Inventory in Michigan. During his 25-year career as a consultant, Mr. Wolverton worked on a diverse array of wetland permitting projects and has designed and supervised construction of more than 1,200 acres of wetlands. He is a former board member of the Society of Wetland Scientists, past member of the Ecological Society of America, and past chairman of the board of directors of Ducks Unlimited Michigan.

123. The Woodland Road Application contained an evaluation of six route alternatives and six route variations and demonstrated that from all of these options Woodland Road was the LEDPA capable of achieving the project purpose. (*Id.* at 1-52.)

² KME is an environmental and ecological consulting firm specializing in, among other things: (a) state and federal wetland permitting; (b) wetland delineations and functional assessments; (c) wetland mitigation and monitoring, hydrologic modeling, and invasive species control; (d) rare, threatened, endangered plant and wildlife assessments; and (e) stream assessments and restoration. KME’s staff includes a number of regulatory specialists, biologists, botanists, ecologists, arborists and landscape architects who collectively have obtained hundreds of wetland fill permits from the Corps and/or MDEQ without USEPA objection.

124. With the exception of a limited impact to the threatened narrow-leaved gentian plant that would be mitigated through a permit from MDNR, the detailed wildlife assessments in the Woodland Road Application demonstrated that Woodland Road would not adversely affect any endangered, threatened, or rare: (a) plant species; (b) bird or mammal species that inhabit the aquatic ecosystem; or (c) reptiles, amphibians, or fish species. (*Id.* at 53-65, 70-79.)

125. The Woodland Road Application contained a thorough study of the proposed road's impact on streams (including ecological assessments, stream crossing diagrams, floodplain modeling, and hydraulic calculations) and demonstrated that the proposed road design would protect stream habitat and inhabitants by maintaining the natural stream bottoms, flow, and temperature, and preventing runoff after construction. (*Id.*)

126. The Woodland Road Application contained a comprehensive study of the proposed road's impact on wetlands (including delineation of all wetlands located within, at least, 100 feet of the centerline of the proposed road, wetland impact spreadsheets and cross-section drawings, and profile drawings showing the exact location of all impacted wetlands) and demonstrated that only 31.09 acres (later reduced to 27.10 acres) of jurisdictional and non-jurisdictional forested, shrub/scrub, and emergent wetlands would be impacted. (*Id.*)

127. Although most of the habitat along Woodland Road consisted of plant communities common in the Upper Peninsula and although the unavoidable impact of 31.09 acres of wetland (later reduced to 27.10 acres) was minimal where it would affect far less than 0.01% of Marquette County's 298,648 acres of palustrine wetlands, Woodland Road proposed a comprehensive plan to mitigate and monitor the 27.10 acres of proposed wetland impacts through the restoration of 3.52 acres of impacted wetlands, creation of 52.85 acres of new

wetlands, and preservation, via conservation easement to the State of Michigan, of 10 acres of existing high-quality wetlands. (*Id.* at 80-104.)

128. The 66.37 acres of proposed wetland mitigation represented a net gain of wetlands with a selected wetland replacement ratio of 1.5 acres of wetland mitigation for each acre of scrub/shrub and emergent wetland impacted (*i.e.*, 1.5:1); and 2.0 acres of wetland mitigation for each acre of forested wetland impacted (*i.e.*, 2:1). (*Id.*)

129. Woodland Road LLC also proposed a detailed monitoring plan whereby it agreed to monitor the wetland mitigation for a period of five years following the completion of construction, and meet certain performance standards which could be enforced via corrective action imposed by MDEQ. (*Id.*)

2. Public Comment On The Woodland Road Application

130. On December 17, 2009, MDEQ placed the Woodland Road Application on Public Notice and sent copies of the Application to the USEPA, Corps, and USFWS.

131. MDEQ then held a public hearing on the Woodland Road Application at Westwood High School in Ishpeming on February 10, 2010.

132. Numerous public comments supporting and opposing the Woodland Road Application were received by state and federal agencies.

3. Federal Objections To The Woodland Road Application

133. In March of 2010, the USEPA, Corps, and USFWS provided MDEQ with their combined federal comments on and objections to the Woodland Road Application and recommended that MDEQ deny same. (*See* 3/12/10 Corps Letter, 3/15/10 USFWS Letter, and 3/17/10 USEPA Letter, attached collectively as **Exhibit 4.**)

134. *First*, the federal agencies found that the purpose of the road was purportedly to “deliver ore from the proposed Kennecott mine at Eagle Rock for processing” and for that reason

the project should be evaluated in conjunction with the permitting of both the Eagle Mine and the Humboldt Mill; not separately. (*Id.*)

135. *Second*, largely ignoring the project purpose and failing to recognize the fact that Woodland Road would be built on or near existing roads and trails, the federal agencies determined that several much longer alternative routes which used existing roads might be the LEDPA because “we expect that hydrologic modification and habitat fragmentation have already occurred in wetlands and streams associated with these routes.” The federal agencies also called for a more detailed assessment of the wetland acreages and types that would be impacted by these various route alternatives. (*Id.*)

136. *Third*, the federal agencies found Woodland Road LLC’s wetland and wildlife assessments to be insufficient because they did not analyze the: (a) direct effects on wetlands associated with another entity’s potential relocation of a snowmobile trail (“Trail 5”); (b) secondary effects on rare wetland communities such as bogs, bog lakes, and wet meadows within the project vicinity; (c) secondary effects to wildlife that might result from year-round traffic; (d) secondary effects to wetlands that might result from the possible introduction of invasive species and pollutants from increased traffic; and (e) secondary effects to wetlands that might result from the possibility that the proposed road could lead to increased development and mining activity in the area. (*Id.*)

137. *Fourth*, the federal agencies objected on the basis that the Woodland Road Application purportedly failed to minimize: (a) potential secondary effects that might result from possible alteration of wetland hydrology (*i.e.*, preventing flow between wetlands) and habitat fragmentation (*i.e.*, preventing amphibians, turtles, and reptiles from crossing the road); and (b)

potential secondary impacts to the gray wolf, Kirtland's warbler, and Canada lynx; although Woodland Road LLC had found these species not to be present. (*Id.*)

138. *Fifth*, the federal agencies objected to the proposed wetland mitigation plan on the conflicting grounds that the plan: (a) failed to demonstrate that the wetlands were threatened by development; (b) relied, in part, upon wetland restoration which, in USFWS's opinion, provided only "limited ecological value"; (c) failed to consider additional options for wetland restoration which USEPA said was a mitigation measure preferred over wetland creation; (d) relied, in part, upon wetland creation which, in USFWS's opinion, were "small" and "scattered" and therefore "unlikely to replace ecological values"; but (e) relied, in part, upon wetland creation which were not located on a pro-rata basis in the four watersheds adversely affected by the project. (*Id.*)

139. Notably, the federal agencies neither criticized the proposal to convey the wetland preservation area to the State of Michigan via conservation easement, nor required a detailed final mitigation plan prior to permit issuance. (*Id.*)

140. The USEPA letter stated that it constituted "a federal objection to the issuance of a permit for this project" and that MDEQ had 90 days to either deny the permit or resolve the issues raised by the federal agencies. (*Id.*)

141. None of the federal agencies provided a statement of the conditions which such permit would include if it were to be issued. (*Id.*)

142. In fact, on March 9, 2010, USFWS staff wrote to USEPA staff that they had been unable to collaborate with the Corps and would be "lucky to have something thrown together by Friday afternoon. Huge project . . . huge impacts . . . just won't be able to cover many specifics." (*See* 3/9/10 Deloria Email, attached as **Exhibit 5**.)

4. Woodland Road LLC's Response To The Federal Objections

143. By way of letters dated April 9, 2010 and April 16, 2010, Woodland Road LLC addressed all of the objections raised by the federal agencies. (*See* 4/9/10 and 4/16/10 MCRC Letters, attached collectively as **Exhibit 6**.)

144. Among other things, Woodland Road LLC explained in writing that:

- a. The federal government's re-characterization of the project's purpose (*i.e.*, to haul ore) was incorrect, failed to acknowledge the numerous other planned public uses and benefits of the road, and was belied by the road design where a single-purpose haul road would have entailed a shorter single-lane route with no public access;
- b. No bogs or bog lakes would be impacted by the project and the unavoidable impact to wet meadow wetlands would be mitigated by relocating any narrow-leaved gentian plants pursuant to a pending MDNR permit;
- c. The Moose Country Snowmobile Club's application to relocate Trail 5 proposed only 0.25 acres of wetland impact;
- d. To ensure minimum impact to wetland hydrology and maximize water flow, the road would use a three-foot thick porous crushed-rock base with geotextile fabric where it crossed wetlands;
- e. The sub-watershed assessment showed that road runoff would not be discharged directly into streams but rather into uplands;
- f. Substantial development along the road corridor was unlikely due to the isolated geographical area, use of adjacent lands for timber harvesting, and enrollment of much of the land under the Commercial Forest Act;
- g. Any introduction of invasive species to wetlands by vehicles could be remedied through monitoring and corrective action permit requirements;
- h. Additional mining in and around the road corridor was speculative and would not be caused by the construction of the road;
- i. It would coordinate with USFWS to select permit conditions to address any speculative impacts to the Kirtland's warbler, gray wolf, and Canada lynx if the presence of those species is documented in the future;
- j. The proposed creation of 52.85 acres of wetland was likely to successfully replace the ecological values of the 27.10 acres of impacted wetlands where the created wetlands would be directly connected to large existing wetlands and would be ground-water driven, which is a more reliable hydrologic source for wetlands as opposed to surface-water fed;

- k. Additional wetland restoration was not feasible due to the fact that the project area has had little wetland impact in the past and thus minimal wetlands to restore; and
- l. The “Porcupine” wetland crossing (which had been of particular concern to USEPA) had been revised to further reduce wetland impacts thus lowering the total wetland impact of the project below the proposed 27.10 acres. (*Id.*)

145. MCRC also held several permitting conferences with USEPA and MDEQ whereby MCRC sought guidance as to what permit conditions would be necessary for USEPA to remove its objections.

146. During these conferences, USEPA refused to disclose what conditions would be necessary for the permit to issue and made clear that USEPA would not withdraw its objections. According to a Corps employee’s recollection, “EPA indicated they are not willing to lift their objection to permit issuance, and said that not only are alternatives available, but the project on its own has unacceptable environmental impacts.” (*See* 05/10/10 Battle Email, attached as **Exhibit 7.**)

147. Because of its inability to obtain the information needed to address the federal issues, Woodland Road LLC was forced to withdraw the Woodland Road Application on May 7, 2010, and MDEQ closed its file on May 14, 2010.

148. Shortly after the withdrawal, an MDEQ employee sent an email to USEPA discussing the possibility that Woodland Road LLC might reapply for a permit and stated that “hopefully it will be something along the lines that we discussed with them but as we heard in several meetings the only alternative that they feel is acceptable is the woodland road route. On the bright side if it does happen you’ll get to make another trip to Marquette!!” (05/10/10 Smolinski Email, attached as **Exhibit 8.**)

149. USEPA and certain MDEQ employees continued to track “rumors” that a permit application for the construction of a road in the same “vicinity as the Woodland Road” would be submitted.

B. County Road 595

1. Purpose Of CR 595

150. After the withdrawal of the Woodland Road Application, Kennecott Eagle Minerals Company (“KEMC”) announced its intentions to use CR 550 as the primary route to haul ore from the Eagle Mine to the Humboldt Mill.

151. KEMC’s decision to utilize the CR 550 route, which travels through the cities of Marquette, Negaunee, and Ishpeming, caused substantial concern among local governmental units and the general public.

152. In response to these concerns, a number of local public officials, businesses, industries, and residents began evaluating measures available to resolve the heavy truck transportation issues in the region, particularly traffic originating from the natural resource rich areas of northwestern Marquette County and traveling through the cities of Marquette, Negaunee, and Ishpeming.

153. On October 18, 2010, MCRC, as the public agency responsible for providing safe transportation in Marquette County, determined that developing a new all-season primary county road running from the Triple A Road in Champion Township south to U.S. 41 in Humboldt Township within a four-mile wide corridor was in the public’s best interest. (*See* MCRC’s 10/18/10 Resolution, attached as **Exhibit 9**.)

154. MCRC defined the project purpose as constructing a primary county road that would: (a) improve emergency, commercial, industrial and recreational access to a somewhat isolated but key industrial, commercial, and recreational area in northwestern Marquette County

by connecting those areas to U.S. 41; and (b) reduce heavy truck travel through Marquette County population centers. (*Id.*; *see also* CR 595 Project Corridor Map, attached as **Exhibit 10**.)

155. The Michigan Department of Transportation (“MDOT”) determined that CR 595 would “serve as a vital commercial and connector route in Marquette County” and “primary road funds may be applied to the construction of the proposed route CR 595.” (*See* 11/18/10 and 6/2/11 MDOT Letters, attached collectively as **Exhibit 11**.)

156. The Federal Highway Administration (“FHWA”) agreed that there was a need for CR 595 and approved CR 595 as “a proposed future major collector rural route.” (*See* 1/11/11 MDOT Letter, attached as **Exhibit 12**.)

157. A traffic crash reconstruction specialist from the Michigan State Police (“MSP”) concluded that “[t]he construction of County Road 595 will almost certainly increase traffic safety by creating a more uniform and efficient traffic flow on County Road 550 and along the US-41/M-28 corridor through the Cities of Marquette, Negaunee, and Ishpeming.” (*See* 7/18/11 MSP Letter, attached as **Exhibit 13**.)

158. Recognizing the importance of the project, KEMC committed to funding significant portions of the design, planning, and construction of CR 595 if all necessary governmental permits were obtained by September of 2012.

2. Planning Of CR 595

159. Over the course of the next year, MCRC expended significant resources planning and designing a road that would: (a) be the LEDPA capable of achieving the project purpose; and (b) avoid and minimize impacts to wetlands, streams, and wildlife to the greatest practicable extent while utilizing accepted road design standards so as to not compromise public safety.

160. MCRC conducted comprehensive assessments of wildlife, streams, and wetlands in the project corridor and made hundreds of revisions to the originally-proposed Woodland Road in order to reduce wetland impacts.

161. As a result of these efforts, MCRC identified a new route primarily on private land that ran 21.4 miles from the Triple A Road in Champion Township south to U.S. 41 in Humboldt Township. The following map depicts the proposed CR 595 route:



162. Approximately 99% of the route was located within 500 feet of an existing road or trail to further limit impacts to wetlands, streams, and wildlife. The following photographs illustrate portions of the existing roads and trails over which CR 595 was to be constructed:



*Existing Wolf Lake Road



*Existing Dead River Bridge On Trail 5

163. Nearly all of the upland habitats along CR 595 had been repeatedly logged and/or converted into pine plantations over the last 150 years. The following photograph illustrates some of the existing upland habitats along the proposed road:



*Clear Cut North of Brocky Lake



*Former Logging Site at Yellow Dog Plains

164. Locating CR 595 primarily on timber production land further reduced the proposed roads impacts to wetlands, streams, and wildlife.

3. CR 595 Application For Permit

165. On August 18, 2011, MDEQ informed USEPA that MCRC would be applying for a wetland fill permit to construct CR 595 and had requested a “pre-application” meeting with all state and federal regulators who would be reviewing the CR 595 Application. USEPA agreed to meet and scheduled the pre-application meeting for September 12, 2011.

166. Prior to this “pre-application” meeting and on August 30, 2011, a very different type of meeting regarding CR 595 took place at USEPA Headquarters in Washington, DC. MCRC was neither invited to nor informed of the meeting. In attendance (as far as is known at the present time) were top USEPA officials, Congressional staff, KBIC representatives, and a prominent environmental activist opposed to the construction of CR 595. It further appears that USEPA made no formal record of the meeting.

167. A recently released letter sent by environmental activist Dr. Laura Farwell to Congressional staff and the USEPA, however, states that **“during the August 30, 2011 meeting at EPA Denise Keehner of EPA’s Office of Wetlands, Oceans and Watersheds definitively reiterated EPA’s position and stated that the haul road [(i.e., CR 595)] would not happen.”** (See **Ex. 1** (emphasis added).)

168. On October 6, 2011, unaware that USEPA officials in Washington had already pledged to block the permitting of CR 595, MCRC applied to MDEQ for a permit to impact a total of 25.60 acres (later increased to 25.81 acres) of jurisdictional and non-jurisdictional wetlands. On January 23, 2012, MCRC submitted a revised application completely replacing the previous filing. (See 1/23/12 CR 595 Application Excerpts, attached as **Exhibit 14**.)

169. The CR 595 Application was prepared by KME, in conjunction with dozens of individuals working for several engineering and environmental firms and other private sector companies at a cost of millions of dollars.

b. Assessment Of Direct And Secondary Impacts To The Aquatic Ecosystem

i. Wetland Assessments

174. The CR 595 Application contained a thorough study of the proposed road's direct and indirect impacts on wetlands, including, but not limited to:

- a. a comprehensive delineation of all wetlands located within 200 feet of the proposed road centerline with supporting wetland data forms showing the soil profiles, dominant vegetation, hydrology indicators, and, if applicable, any observed aquatic species and wetland type;
- b. a complete set of wetland impact spreadsheets, wetland cross section descriptions, and plan and profile drawings showing the exact locations of all impacted wetlands;
- c. an assessment of the functional values of the wetlands along the proposed route using the Michigan Rapid Assessment Method for Wetlands ("MiRAM"); and
- d. an assessment of disruption of near-surface hydrology, increased runoff, pollution related to winter road maintenance, secondary development, and invasive species. (*Id.* at 72-81, 162-192.)

175. The CR 595 Application demonstrated that most of the land cover along the proposed road consisted of plant communities common in the Upper Peninsula and that the 25.81 acres of impacted wetlands consisted of 19.38 acres of forested wetlands, 5.83 acres of emergent wetlands, and 0.60 acres of scrub-shrub wetlands. (*Id.*)

176. The CR 595 Application further identified that the project's unavoidable impact of 25.81 acres of wetland was minimal where it would affect less than 0.01% of Marquette County's 298,648 acres of palustrine wetlands. (*Id.*)

177. The proposed road would impact just over one acre of wetland per linear mile of road construction with only 11 impacted wetland areas exceeding ½ acres. (*Id.*)

ii. Stream Assessments

178. The construction of CR 595 required 22 stream crossings via the installation of new clear-span bridges or concrete box culverts all of which would have been appropriately

sized using MDEQ's previously recommended Stream Simulation Methodology to ensure that these structures had minimal impacts on the streambed, stream flow, and provided an area sufficient to allow most wildlife species and fish to pass freely. (*Id.* at 81-90, 162-192.)

179. The CR 595 Application contained a thorough study of the proposed impact on these streams, including, but not limited to: (a) ecological assessments of the stream crossing sites; (b) detailed stream crossing maps and diagrams; (c) floodplain and floodwater modeling; (d) hydraulic calculations using the Stream Simulation Methodology; and (e) pebble count surveys so that the proper size and composition of stream substrate would be provided in disturbed areas. (*Id.*)

180. With respect to the potential impact on streams, the CR 595 Application demonstrated that the proposed road design, soil erosion management practices, and stormwater pollution prevention plans would protect stream habitat and inhabitants by maintaining natural stream bottoms, flow, temperatures, and turbidity. (*Id.*)

iii. Flora And Fauna Assessments

181. The CR 595 Application contained a thorough study of the proposed impact on flora and fauna, including, but not limited to: (a) a wide-ranging botanical survey to characterize vegetative communities within 150 feet of the centerline of the proposed road; (b) comprehensive assessments of large and small mammals, birds, reptiles and amphibians, fish and aquatic macroinvertebrates; and (c) a habitat fragmentation analysis. (*Id.* at 107-26.)

182. With respect to the potential impact on wildlife, the CR 595 Application demonstrated that CR 595 would neither: (a) impact any endangered, threatened, or rare plant species because the impact to the threatened narrow-leaved gentian would be properly mitigated; (b) impact any endangered, threatened, or special concern bird species; (c) lead to an unacceptable loss rate that would adversely impact general bird populations in the area; (d) have

any substantial negative impact on large or small mammals, including the Canada lynx (no presence) or gray wolf (no critical habitat within five miles); (e) nor adversely impact any threatened, endangered, or special-concern reptiles, amphibians, or fish species.

183. Specifically, with respect to habitat fragmentation, the CR 595 Application identified that while CR 595 would result in the loss of approximately 170 acres of habitat within its clearing limits, it was not likely to diminish overall regional landscape connectivity to any measurable extent or reduce biodiversity within the project corridor where, among other things: (a) a majority of wildlife species located around the road corridor utilized more than one type of land cover and could easily move among habitat components; (b) the proposed road would be only ¼ the width of an interstate highway and would not present a physical barrier to fish and wildlife species movement; and (c) animal densities and biomass in the area were relatively low due to a short growing season, heavy lake-effect snowpack, and other climate-related factors.

c. Avoidance And Minimization Of Direct And Secondary Effects On The Aquatic Ecosystem

184. In determining the CR 595 route and design, serious efforts were made to avoid and minimize impacts to wetlands, streams, and wildlife to the greatest extent possible utilizing accepted road design standards. (*Id.* at 47-70, 74-79, 84-86, 89-90, 99-107, 114-15, 122-27.)

185. These efforts included a detailed analysis of twenty different route and design variations within a four-mile wide corridor which were evaluated pursuant to the following environmental and safety factors: (a) avoid higher quality wetlands to the extent possible; (b) avoid/minimize wetland impacts by crossing wetlands at narrow points where feasible; (c) minimize new stream crossings by crossing at existing stream crossings; (d) avoid indirect impacts to camps and lakefront areas; (e) avoid steep rock outcrops or narrow deep valleys when possible; (f) consider snow removal as a primary issue with road design and location; (g) use

existing county roads where use would not affect existing development; (h) reduce grades to 6% or less where possible and avoid sharp curves; (i) decrease road fill depths in wetlands by lowering road grade; (j) use steeper 1:3 road embankment slopes and 1:2 road embankment slopes with guardrails where feasible to minimize wetland impacts; and (k) use design speed modifications where feasible. (*Id.*)

186. To further avoid/minimize wetland impacts, CR 595 was designed to: (a) be 32 feet in width as opposed to the standard primary county road width of 42 feet; and (b) use fill with good hydraulic conductivity and a crushed rock groundwater drainage layer in wetlands where groundwater flow is present. (*Id.*)

187. To further avoid/minimize stream impacts, CR 595 was designed to: (a) remove and rehabilitate existing, often deficient, stream crossings along the existing system of roads and trails in the 595 corridor; (b) employ clear-span bridges and properly sized bottomless concrete box culverts on large stream crossings to preserve natural stream flow and bottoms; (c) use properly sized arch culverts on small stream crossings to preserve natural stream flow and bottoms; and (d) reduce the length of crossings by using headwalls and wingwalls. (*Id.*)

188. To prevent the introduction of runoff into streams and wetlands, CR 595 was designed to: (a) divert runoff away from streams and wetlands and into adjacent uplands; (b) implement best management practices such as paving, rock riprap check dams, rock-lined runoff channels, geotextile fencing, slope seeding and mulching, and other proven erosion control practices; (c) avoid placement of storm drains on bridges; and (d) utilize temporary erosion control practices during construction. (*Id.*)

189. If wood turtles, a special-concern species, were found to be present (although none had been observed to date), MCRC committed to install fencing necessary to funnel turtles under bridges and through wide culverts at appropriate locations. (*Id.*)

190. To protect the gray wolf, moose, and other wildlife species, although no critical habitat existed in the area, MCRC committed to coordinate with USFWS and MDNR to implement mitigation measures such as signage to alert drivers, barriers adjacent to important wildlife travel corridors, speed limit advisories in critical areas, mortality surveys, and other actions to address wildlife-related issues. (*Id.*)

d. Mitigation Of Unavoidable Impacts To The Aquatic Ecosystem

i. Wetland Mitigation

191. The CR 595 Application contained a comprehensive plan to mitigate the proposed 25.81 acres of wetland impacts through the restoration of 3.52 acres of impacted wetlands and creation of 49.40 acres of new wetlands. (*Id.* at 80, 207-21.)

192. The 52.93 acres of proposed wetland mitigation represented a net gain of wetlands with a selected wetland replacement ratio of wetland mitigation to wetland impacted of 1.5:1 (scrub-shrub and emergent) and 2:1 (forested). (*Id.*)

193. The CR 595 Application also contained a detailed monitoring plan pursuant to which MCRC agreed to: (a) monitor the wetland mitigation for a minimum period of five years following the completion of construction; and (b) meet certain performance standards which could be enforced via corrective action imposed by MDEQ. (*Id.*)

ii. Stream Mitigation

194. The following photographs depict the inadequately-sized existing stream crossings negatively impacting the aquatic ecosystems along the proposed CR 595 route:



*Existing Mulligan Creek Crossing



*Existing culvert at Trail 5 crossing of Mulligan Creek Tributary 1.

195. The CR 595 Application proposed to replace 15 existing stream crossings which were inadequately sized and negatively impacting aquatic ecosystems. (*Id.* at 89, 223-26.)

196. The CR 595 Application also proposed to fully restore four existing stream crossings that would have been abandoned by the construction of CR 595 and were inadequately sized and negatively impacting aquatic ecosystems. (*Id.*)

197. A further component of the CR 595 Application's stream mitigation plan entailed: (a) the relocation of a portion of Triple A Road; (b) removal of three existing corrugated metal culvert crossings on the East Branch Salmon Trout River and restoration of the stream channel and banks; and (c) the installation of a new 65-foot span box beam bridge on a new road crossing location that would span the entire stream crossing so as to not disturb the natural stream bottom

or stream banks. This major stream mitigation project would have eliminated a road crossing over three culvert crossings of the East Branch Salmon Trout River that has conveyed substantial sedimentation to the river for many years. (*Id.*)

4. USEPA Regional Administrator Meetings In Marquette

198. On January 26, 2012, USEPA Regional Administrator (“RA”), Dr. Susan Hedman, traveled to Marquette to meet with MCRC regarding the CR 595 Application. RA Hedman also met separately with several environmental and tribal groups, including the Keweenaw Bay Indian Community (“KBIC”), where she discussed USEPA’s pending review of the CR 595 Application, among other things.

199. According to recently released documents, Senator Carl Levin’s office later received information from an informant that during her visit with the environmental and tribal groups RA Hedman advised the anti-mining groups that: (a) the USEPA would fight mining in Michigan; (b) there will be no mining in the Great Lakes basin; and (c) USEPA had formed an anti-mining committee to further these goals. The informant also notified Senator Levin’s office that KBIC had received substantial USEPA grants which KBIC used to oppose mining activity in Marquette County. (*See* Berglund Email Chain, attached as **Exhibit 15.**)

200. When confronted with this information by Senator Levin’s office, USEPA responded by stating that the alleged comments had been falsely attributed to RA Hedman.

201. USEPA did, however, admit to giving hundreds of thousands of dollars to KBIC who was actively lobbying USEPA against local mining and against CR 595.

202. USEPA also admitted to forming an internal mining team which it did not publicize on its website and which was regularly meeting on CR 595.

203. Furthermore, another recently released document shows that a lead member of USEPA’s mining team may very well have been opposed to mining and economic development

in the Great Lakes region. On January 20, 2011, a member of USEPA's mining team received a request for a member of the Wisconsin-based Oneida Nation to be added to USEPA's tribal mining team because "Wisconsin is the new front." In response, the USEPA mining team member agreed and commented that "the Welcome to WI signs stating 'Open for Business' is a sign of things to come" and that a proposed taconite mine in Wisconsin was "pushing jobs" during a town hall meeting he attended. (See 1/20/11 Cozza Email, attached as **Exhibit 16**.)

5. Public Comment On The CR 595 Application

204. On January 23, 2012, MDEQ placed the CR 595 Application on Public Notice and sent copies to USEPA, the Corps, and USFWS.

205. MDEQ held a public hearing on the CR 595 Application on February 21, 2012 at the Country Village Conference Center in Ishpeming, Michigan.

206. Many individuals, entities, and organizations provided comments to MDEQ in support of and opposition to the CR 595 Application.

207. Several individuals, environmental organizations, and KBIC directly lobbied USEPA, the Corps, and/or USFWS to object to the CR 595 Application.

6. Federal Objections To The CR 595 Application

208. On March 2, 2012, MCRC met with USEPA, USFWS, and Corps who indicated that they would formally object to the issuance of the requested permit, based primarily upon what they allegedly considered to be an inadequate LEDPA analysis.

a. The Corps' Objection To The CR 595 Application

209. By way of a March 29, 2012 letter, the Corps communicated to USEPA and others that in its view, "[t]he County Road 595 application is deficient in several areas, including the project purpose, reasonable comparison of alternatives, an adequate Section 404(b)(1)

analysis, and an adequate compensatory mitigation proposal.” (See 3/29/12 Corps Objection, attached as **Exhibit 17**.)

210. Although difficult to decipher, the Corps appeared to complain, among many other things, that:

- a. The stated project purpose was purportedly too narrow, should have been “to improve transportation between US-41 and northern Marquette County,” and illegitimate because CR 595 would not improve safety and access for emergency responders;
- b. The LEDPA analysis was insufficient and should have considered rail as an alternative (even though USEPA and Corps had previously accepted the Woodland Road LLC’s conclusion that rail was not the LEDPA);
- c. Wetland impacts were not adequately characterized because the proposed road widths within the right-of-way could purportedly be changed at a later date;
- d. The vegetative assessments were allegedly inadequate because they did not appear to analyze the segments of CR 595 that varied from the Woodland Road;
- e. The wetland mitigation plan would likely fail to replace the functional value of the impacted wetlands because many of the proposed mitigation sites were allegedly too close to CR 595;
- f. The wetland mitigation monitoring plan was allegedly insufficient because it neither required remedial action, contained a long enough monitoring period, nor addressed financial assurances or conservation easements; and
- g. The proposed stream mitigation would likely fail to result in net benefits in water quality because there was allegedly no support for the premise that replacing undersized culverts at existing stream crossings with properly sized culverts would improve water quality. (*Id.*)

211. The Corps did not list the conditions necessary for the permit to issue. (*Id.*)

b. USFWS’ Objection To The CR 595 Application

212. By way of a April 5, 2012 letter, USFWS objected to just about every aspect of the CR 595 Application and “recommended against issuance of a permit.” (See 4/5/12 USFWS Objection, attached as **Exhibit 18**.)

213. With respect to the assessment of direct impacts, USFWS: (a) focused on the overall “clearing, excavation, and fill” that would “be required along the entire 21.4 mile route”

and “impact a minimum of 171 acres”; (b) speculated that “more impacts are likely in order to facilitate passing lanes, stream crossings, and wider ditches” not contemplated by the actual application; (c) expressed its unfounded “concern that rare, unique, or high-quality wetlands would be impacted by the project”; and (d) opined that the replacement and improvement of the existing and inadequately-sized stream crossings might somehow cause an adverse impact to stream flow. (*Id.*)

214. With respect to the assessment of indirect impacts, USFWS: (a) expressed its unfounded opinion that the proposed equalization culverts and groundwater drainage layers may not work and may lead to fragmented wetlands; (b) found that while the application provided general measures to monitor for invasive species, the application “fails to provide any specific details on how non-native invasive species will be monitored along CR 595.” (*Id.*)

215. With respect to impacts on wildlife, USFWS objected on the basis that the CR 595 Application: (a) called for road heights in certain areas that would restrict amphibians and reptiles from crossing the road; (b) did not evaluate mitigation measures (e.g., lowering speed limits) in unspecified areas to help minimize vehicle collisions with animals such as white-tailed deer, gray wolf, and moose; and (c) failed to restrict removal of potential and unspecified migratory bird nesting habitat along the entire road corridor during the nesting period which runs from April 15 to August 15 of each year. (*Id.*)

216. Although no Kirtland’s warblers were identified during two separate field surveys, USFWS found that additional studies and surveys were allegedly needed, because Kirtland’s warbler habitat is “temporal in nature.” (*Id.*)

217. Although MCRC's studies showed that the Canada lynx was not present in the area, USFWS determined that additional studies were needed, because a Canada lynx was allegedly spotted in the Eastern Upper Peninsula in 2003 and 2010. (*Id.*)

218. USFWS also concluded, without any supporting evidence, that some of the proposed wetland mitigation was unlikely to succeed because it was too close to CR 595. (*Id.*)

219. USFWS did not list the conditions necessary for the permit to issue. (*Id.*)

c. USEPA's Objection To The CR 595 Application

220. On April 23, 2012, USEPA submitted to the MCRC what USEPA described as the combined federal comments on and objections to the CR 595 Application. (*See* 4/23/12 USEPA Objection, attached as **Exhibit 19**.)

221. Ignoring the catastrophic flood in 2003 that cut off the northern portion of Marquette County from emergency access for several days, USEPA first objected on the basis that one of the stated purposes of CR 595 (namely, that the road be within a four-mile wide corridor west of Silver Lake Basin to provide access to the areas of Marquette County north of the Dead River in the event of another catastrophic flood) was too narrowly defined and impermissibly limited alternative routes which would meet the project purpose. (*Id.*)

222. USEPA next found that the LEDPA analysis was deficient because the CR 595 Application: (a) "may have" overestimated the aquatic impacts of the Mulligan Plains East-Sleepy Hollow alternative; (b) contained insufficient information regarding the cost of crossing the Yellow Dog River; and (c) improperly ruled out CR 510-Red Road-Sleepy Hollow-Wolf Lake Road because of the length and additional cost of the route. (*Id.*)

223. USEPA objected to MCRC's assessment of direct impacts on the basis that the proposed project's clearing, excavation, and fill along the entire 21.4 mile route would impact 171 acres of mostly non-jurisdictional uplands. (*Id.*)

224. With respect to indirect impacts, USEPA determined that the CR 595 Application allegedly contained insufficient details regarding: (a) the proposed monitoring and mitigation of invasive species that could arise from vehicles traveling along the proposed route; (b) the effect the road would have on fragmented wetlands over 0.5 acre in size even though the road design utilized equalization culverts and groundwater drainage layers to facilitate water exchange between wetlands; and (c) the speculative loss of stream function downstream of the proposed crossings even though those crossings were adequately sized with the Stream Simulation Methodology and in many cases replaced existing inadequately-sized crossings. (*Id.*)

225. USEPA next found that the wildlife assessments were purportedly insufficient and ordered MCRC to take the following actions: (a) coordinate with USFWS to address impacts to migratory birds along the entire route that might result from the “the large amount of habitat clearing”; (b) conduct a survey for Kirtland’s warblers although no Kirtland’s warblers were identified during two separate field surveys; (c) reconsider one segment of the proposed road (*i.e.*, the Porcupine wetland) which required 25 feet of vertical fill because it would inhibit animal movement; (d) work with MDNR “to identify areas with higher relative densities of wildlife and to develop any potential mitigative measures”; and (e) analyze the proposed road’s impact on dispersing the Canada lynx which, according to MCRC’s studies, was not present in the area. (*Id.*)

226. Lastly, USEPA determined that: (a) the wetland creation plan purportedly had a low probability of success because the type of wetlands impacted by the proposed road (*i.e.*, forested wetlands) were “difficult to replace” and two of the proposed wetland creation sites were too close to the proposed road; and (b) additional stream mitigation would be needed to compensate for the new and longer replacement stream enclosures. (*Id.*)

227. Because USEPA -- at this point in time -- determined that CR 595 was not the LEDPA, USEPA refused to list the “conditions which such permit would include if it were issued by the [USEPA]” stating that it was “not possible at this time to provide the conditions necessary for issuance of this permit in accordance with CWA 404(b)(1) Guidelines.” (*Id.*)

7. MCRC’s Supplementation Of The CR 595 Application And Response To The Federal Objections

228. In response to a request by MDEQ for additional information, and between April and May of 2012, MCRC supplemented the CR 595 Application with a plethora of information regarding its LEDPA analysis and confirmed that CR 595 was the LEDPA capable of achieving the project purpose. (*See* 4/12/12, 5/7/12, and 5/29/12 MCRC Letters, attached collectively as **Exhibit 20.**)

229. On May 2, 2012 and May 14, 2012, MCRC requested guidance from USEPA regarding the additional conditions that USEPA would require for the federal objections to be withdrawn. (*See* 5/2/12 MCRC Letter, attached as **Exhibit 21.**) USEPA did not identify any of the conditions necessary for its objections to be withdrawn. USEPA did, however, request that MCRC consider “preservation” as a means of mitigation.

230. In response to a request by MDNR for additional information, MCRC meet with MDNR and supplemented the CR 595 Application with a plethora of information demonstrating that CR 595 would have minimal impacts to wildlife. Among other things, MCRC committed to:

- a. post yellow moose crossing signs along the proposed road, limit large grassy roadsides that could be attractive to wildlife, implement wildlife underpasses and fencing if MDNR identified any areas of concern, and create and enforce a detailed wildlife-vehicle mortality monitoring plan;
- b. install a smooth asphalt road surface to lower noise;
- c. coordinate with adjacent landowners to limit the construction of secondary roads and conduct a survey to identify the locations of the narrow-leaved gentian;

- d. use only certified weed-free top soil and straw and native grasses and forbs along the proposed road and monitor invasive species, if any, along the proposed road corridor;
- e. reduce the total length of culverts in the initial construction plans from 1,735 feet to 1,219 feet; and
- f. limit road salt use to intersections, steep hills, and curves. (*See* 5/30/12 MCRC Letter, attached as **Exhibit 22**.)

231. By way of two June 6, 2012 letters sent to MDEQ and USEPA, MCRC provided a comprehensive response to the remainder of the federal objections and MDEQ's informational requests. (*See* 6/6/12 MCRC Letters, attached as **Exhibit 23**.) These two letters included:

- a. Information showing that the compensatory floodplain cuts and peat excavation areas along the proposed road would have no adverse impacts on wetland flows;
- b. Revisions to the CR 595 Application increasing the size of and partially burying the wetland equalization culverts to assuage the federal concerns regarding wetland fragmentation;
- c. A three-year plan for monitoring and eradicating any invasive species that may appear along the 595 corridor in the future;
- d. A commitment to further work with MDNR to develop a plan to minimize wildlife impacts along the 595 corridor;
- e. A commitment to perform new Kirtland's warbler and Canada lynx studies for CR 595 and all of the alternative routes;
- f. A reduction of 303 feet of proposed stream enclosures and a commitment to replace two box culverts with box beam bridges to further facilitate wildlife passage and maintenance of stream functionality;
- g. Revisions to the bridge plans for the Second River crossing to propose a bankfull width channel to be constructed and stabilized with rock;
- h. Revisions to the Dead River crossing to increase the width of the bridge from 24 feet to 32 feet;
- i. A commitment to minimize runoff into streams and wetlands by implementing additional best management practices taken from the USDA's Stream Simulation Work Group;
- j. A more thorough evaluation of the 22 stream crossings, including a detailed habitat and biologic assessment of all impacted streams and an analysis of all direct and indirect stream impacts;
- k. A menu of proposed projects, with measurable performance standards, to mitigate the 1,391 feet of unavoidable stream impacts (*i.e.* streams in bridges

or culverts). Among other things, the stream mitigation proposal included: (i) a plan to restore 1,637 linear feet of the East Branch Salmon Trout River; (ii) a plan to restore 2,000 linear feet of Partridge Creek; (iii) 0.9 miles of paving projects to reduce sediment load into the Big Garlic River and the Yellow Dog River on CR 510; and (iv) replacement of six undersized or improperly installed culverts in varying locations around Marquette County;

- l. A revised wetland impact assessment acknowledging the potential secondary impact on 0.4 acres of wetlands that would have been fragmented by the construction of the proposed road and an assessment of the functional values of all impacted wetlands using MiRAM which showed that 10.68 acres of the 26.06 acres of impacted wetlands were ranked “S3/G4” pursuant to MNFI. Notably, the breakdown of “S3/G4” wetlands were: 8.29 acres of Hardwood Conifer Swamp, 1.76 acres of Rich Conifer Swamp, and 0.63 acres of Northern Hardwood Swamp;
- m. A buffet of alternative wetland mitigation proposals, with measurable performance standards, involving the creation of 12.55 acres of emergent and scrub-shrub wetlands and the preservation of high quality (*i.e.*, MiRAM scores over 70 and S3/G4 ranks) forested wetland systems with upland buffers at up to twelve candidate preservation sites. Many of these proposed mitigation sites contained large patches of the State-threatened narrow-leaved gentian plants; and³
- n. Revised cost estimates, detail drawings, and plan and profile drawings for constructing CR 595. (*Id.*)

232. USEPA did not respond to these letters in writing.

8. MDEQ’s And MDNR’s Consultation With MCRC Regarding The Federal Objections

233. On June 11, 12, and 15, 2012, MCRC met with MDEQ and MDNR onsite and reviewed the federal objections in detail. In particular, the group conducted a field review of the proposed stream crossings and wetland impacts and discussed the wetland preservation options that would satisfy the Corps, USFWS, and USEPA.

234. MDEQ advised MCRC that a preservation mitigation ratio of 10:1 should be used for impacts to low-quality wetlands and that a preservation mitigation ratio of 12:1 should be used for impacts to high-quality wetlands ranked “S3/G4” or containing narrow-leaved gentian.

³ The intent of providing a buffet of alternative options for stream and wetland mitigation was to receive guidance from the federal agencies on what would constitute acceptable components of the mitigation plans since the federal agencies had refused to list the “conditions which such permit would include if it were issued by the [USEPA].”

235. On June 25, 2012, MDEQ encouraged MCRC to submit: (a) a “final stream mitigation plan containing at least one stream mitigation project by each impacted HUC8 watershed, based on lineal feet of proposed stream impacts per watershed”; (b) a final wetland mitigation plan with a combination wetland creation for emergent and scrub wetlands and preservation for the forested wetlands; and (c) a final “clean copy” of the comprehensive application denoting the revisions. MDEQ also urged MCRC to use the Wolf Lake Road route variation at the southern portion of the CR 595 route to minimize impacts to aquatic resources. (See 06/25/12 MDEQ Letter, attached as **Exhibit 24**.)

236. With respect to wetland mitigation, MDEQ directed MCRC to submit documentation showing that: (a) the proposed wetland preservation areas were threatened from logging; (b) the proposed preservation wetlands would replace the functions and values of the impacted wetlands; and (c) such replacement of functions would be maintained following the completion of road construction. Notably, MDEQ wrote that for “impacts to rare and imperiled (S/3/G4) wetlands a 5:1 mitigation ratio or a 12:1 preservation mitigation ratio is required.” (*Id.*)

237. With respect to stream mitigation, MDEQ suggested that MCRC submit documentation showing: (a) the proposed stream channel enclosure, excavation, reconstruction, and relocation impacts in lineal feet; (b) the measures used to mitigate these stream impacts; and (c) the lost functionality of the impacted streams that would be replaced by the mitigation. (*Id.*)

9. MCRC’s Second Revised CR 595 Application

238. In light of the substantial revisions needed to address the federal objections, MCRC, at MDEQ’s request, submitted a revised permit application dated June 29, 2012 which, among other things: (a) reduced the proposed wetland impacts down to 24.32 acres; (b) incorporated the Wolf Lake and Kipple Creek route variations requested by MDEQ thereby reducing the length of the proposed road from 21.4 miles to 20.9 miles; and (c) contained

significant structure redesign such as replacing culverts with bridges or enlarging the culverts to improve both wildlife movement and hydraulics. (*See* 6/29/12 Second Revised CR 595 Application, attached as **Exhibit 25**.)

239. The Second Revised CR 595 Application contained a Second Wetland Mitigation Plan that proposed to preserve in perpetuity via conservation easements 228.1 acres of upland buffer and 311.9 acres of existing high quality wetlands with the following attributes: (a) MiRAM scores over 70 (on a scale of 100); (b) MNFI ranks of S3/G4; and (c) established populations of State-threatened narrow-leaved gentian plants. (*Id.*)

240. Not even counting the upland buffers, the proposed wetland preservation areas exceeded the State required acreage of wetland preservation by 45.2 acres and used wetland mitigation ratios of 10:1 for regular wetlands and 12:1 for rare wetlands ranked S3/G4 or wetlands housing narrow-leaved gentian. (*Id.*)

241. The Second Wetland Mitigation Plan also contained information showing that the proposed preservation areas: (a) were mostly located in the same HUC10 watersheds as the impacted wetlands; (b) were under threat of logging, recreational development, and recreational vehicular traffic; (c) would be fully evaluated and delineated as part of a baseline assessment; and (d) would be subject to rigorous invasive species monitoring. (*Id.*)

242. The Second Revised CR 595 Application also contained a Second Stream Mitigation Plan that provided a comprehensive analysis of the 2,224.25 lineal feet (later revised to 2,319.25) of stream impacts and 9,940 lineal feet of stream benefits derived from reconstructing 17 inadequate stream crossing structures along the existing CR 595 route using design protocols in the Stream Simulation Methodology. (*Id.*)

243. Additionally, the Second Stream Mitigation Plan proposed to take actions outside of the CR 595 corridor to: (a) replace two substandard stream culvert crossings at Flopper Creek and Halfway Creek with bridges, install paving and curbing to minimize stormwater runoff, and create a stable stream channel to maximize fish movement and wildlife passage; (b) restore 1,637 feet of the East Branch Salmon Trout River by relocating 0.8 mile of Triple A Road, replacing three corrugated metal culverts with a 65-foot bridge; (c) pave a 0.7 mile segment of CR 510 to reduce sediment that is being introduced into the Big Garlic River; and (d) pave 0.2 mile of CR 510 to reduce sediment being introduced into the Yellow Dog River. (*Id.*)

10. USEPA's Informal Objection To The Second Revised CR 595 Application

244. The same day as the Second Revised CR 595 Application was submitted, MCRC held a site visit with USEPA and MDEQ. During the site visit, USEPA's Tinka Hyde and Melanie Burdick (f/k/a Melanie Haveman) stated orally that: (a) the CR 510-Red Road-Sleepy Hollow route alternative could be the LEDPA; and (b) the Second Wetland and Stream Mitigation Plan was allegedly inadequate because it purportedly failed to account for unspecified "secondary" or "indirect" wetland and stream impacts that would allegedly be caused by CR 595.

245. Although USEPA continued its refusal to identify the conditions necessary for its objections to be removed, USEPA's Melanie Burdick (f/k/a Melanie Haveman) stated that a wetland preservation ratio of 20:1 should be utilized by MCRC to mitigate the proposed road's wetland impacts.

246. Ms. Burdick further provided an unlabeled document generally listing the type of wetland preservation that would presumably satisfy USEPA's objection. That document directed MCRC toward sites that, among other things: (a) would provide compensation for habitat

fragmentation such as “areas adjacent to existing wilderness areas (*e.g.*, along the McCormick Wilderness)”; (b) were high quality resources including headwaters to the Dead River or Yellow Dog River or other riparian areas; (c) were greater than 100 acres in size and had a buffer so logging could not occur around the perimeter; (d) were under a demonstrable threat of logging; and (e) could be managed by an experienced third party land manager. (*See* Unlabeled USEPA Mitigation Guidance, attached as **Exhibit 26**.)

247. On July 5, 2012, MCRC sent USEPA a letter confirming the discussions from the June 29, 2012 site visit. MCRC explained why the CR 510-Red Road-Sleepy Hollow alternative was not the LEDPA, and committed to search for wetland preservation sites that met criteria described by USEPA. (*See* 7/5/12 MCRC Letter, attached as **Exhibit 27**.)

11. MCRC’s Third Revised CR 595 Application

248. On July 24, 2012, MCRC submitted its Third Revised CR 595 Application which incorporated all of MCRC’s responses to the federal objections and corrected several typographical and calculation errors contained in the prevision application. (*See* 07/24/12 KME Letter and 8/12/12 Summary of Third Revised CR 595 Application, attached as **Exhibit 28**.)

249. That same day, MCRC submitted a Third Stream Mitigation Plan that corrected the stream impact and mitigation calculations. As revised, the proposed road had 26 stream crossings which: (a) entailed 1,650 lineal feet of stream within bridges and culverts; (b) replaced 515 feet of existing substandard stream crossing structures; and (c) involved 589 feet of streambed reconstruction. (*See* Third Stream Mitigation Plan, attached as **Exhibit 29**.)

250. On August 21, 2012, MCRC submitted its Third Wetland Mitigation Plan which was tailored to meet USEPA’s comments and unlabeled guidance document. As directed, the Third Wetland Mitigation Plan proposed to compensate for the direct impact to 25.48 acres of wetlands as well as all associated secondary impacts to aquatic resources resulting from the

construction of CR 595 by preserving, via conservation easement, 1,576 acres of high quality habitat adjacent to the federally owned McCormick Wilderness, consisting of 647 acres of remote and existing high-quality wetlands, 929 acres of upland buffer, 4.3 miles of headwater tributary streams, and two lakes. (*See* Third Wetland Mitigation Plan, attached as **Exhibit 30**.)

251. The Third Wetland Mitigation Plan thus provided a ratio of approximately 25:1 for preserved wetlands as compared to direct wetland impacts and preserved one-and-a-half times as much upland to serve as a buffer to protect the ecological integrity of the preserved wetlands. (*Id.*)

252. MCRC's initial evaluation of the preservation area showed that: (a) the proposed preservation wetlands consisted of several high-quality wetland types including poor conifer swamp, rich conifer swamp, hardwood conifer swamp, mixed wetland emergent/shrub/forested, northern wet meadow, and bog; (b) 67 of the 70 different preservation wetlands evaluated scored within MiRAM's high or moderate wetland function value range; and (c) the preservation of wetlands or lakes contained the following threatened species: common loon, dwarf bilberry, Farwell's water milfoil, narrowed-leaved gentian, and northern blue butterfly. (*Id.*)

253. The Third Wetland Mitigation Plan demonstrated that the designated preservation area was under a demonstrable threat of logging (*i.e.*, the land was owned by timber companies) and that MCRC was willing to transfer ownership of the land to either the State of Michigan or the federal government. Moreover, the Third Wetland Mitigation Plan called for intensive preservation and invasive species monitoring, including a baseline survey and GIS map, to assist in the development of a long-term management plan. MCRC further committed to providing financial assurance if required. (*Id.*)

12. MDEQ's Proposed Permit Conditions

254. On August 24, 2012, MDEQ sent USEPA and MCRC a letter enclosing 53 draft conditions MDEQ would impose on any future permit. In addition to the general requirement that all work be completed in accordance with the Third Revised CR 595 Application, MDEQ included the following additional permit conditions, among others, related to the proposed wetland mitigation:

- a. The permittee shall execute a conservation easement over all wetland preservation areas in a form identical to the conservation easement model on the MDEQ's website at www.michigan.gov/wetlands;
- b. The permittee shall provide documentation of ownership for the wetland preservation areas including: (i) a title report or title opinion that provides 50-year ownership history including copies of all deeds, encumbrances, easements, severed mineral rights, and other pertinent documents; (ii) a written statement from the property owner that there are no easements, encumbrances, or transfers of the property, in whole or in part, not disclosed in the title search or ownership history; (iii) subordination of any property interest (*e.g.*, mineral rights, mortgages, easements) that would interfere with establishment and protection of the conservation easement; (iv) a title insurance policy insuring the conservation easement area in the name of MDEQ, in an amount determined by MDEQ; and (v) a copy of the warranty deed;
- c. The conservation easement boundaries shall be demarcated by the placement of signage along the perimeter. The signage shall be placed at an adequate frequency, visibility, and height for viewing, made of a suitable material to withstand climatic conditions, and should be replaced as needed;
- d. Except as otherwise provided by this permit or approved in writing by MDEQ, the following activities are prohibited in perpetuity within the conservation easement areas: (i) alteration of surface topography, creation of paths, trails, or roads; (ii) placement of fill, dredging, or excavation; (iii) drainage of surface or groundwater; (iv) construction or placement of any structure; (v) plowing, tilling, or cultivating the soils or vegetation; (vi) cutting, removal, or alteration of vegetation; including the planting of non-native plant species; (vii) ranching, grazing, farming; (viii) use of chemical pesticides, fungicides, herbicides, or other chemical treatment; (ix) construction of unauthorized utility or petroleum lines; (x) storage or disposal of garbage, yard waste, trash, debris, abandoned equipment; (xi) accumulation of machinery or other waste materials; (xii) use or storage of off road vehicles; (xiii) placement of billboards or signage; (xiv) use of the wetland for the dumping of untreated storm water (except as otherwise allowed in this permit); or (xv) actions or uses detrimental or adverse to water conservation and purity, and fish, wildlife, or habitat preservation.

- e. The permittee shall submit a surety bond or letter of credit to the MDEQ in a form identical to the financial assurance models on the MDEQ's website at www.michigan.gov/wetlands in an amount to ensure that: (i) the conservation easements are recorded; (ii) signs are posted; (iii) site enhancement measures are completed; (iv) a management plan is provided; (v) baseline conditions are documented; (vi) an adequate stewardship agreement and funds have been established; and (vii) all other mitigation actions are performed as required to comply with the requirements and conditions of this permit.
- f. The financial assurance document shall be provided to and accepted by MDEQ prior to signature of this permit by MDEQ.
- g. The permittee shall submit a baseline ecological report for the conservation easement area, a conservation easement area management plan, a long-term management plan, and monitoring, and maintenance plan meeting detailed requirements.
- h. The permittee shall identify a responsible party to provide for the long-term management, maintenance and monitoring of the conservation easement area(s). A stewardship agreement with an appropriate third party (*e.g.*, municipality or non-profit resource management agency such as a land conservancy) and MDEQ, that is in compliance with the MDEQ-approved long-term management plan shall be established and recorded as Exhibit E to the Conservation Easement Agreement.
- i. A long-term financing mechanism or endowment fund to provide for the long-term management, monitoring and sustainability of the site shall be considered as part of the Stewardship Agreement to provide for the long-term maintenance and sustainability of the conservation easement area(s). (*See* 8/24/12 MDEQ Draft Permit Conditions, attached as **Exhibit 31**.)

13. Public Comment On The Third Revised CR 595 Application

255. In early June 2012, USEPA and MDEQ staff began discussing the possibility of MDEQ requesting a public hearing on USEPA's objections. Although one of USEPA's lead employees opined that she did not "think a public hearing or more time will change [RA Hedman's] determination" on the Application, MDEQ nevertheless requested a public hearing. (*See* 06/08/12 Haveman Email, attached as **Exhibit 32**.)

256. Specifically, on July 11, 2012, MDEQ formally requested that USEPA hold a public hearing because of "the widespread support for this project" and MCRC's comprehensive revised application. MDEQ further urged USEPA to make its decision by October 1, 2012, so

that MCRC would not lose funding for the project. (*See* 07/11/12 Creal Letter, attached as **Exhibit 33.**)

257. On July 30, 2012, USEPA issued a Notice of Public Comment on the Third Revised CR 595 Application.

258. Numerous entities, organizations, and individuals submitted comments in support of and in opposition to the Third Revised CR 595 Application.

259. On August 27, 2012, MDNR notified USEPA that the CR 595 Application met all of MDNR's requirements. (*See* 8/27/12 MDNR Letter, attached as **Exhibit 34.**)

260. On August 28, 2012, USEPA held a public hearing on MCRC's Third Revised CR 595 Application. At the public hearing, USEPA representatives acknowledged that KEMC would withdraw its funding commitment for the proposed road if USEPA did not withdraw its objections before October 2012.

14. MDEQ Notifies USEPA Of Its Intent To Approve The Third Revised CR 595 Application

261. In response to continuing discussions with MDEQ, MCRC re-evaluated the four proposed passing lanes and, by way of a September 14, 2012 letter, committed to revise one of the passing lanes to reduce wetland impacts from 1.38 acres to 1.08 acres. MCRC also committed to discussing the particulars of the long and short-term management plan for the wetland preservation area in its next meeting with MDEQ and USEPA. (*See* 9/14/12 MCRC Letter, attached as **Exhibit 35.**)

262. On September 17, 2012, MDEQ Director Dan Wyant sent a letter to USEPA explaining that "the improvements to the Road Commission's proposal since last April have brought this project to the point that Michigan will soon be in a position to issue a permit under state authorities." MDEQ then urged "the USEPA to remove their objection to the DEQ issuing a

permit for construction of Marquette County Road 595.” (See 9/17/12 MDEQ Letter, attached as **Exhibit 36.**) To MCRC’s knowledge, USEPA did not respond.

15. MCRC’s Fourth Wetland Mitigation Plan

263. On October 3, 2012, in preparation for an upcoming meeting with USEPA and MDEQ, MCRC provided both agencies with a “Mitigation Task List” that contained the following schedule of commitments:

- a. Submit a preliminary baseline assessment describing habitat types and acreage to MDEQ prior to October 31, 2012;
- b. Submit a Draft Stewardship Agreement between MDEQ, MCRC, and the selected land steward (Michigamme Township) prior to MDEQ counter-signature of the permit;
- c. Submit a Long-term Management Plan prior to MDEQ counter-signature of the permit outlining: (i) how the preservation area shall be managed in accordance with the Conservation Easement; (ii) a vegetation management strategy for controlling non-native invasive plant species identified in the baseline assessment; (iii) overall site management required to minimize any threats to the preservation area that could have a negative effect on the long-term viability of the Conservation Easement; (iv) an assessment of existing uses and the maintenance issues associated with existing pathways, trails, and structures; and (v) a reporting time period;
- d. Identify a source of funding for the Steward’s management of the preservation area prior to MDEQ counter-signature of the permit;
- e. Submit a Conservation Easement and Title Report prior to start of construction of CR 595;
- f. Submit a surety bond or letter of credit to ensure that the Conservation Easement is recorded, signs are posted, site enhancement features are completed, a management plan provided, the baseline conditions documented, stewardship agreement and funds are established prior to MDEQ counter-signature of the permit;
- g. Conduct and submit a baseline ecological assessment documenting the current ecological conditions of the preservation area by November 1, 2013; and
- h. Place signs, or other suitable markings along the boundary of the preservation area within 180 days of issuance of the permit or sooner as weather conditions might allow. (See 10/3/12 Mitigation Task List, attached as **Exhibit 37.**)

264. On October 31, 2012, MCRC submitted its Fourth Wetland Mitigation Plan which included, among other things, a preliminary baseline ecological assessment, short and long-term

management plans, an invasive species monitoring plan, and a draft cooperative stewardship agreement naming MCRC as the land steward. Notably, the draft cooperative stewardship agreement recorded MCRC's intent to transfer the preservation area to the United States Forest Service in order to expand the existing McCormick Wilderness. (See Fourth Wetland Mitigation Plan, attached as **Exhibit 38**.)

16. USEPA's December 4, 2012 Objections To The Third Revised CR 595 Application

265. On December 4, 2012, USEPA advised MDEQ that USEPA had "decided to withdraw the Agency's objection regarding the permit applicant's Alternatives Assessment," but that it "has not received adequate plans to minimize impacts or a comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts." (See 12/4/12 USEPA Objections, attached as **Exhibit 39**.)

266. With respect to USEPA's objection that the Application purportedly failed to minimize the direct and indirect impacts to wetlands, streams, and wildlife from CR 595, USEPA stated without supporting citation or analysis that:

- a. Wildlife. "The clearing of trees from the 21 mile long road corridor will fragment a significant portion of the wildlife habitat that exists along the road alignment. The fragmentation would be a significant physical barrier to wildlife movement and would likely increase wildlife mortality. Moose is one of the wildlife species likely to be adversely impacted by construction of CR 595. The proposed CR 595 alignment cuts through habitat that is frequently used by moose. CR 595 would be a significant physical barrier to movement for moose and is likely to result in an increase in moose mortality due to vehicle-moose collisions. Habitat fragmentation will also lower habitat quality for bird species that are dependent on large blocks of undisturbed forest for nesting habitat."
- b. Invasive Species. "The construction of a new road along the CR 595 alignment will also provide a corridor for the spread of invasive plant species which would contribute to the degradation of high quality wetland plant communities found along the road corridor as well as degrading wildlife habitat."

- c. Stormwater Runoff. “[E]ven with [the Applicant’s proposed] BMPs, the construction of CR 595 would likely result in a number of wetlands and streams being newly exposed to salt and other pollutants. Exposure to road salt and other pollutants associated with road runoff has been shown to result in the degradation of both wetland and stream quality.”
- d. Wetlands. “The construction of CR 595 is likely to have an adverse effect on flood storage functions of the wetlands in the road corridor, especially during spring thaws in years with heavy snow accumulation.”
- e. Streams. “Stream habitat quality may degrade due to changes in channel configuration at road crossings and exposure to salt and other pollutants.”
- f. Secondary Development. “New road construction or additional development along the CR 595 corridor is likely to cause additional disruption to wildlife travel corridors. Secondary development may contribute to the degradation of wetlands due to habitat fragmentation, introduction of invasive species and disruption of wetland hydrology through alteration of surface flow patterns within the impacted watersheds or within wetlands. In addition, the construction of new secondary roads and new development has the potential to adversely impact stream habitat and water quality due to the addition of pollutants such as sediments and road salt to streams, the degradation or loss of stream buffer areas and may also have an adverse impact on stream channel stability.” (*Id.*)

267. To satisfy these objections regarding minimization of direct and indirect impacts,

USEPA directed MCRC in its December 4, 2012 letter to provide the following:

- a. Secondary Development. “A detailed proposal describing the . . . locations of protected critical habitat areas” along the 595 corridor and the “mechanisms,” such as “conservation easements” or “deed restrictions,” necessary to “limit the building or connection of secondary road in critical habitat areas.”
- b. Wetlands, Streams, and Invasive Species. “Plans for monitoring and managing wetlands along the CR 595 corridor for a minimum of 10 years. These plans shall include methods to assess, manage and mitigate for indirect impacts to aquatic resources resulting from the addition of pollutants, fragmentation, invasive species, and changes in overall wetland and stream functions.”
- c. Wetlands. “Long-term monitoring and maintenance plans for the applicant’s proposed porous rock road design and wetland equalization culverts . . . to ensure that these structures perform as designed in the future.”
- d. Funding. A funding mechanism for all long-term monitoring and management of indirect impacts along the 595 corridor.
- e. Wildlife. A plan, approved by MDNR and USFWS, describing the locations and design of an appropriate number of sufficiently-sized wildlife crossings and fencing “in areas with the highest moose density as indicated on the

Moose Survey Plots of Northern Marquette County map” and “along major stream crossings” on the 595 route. (*Id.*)

268. With respect to USEPA’s objection that the Third Revised CR 595 Application purportedly failed to compensate for wetland and stream impacts from CR 595, USEPA identified the following alleged deficiencies in MCRC’s Fourth Wetland Mitigation Plan:

- a. Management Plan. There is no long-term management plan to ensure that the wetlands are managed to maintain them as high quality habitats.
- b. Steward. No long-term manager for the site has been identified, and no funding mechanism for long-term management has been established.
- c. Mineral Rights. The applicant has not secured mineral rights for all preservation areas. If all necessary mineral rights are not included as part of the mitigation plan, some of the preservation area may be subject to mining or other mineral extraction activities at some point in the future. (*Id.*)

269. To satisfy its objections regarding certain components of the Fourth Wetland Mitigation Plan, USEPA directed MCRC to:

- a. Steward. Identify an experienced “third-party” land steward for long-term management of the wetland preservation site.
- b. Management Plan. Submit “[a]daptive and long-term management plans for both stream and wetland mitigation [in the preservation area] that include a monitoring and reporting schedule and funding mechanism.”
- c. Management Plan. Provide “[m]easurable performance standards for stream mitigation” in the preservation area which “specify how sediment input will be measured and provide a baseline with which to compare pre-mitigation and post-mitigation conditions.”
- d. Funding. Show that “financial assurances are in place for construction and long-term management of both stream and wetland mitigation” in the preservation area.
- e. Mineral Rights. Demonstrate that “all necessary mineral rights to ensure that the wetland preservation area will be permanently protected have been secured” (*Id.*)

270. USEPA then stated that MDEQ had 30 days within which to either: (a) grant MCRC a permit consistent with USEPA’s “minimization and mitigation plans;” or (b) notify USEPA that MDEQ intends to deny the permit. (*Id.*)

17. USEPA's Repeated Refusals To Explain The Conditions Necessary To Satisfy Its New Objections

271. Between December 4, 2012 and December 27, 2012, MCRC repeatedly contacted USEPA by email and phone to ascertain the basis for its new objections and the specific conditions necessary to satisfy its new objections. USEPA, however, refused to answer any questions directly, instead stating that USEPA would “check into it and get back to” MCRC or stating that MCRC should submit its questions to MDEQ.

272. In light of the USEPA-imposed 30-day deadline to resolve USEPA's objections (extending through the Christmas and New Year holidays when many state and federal agency staff are unavailable) MCRC emailed USEPA on December 4, 2012, to find out who at USEPA would be responsible for working with MCRC to resolve the USEPA's objections. USEPA did not respond in writing. (*See* Iwanicki/Hyde Email Chain, attached as **Exhibit 40**.)

273. On December 7, 2012, MCRC contacted USEPA's Tinka Hyde by phone and reiterated the need for USEPA to provide more detail as to what conditions would need to be added to the permit in order for USEPA to withdraw its objections and asked USEPA to identify the USEPA staff members responsible for identifying the conditions necessary for the permit to issue so that MCRC could conference with those individuals. Ms. Hyde refused to answer the questions directly. (*Id.*)

274. That same day, MDEQ confirmed to MCRC that MDEQ had not heard anything from USEPA regarding what conditions would need to be added to the permit in order for USEPA to withdraw its objections, or which USEPA staff members were responsible for identifying same. (*Id.*)

275. By December 13, 2012, MCRC had still not received any feedback from USEPA regarding what conditions would need to be added to the permit in order for USEPA to withdraw

its objections. As such, MCRC renewed its request for coordination via an email to USEPA's Tinka Hyde. (*Id.*)

276. Ms. Hyde responded stating that “[s]ince MDEQ is the permitting authority, they have the lead on this project and will be following up with you. I encourage you to work directly with MDEQ.” (*Id.*)

277. The next day, on December 14, 2012, MCRC reiterated its request for coordination explaining that the request to USEPA was reasonable and expressed its disappointment with USEPA's refusal to provide any specific details as to what conditions were necessary for the permit to issue. (*Id.*)

278. USEPA's Tinka Hyde responded by stating that a 4:30 p.m. call with USEPA had been set up by MDEQ, but maintained USEPA's position that “MDEQ, as the permitting authority, has the lead.” Understandably unsatisfied, MCRC responded by pointing out that while MDEQ “may have the lead,” MCRC is attempting to resolve the USEPA's concerns, so “it would make sense that MCRC should be talking directly to the EPA.” (*Id.*)

279. As such MCRC again renewed its request for USEPA to inform MCRC who at USEPA would be making the decision as to the conditions necessary for the permit to issue. (*Id.*)

280. On December 14, 2012, MCRC conducted a phone conference with both USEPA and MDEQ. Specifically MCRC again asked USEPA to: (a) identify where along the road corridor USEPA would require additional wildlife crossings; (b) allow MDNR to serve as the experienced third-party land steward for the preservation site; and (c) accept legal opinions and title commitments evidencing MCRC's ability to obtain the remaining mineral rights underneath the preservation site.

281. USEPA refused to provide any guidance as to what additional wildlife crossings USEPA would require, refused to acknowledge that MDNR would be an appropriate third-party land steward for the preservation site, and refused to accept legal opinions and title commitments evidencing MCRC's ability to obtain the remaining mineral rights underneath the preservation site, instead stating that all mineral rights had to be owned prior to any withdrawal of the USEPA's objections. The latter, of course, would be essentially impossible within the approximately 20 days remaining in the 30-day period allowed to resolve the USEPA objections. In addition, ownership of all subsurface mineral rights is not necessary in order to protect the land from unwanted alterations and, in fact, is an unreasonable demand.

282. On December 16, 2012, MCRC provided USEPA and MDEQ with a partial draft response to USEPA's December 4, 2012 objections to the Third Revised CR 595 Application. The purpose of providing an advanced draft response was to initiate an open, honest, and helpful line of communication with USEPA so as to allow MCRC to ascertain the permit conditions which would satisfy USEPA's objection. (*See* 12/16/12 Partial Draft Response To USEPA's Objections, attached as **Exhibit 41**.)

283. In response to USEPA's "mitigation requirements," MCRC: (a) identified MDNR as the experienced third-party steward of the preservation area; (b) committed to sign a stewardship agreement with MDNR and agreed to compensate MDNR for its services; (c) proposed adaptive and long-term management plans with measurable performance standards for wetland and stream mitigation; (d) committed to establish financial accounts with funding sufficient to pay for the implementation of these mitigation management plans; and (e) stated that it was conducting a legal analysis to determine whether it would be able to secure all mineral rights under the preservation site. (*Id.*)

284. In response to USEPA's minimization requirements, MCRC: (a) explained that it was awaiting MDNR feedback on mitigation measures to protect the unspecified critical habitat areas along CR 595 from secondary development; (b) agreed to provide MDEQ with plans for monitoring and managing wetlands along the CR 595 corridor for a minimum of 10 years; (c) ensured that these monitoring and management plans would include methods to assess, manage, and mitigate impacts to aquatic resources along the CR 595 corridor resulting from pollutants, fragmentation, invasive species, and changes in wetland and stream functions; (d) proposed a long-term monitoring and maintenance plan for the road's groundwater drainage layers and wetland equalization culverts; (e) agreed to have funding mechanisms in place for these monitoring and management plans; and (f) explained that the 22 proposed stream crossings were already designed to facilitate wildlife crossings and advised that MCRC was awaiting MDNR's comments as to whether additional wildlife crossings were needed. (*Id.*)

285. USEPA, however, continued to refuse to provide clarification of what conditions would satisfy its objections. Instead, USEPA's attorney sent MCRC a letter on December 17, 2012 redirecting MCRC back to USEPA's December 4, 2012 objections and advising MCRC that it needed to work with MDEQ, not USEPA, to resolve USEPA's objections. (*See* 12/17/12 USEPA Letter, attached as **Exhibit 42.**)

286. On December 21, 2012, United States Senator Carl Levin wrote USEPA regarding his concern that "EPA's objections are not entirely clear and seem to have become moving targets" and his request that "EPA's objections need to be clearly defined in order for MDEQ to be responsive to them; I urge you to prove clarity and specificity as you hopefully work through these issues." (*See* 12/21/12 Senator Levin Letter, attached as **Exhibit 43.**)

18. MCRC's Final Response To USEPA December 4, 2012 Objections

287. On December 27, 2012, MCRC responded to USEPA's new objections by way of a detailed letter addressing USEPA's concerns on a point-by-point basis. (*See* 12/27/12 MCRC Letter, attached as **Exhibit 44**.)

288. Specifically, in the response to USEPA's objections to MCRC's stream and wetland mitigation plans, MCRC:

- a. delivered a Stewardship Agreement naming MDNR as the third-party steward responsible for management of the preservation site;
- b. committed to place \$650,000 in an endowment to finance MDNR's management services;
- c. submitted extensive adaptive and long-term monitoring and management plans containing measurable performance standards for wetland and stream mitigation at an estimated cost of \$1,067,000;
- d. committed to establish financial accounts with funding sufficient to pay for the implementation of these mitigation monitoring and management plans, and a \$1,300,000 endowment for the payment of property taxes; and
- e. demonstrated by way of attorney opinions, title insurance commitments, and abstracts that the remaining mineral rights could be secured for the preservation site. (*Id.*)

289. In the response to USEPA's stated position that MCRC had allegedly failed to minimize secondary impacts to unspecified critical habitats along the 595 corridor, MCRC:

- a. identified several specific areas of critical habitat (*i.e.*, areas it defined as being inhabited by threatened or endangered species such as the narrow-leaved gentian) within the 595 corridor;
- b. explained that any impacts to areas of critical habitat within the CR 595 corridor would require permits from the State of Michigan prior to impact;
- c. committed to further delineate the location of any critical habitats along CR 595 and adopt a Critical Habitat Monitoring and Management Plan to include annual monitoring of any secondary impacts and corrective actions to be taken if secondary impacts to these areas were identified;
- d. explained that the presence of the existing 65 roads/trails already connected to CR 595 minimized the need for future road connections; but

- e. nevertheless agreed to, *inter alia*, ban new roads in critical habitats (including wetlands and areas inhabited by the narrow-leaved gentian) or within a reasonable distance of an existing road on the same property. (*Id.*)

290. In the response to USEPA's stated position that MCRC had allegedly failed to minimize other secondary impacts to wetlands and wildlife, MCRC:

- a. provided a detailed plan for monitoring and managing the 122 wetland complexes along the CR 595 corridor for a minimum of 10 years and at an estimated cost of \$1,560,000;
- b. submitted an invasive species monitoring plan for the CR 595 corridor that would include pre-construction removal/treatment of invasive species, post-construction invasive species monitoring, and post-construction annual removal/treatment of invasive species at an estimated cost of \$328,000;
- c. proposed a long-term monitoring and maintenance plan for the CR 595's groundwater drainage layers and wetland equalization culverts which included installation of 26 observation wells and data loggers, surveys of top-of-casing of wells, and preparation of annual reports at an estimated cost of \$180,000;
- d. explained that the 22 proposed stream crossings were already designed to facilitate wildlife crossings, that MDNR had concluded that additional wildlife crossings were not needed, and that USFWS had not commented on the need for additional wildlife crossings; but
- e. nevertheless included a plan to: (i) mitigate and monitor direct and indirect wildlife impacts from CR 595 that entailed the erection of signs in wildlife crossing areas; (ii) design and construct wildlife crossings; (iii) implement wildlife-vehicle mortality monitoring that included daily inspection of CR 595 to document road kills; (iv) monitoring wildlife use of wildlife crossings; and (v) submit annual reports at an estimated cost of \$2,650,000. (*Id.*)

291. MCRC also agreed to obtain a \$5.7 million surety bond or letter of credit to ensure that the required monitoring, management, and reporting activities required by the permit would be carried out. (*Id.*)

292. USEPA did not reply to MCRC's comprehensive December 27, 2012 response document.

19. Transfer Of The Third Revised CR 595 Application To The Corps

293. On January 3, 2013 MDEQ sent USEPA a letter explaining that MCRC had been working with MDEQ "to address the concerns raised by the USEPA's reaffirmed objection" and

that MDEQ “believe[d] that there [were] reasons to support approval of this project.” (1/3/13 MDEQ Letter, attached as **Exhibit 45**.)

294. Because of the short timeframe and complexity of the issues remaining, MDEQ advised USEPA that it would be unable to grant a permit complying with USEPA’s “minimization and mitigation plans” and thus acknowledged that the permit application would be “now transferred to [the Corps].” (*Id.*)

295. Although USEPA did not reply to MCRC’s comprehensive December 27, 2012 response document, USEPA did make time to respond to a flurry of press inquiries regarding its successful blockage of the project, pass around news articles of the denied permit application, and schedule meetings with environmental organizations regarding the future, if any, of CR 595.

296. USEPA also received and accepted emails from a number of environmental organizations and state employees praising USEPA for stopping the project.

297. One MDEQ employee wrote to USEPA to express how “thankful” he was that “the EPA held their ground on County Road 595,” while another state employee sent an email to USEPA joking about a news article that referred to CR 595 as a “boondoggle.” (*See Cronk and Dortman Emails, attached collectively as Exhibit 46.*)

C. The Corps’ Failure To Process The Transferred CR 595 Application

298. The Corps, which had already objected to the issuance of the requested permit, did not take any formal action on the transferred CR 595 Application.

299. Specifically, on a number of occasions, the Corps stated to MCRC and others that (a) the Corps would not issue the permit as requested in the Third Revised CR 595 Application filed with MDEQ; and (b) in order to proceed MCRC would need to submit a wholly new application to the Corps.

300. The Corps, however, neither issued a denial of the 595 Application nor provided a notification of any appealable action pursuant to 33 C.F.R. § 331.4.

301. As of present date, MCRC has not submitted a new application to the Corps.

D. Consequences Of USEPA's Final Decision

302. USEPA's Final Decision divested MDEQ of the authority to process the CR 595 Application under the CWA and marked the consummation of USEPA's oversight of the permit Application; leaving both MDEQ and USEPA with nothing left to do with respect to the Application.

303. USEPA's Final Decision also caused the CR 595 Application to be transferred to the Corps who had previously objected to its issuance.

304. However, because the Corps did not take any action on the Application, MCRC has been unable to obtain the permits necessary to construct CR 595 and may not commence construction of CR 595. Moreover, the preparation and submission of a new application to the Corps would be a time-consuming, costly, and entirely futile process especially where the Corps has already voiced its opposition to the project.

305. As a result, heavy truck traffic originating in northwestern Marquette County is now routed south on CR 550 into the city of Marquette and then westerly on U.S. 41 through Marquette Charter Township and the cities of Negaunee and Ishpeming.

306. The CR 550 route is more highly populated and passes through numerous residential, retail, and commercial areas, including crossing directly in front of several bus stops and the main dormitory complex at Northern Michigan University.

307. The CR 550 route is approximately 55 miles long, more than twice the length of CR 595, adds about 1.5 million miles of commercial vehicle traffic on Marquette County Roads per year for Eagle Mine haulage alone, requires local transportation businesses to consume an

estimated 464,000 gallons of additional fuel every year, and introduces approximately 4,989 extra tons of pollution and greenhouse gases into the local airstream each year.

308. Since January 2013, there have been several pedestrian and vehicular accidents on the CR 550 route as a result of the increased heavy truck traffic.

COUNT I
Declaratory Judgment Action
USEPA's Objections Were Arbitrary And Capricious

309. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein.

310. MCRC's CR 595 Application complied with all requirements of Section 404 of the CWA including the 404(b)(1) guidelines.

311. For the following five reasons, USEPA's April 23, 2012 objections to the CR 595 Application were arbitrary and capricious, unsupported by fact, and otherwise not in accord with law.

312. *First*, USEPA's (later withdrawn) objection to MCRC's description of the "project purpose" was:

- a. unsupported by the administrative record;
- b. plainly wrong where the Project Purpose of, *inter alia*, reducing traffic congestion, increasing safety, serving local needs, and providing accessibility for local residents and communities West of Silver Lake Basin were genuine and legitimate; and/or
- c. otherwise not in accord with the Guidelines.

313. *Second*, USEPA's (later withdrawn) objection to MCRC's finding that CR 595 constituted LEDPA was:

- a. unsupported by the administrative record;
- b. plainly wrong where it failed to take into consideration cost, existing technology, and logistics in light of overall project purposes; and/or
- c. otherwise not in accord with the Guidelines.

314. *Third*, USEPA's vague objections to MCRC's assessment of direct impacts and concerns that the proposed project's clearing, excavation, and fill along the entire 21.4 mile route would impact 171 acres of mostly non-jurisdictional uplands were:

- a. unsupported by the administrative record;
- b. illegally focused on putative secondary impacts extending beyond the aquatic ecosystem;
- c. improperly based on separate features of the project that would not themselves be built upon disposal areas; and/or
- d. otherwise not in accord with the Guidelines.

315. *Fourth*, USEPA's vague demands for additional information and minimization measures, objections to MCRC's detailed assessment of indirect and wildlife impacts, concern that "the large amount of habitat clearing" would have a negative impact on migratory birds, and worry that the elevation of the road would "create a barrier that is likely to inhibit animal movement" were:

- a. unreasonable and impracticable;
- b. speculative and unsupported by the administrative record;
- c. illegally focused on putative secondary impacts extending beyond the aquatic ecosystem;
- d. improperly based on separate features of the project that would not themselves be built upon disposal areas; and/or
- e. otherwise not in accord with the Guidelines.

316. *Fifth*, USEPA's objection to MCRC's wetland mitigation plan on the basis that it purportedly had a low probability of success because forested wetlands were allegedly "difficult to replace" was:

- a. speculative and unsupported by the administrative record;
- b. not based on appropriate factual determinations, evaluations, and tests;
- c. plainly wrong where similar forested wetlands have been successfully created in Marquette County and elsewhere on numerous occasions; and
- d. otherwise not in accord with the Guidelines.

317. For the following three reasons, USEPA's subsequent December 4, 2012 objections to the revised CR 595 Application were also arbitrary and capricious, unsupported by fact, and otherwise not in accordance with law.

318. *First*, USEPA's conclusory finding that the proposed road would allegedly have "significant direct and indirect impacts on high quality wetland and stream resources, as well as on wildlife" was:

- a. speculative and unsupported by the administrative record;
- b. not based on appropriate factual determinations, evaluations, and tests;
- c. illegally focused on putative secondary impacts extending beyond the aquatic ecosystem;
- d. improperly based on separate features of the project that would not themselves be built upon disposal areas;
- e. plainly wrong where the proposed mitigation measures more than adequately compensated for any adverse effects; and/or
- f. otherwise not in accord with the Guidelines.

319. *Second*, USEPA's conclusory finding that the CR 595 Application allegedly failed to minimize direct and indirect impacts to aquatic resources was:

- a. neither supported by the administrative record nor appropriate factual determinations;
- b. impermissibly centered on speculative future impacts unlikely to occur and unrelated to the permitted activity;
- c. illegally focused on putative secondary impacts extending beyond the aquatic ecosystem;
- d. improperly based on separate features of the project that would not themselves be built upon disposal areas;
- e. plainly wrong where, *inter alia*, the proposed road and route design utilized state-of-the-art methodologies and best practices to avoid and minimize impacts; and/or
- f. otherwise not in accord with the Guidelines.

320. Moreover, USEPA's ambiguously worded, ever changing, and redundant "minimization requirements" were neither "appropriate and practicable," compliant with the

specialized methods of minimization set forth in Subpart H of the Guidelines, nor *required* by any provision of the Guidelines.

321. *Third*, USEPA's conclusory objection that the CR 595 Application allegedly failed to contain a "comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts" was:

- a. unsupported by the administrative record;
- b. unaccompanied by the "rationale for the required replacement ratio" as required by the Guidelines;
- c. plainly wrong where, *inter alia*, MCRC's proposal to preserve 1,576 acres of high-quality wetlands and uplands adequately compensated for the unavoidable impact to a mere 25 acres of wetlands and represented a preservation ratio (*i.e.*, 63:1) greatly in excess of that required by the Guidelines (*i.e.*, 1:1), the Corps' internal guidance documents (*i.e.*, 8:1), Michigan law (*i.e.*, 10:1), and the USEPA's own field staff (*i.e.*, 20:1); and/or
- d. otherwise not in accord with the Guidelines which only require mitigation to be "commensurate" with the amount and type of impact to the aquatic ecosystem that is caused by the permitted activity.

322. Furthermore, USEPA's ambiguously worded and eleventh-hour "mitigation requirements" were neither "appropriate and practicable" nor *required* by any provision of the Guidelines which, notably, do not require a detailed mitigation plan or implementation of mitigation prior to issuance of a 404 permit.

323. USEPA's refusal to remove its objections even after MCRC's December 27, 2012 point-by-point response to same was arbitrary and capricious where MCRC had completely resolved and capitulated to each and every one of USEPA's (albeit ambiguous) "minimization and mitigation requirements."

324. For example, USEPA's refusal to accept MDNR as the third-party steward for the preservation site was arbitrary and capricious where MDNR manages 12% of Michigan's total

land area, 6 million acres of mineral estates and oil and gas leases, and numerous wetland mitigation sites.

325. By way of further example, USEPA's refusal to accept MCRC's attorney opinions, title insurance commitments, and abstracts demonstrating that the remaining mineral rights would be secured for the preservation site was also arbitrary and capricious where the 404(b)(1) guidelines: (a) permit the use of "appropriate real estate or other legal instruments" such as "conservation easements," "restrictive covenants," or "transfer of title" to accomplish protection of preservation sites; but (b) only require that such "appropriate real estate or other legal instruments" be approved concurrent with the activity causing the authorized impacts. 40 C.F.R. §§ 230.93(h) and 230.97(a).

326. USEPA's Final Decision constitutes a final agency action subject to judicial review under the APA where:

- a. USEPA's Final Decision marked the consummation of both MDEQ's and USEPA's review of the CR 595 Application and left nothing for either MDEQ or USEPA to do with respect to that Application. To be sure, the USEPA may not reconsider its objections after the applicable temporal deadlines in Section 404(j) of the CWA have passed.
- b. Legal consequences directly flowed from USEPA's Final Decision where it forced MCRC to either wade through the prohibitively burdensome, time consuming, and expensive Corps permitting process. Indeed, the United States Supreme Court and other federal courts have held that the remedy for denial of action that might be sought from one agency (*e.g.*, the Corps) does not provide an adequate remedy for action already taken by another agency (*e.g.*, the USEPA).

327. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

328. Any further administrative proceeding before the Corps would be futile where the Corps: (a) helped formulate and joined in the USEPA's Final Decision; and (b) expressed to MCRC that it would not grant even the revised CR 595 Application submitted to MDEQ.

329. There exists an actual and substantial controversy between MCRC and USEPA regarding the legitimacy of USEPA's objections and refusal to withdraw same. Moreover, for the reasons stated above, MCRC is currently and continuously injured by the USEPA's unlawful objections.

330. The case is currently justiciable because USEPA has asserted jurisdiction over MCRC's permit application and unlawfully objected to same.

WHEREFORE, MCRC respectfully requests that this Court enter an Order: (a) declaring that USEPA's Final Decision was arbitrary and capricious, unsupported by fact, and otherwise not in accord with law; (b) setting aside USEPA's Final Decision and restoring MDEQ's assumed authority over the CR 595 Application; (c) enjoining USEPA from further objecting to or interfering with MDEQ's processing of the CR 595 Application; (d) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (e) granting to MCRC any further such relief this Court deems just and equitable.

COUNT II
Declaratory Judgment Action
USEPA Exceeded Its Congressionally Delegated Oversight Authority Under Section
404(j)(2)(B) Of The CWA

331. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein.

332. Section 404(j)(2)(B) of the CWA *only* authorizes the USEPA to object to a State's issuance of a 404 permit where the proposed permit is "outside the requirements" of Section 404 of the CWA and the Section 404(b)(1) guidelines.

333. By objecting to the issuance of the proposed permit here, USEPA exceeded its delegated oversight authority because none of the terms set forth in the CR 595 Application were “outside the requirements” of Section 404 of the CWA or the Section 404(b)(1) guidelines.

334. For example, USEPA’s objections to MCRC’s minimization of direct and indirect effects impermissibly focused on: (a) speculative and future secondary effects unlikely to occur; and (b) “critical habitats,” “secondary development,” and “wildlife crossings . . . large enough to accommodate larger wildlife species such as moose, cougar, and bear” beyond the “aquatic ecosystem.”

335. Section 404 of the CWA and the Guidelines do not, however, “require” minimization of such speculative secondary effects, nor do they “require” the application of such minimization measures to separate features of a project that would not themselves be built upon the permitted disposal areas.

336. By way of further example, USEPA’s objections to MCRC’s revised mitigation plans were impermissibly based on the alleged lack, prior to permit issuance, of: (a) “a signed stewardship agreement;” (b) “demonstration that financial assurances are in place for construction and long-term management of both stream and wetland mitigation;” (c) final “adaptive and long-term management plans” for stream and wetland mitigation; (d) “measurable performance standards” for stream mitigation; and (e) “demonstration that all necessary mineral rights . . . have been secured.”

337. Nothing in Section 404 of the CWA or the Guidelines “require” that these detailed aspects of a mitigation plan be signed and completed prior to permit issuance. Rather, Section 404 of the CWA and the Guidelines merely require that a permit be conditioned on future implementation of a reasonably complete mitigation plan.

338. Neither Section 404 of the CWA nor the Guidelines “require” financial assurance where, as here, there exists a “documented commitment from a government agency or public authority” that the compensatory mitigation will be provided and maintained.

339. Neither Section 404 of the CWA nor the Guidelines “require” that the selected mechanism for providing long-term protection of a mitigation site prohibit mineral extraction where to do so would be inappropriate or impracticable, nor do they “require” that all mineral rights underneath a mitigation site be obtained where, as here, the selected mechanism for providing long-term protection of the mitigation site prohibits adverse effects to the site’s aquatic ecosystem.

340. USEPA’s *ultra vires* objections constitute a final agency action subject to judicial review under the APA.

341. Any further administrative proceeding before the Corps would be futile where the Corps: (a) helped formulate and joined in the USEPA’s *ultra vires* objections; and (b) expressed to MCRC that it would not grant even the revised CR 595 Application submitted to MDEQ.

342. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

343. There exists an actual and substantial controversy between MCRC and USEPA regarding the legality of USEPA’s objections, and MCRC is currently and continuously injured by the USEPA’s unlawful objections.

344. The case is currently justiciable because USEPA has asserted jurisdiction over MCRC’s permit application and unlawfully objected to same.

345. Without this Court's intervention, USEPA's *ultra vires* actions will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the Constitution, CWA, and APA.

WHEREFORE, MCRC respectfully requests that this Court enter an Order: (a) declaring that USEPA's objections exceeded USEPA's congressionally-delegated oversight authority under Section 404(j)(2)(B) Of the CWA; (b) setting aside USEPA's *ultra vires* objections and restoring MDEQ's assumed authority over the CR 595 Application; (c) enjoining USEPA from further objecting to or interfering with MDEQ's processing of the CR 595 Application; (d) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (e) granting to MCRC any further such relief this Court deems just and equitable.

COUNT III

Declaratory Judgment Action

USEPA Failed To List The Conditions Necessary For The Requested Permit To Issue As Mandated By Section 404(j)(2)(B) Of The CWA

346. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein.

347. Section 404(j) of the CWA mandates that when objecting to a State's issuance of 404 permit, "such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by [USEPA]."

348. USEPA's April 23, 2012 objections failed to specify "the reasons for such objection[s]" and "the conditions which such permit would include if it were issued by [USEPA]." Indeed, USEPA even stated that because MCRC had not purportedly "demonstrated that the project is the LEDPA . . . it is not possible at this time to provide the conditions necessary for issuance of this permit"

349. With regard to MCRC's minimization of "direct impacts," USEPA based its objection on the following sentence: "[a]lthough the application outlines measures to minimize likely impacts to aquatic resources, we remain concerned that the magnitude of the proposed impacts to the relatively un-impacted aquatic resources along the route is significant."

350. Besides the fact that USEPA's stated concern has nothing to do with the "direct effects" of the permitted discharges into waters of the United States, USEPA wholly failed to describe the "direct impacts" of concern or list what additional minimization measures should have been included in the permit.

351. With regard to MCRC's minimization of "indirect impacts," USEPA expressed its concern that: (a) "[a]lthough the applicant has proposed methods to minimize . . . indirect impacts, the project will have long-term impacts on hydrology [(e.g., wetland flow patterns from floodplain compensating cuts)] and water quality (e.g., road salt, sediment, oil inputs) that would degrade habitats adjacent to the proposed road;" and (b) "[t]here are no specifics on the monitoring and mitigation for invasive species, and we remain concerned that natural communities adjacent to the road will be disturbed by invasive species."

352. Besides the fact that USEPA's stated concerns were unsupported by the administrative record, USEPA did not list the minimization measures it would require in order to assuage its speculative concerns, nor did it list what additional invasive species monitoring and mitigation it would require.

353. With regard to MCRC's minimization of "wildlife impacts," USEPA expressed its irrelevant and overreaching concern that "the large amount of habitat clearing required for the proposed project will have negative impacts on migratory birds" and the elevation of the road "would create a barrier that is likely to inhibit animal movement." Rather than list the

minimization measures necessary to assuage these groundless concerns, USEPA merely recommended coordination with USFWS and MDNR to address USEPA's concerns.

354. With regard to MCRC's wetland and stream mitigation plan, USEPA expressed its concern that "[b]ecause the proposed compensatory mitigation relies primarily on forested wetland creation, the probability of success of replacing the lost wetland functions is low;" and (b) "additional stream mitigation would be needed to compensate for the new and longer replacement stream enclosures."

355. Besides being unsupported and plainly wrong, USEPA's objection wholly failed to list what wetland and stream mitigation measures it would deem acceptable.

356. USEPA's December 4, 2012 objections also failed to contain a reasonably understandable "statement of the reasons for such objection[s]" and failed to adequately specify "the conditions which such permit would include if it were issued by [USEPA]." To be sure, USEPA did not provide any required "permit conditions" or modify the "permit conditions" supplied by MDEQ.

357. *First*, USEPA objected to MDEQ's intention to grant the CR 595 Application on the basis that "construction of County Road 595 would have significant direct and indirect impacts on high quality wetland and stream resources, as well as on wildlife," but neither identified the alleged direct and indirect impacts nor explained the reasons why it believed these purported impacts would be significant.

358. *Second*, USEPA objected to MDEQ's intention to grant the CR 595 Application on the basis that USEPA allegedly "has not received adequate plans to minimize impacts," but then, within only 30 days for MCRC to cure the purported deficiencies, set forth an unreasonably vague and open ended set of "minimization requirements" which did not satisfy USEPA's

statutory obligation to list “the conditions which such permit would include if it were issued by [USEPA].”

359. By way of example, USEPA required MCRC to place “conservation easements or deed restrictions” on “critical habitat areas” to protect these areas from “secondary development” but provided no guidance on what areas USEPA would deem critical or where it believed secondary development was likely to occur.

360. USEPA required MCRC to adopt “plans for monitoring and managing wetlands along the CR 595 corridor for a minimum of 10 years” and “funding mechanisms . . . for long-term monitoring and management of indirect impacts” but provided no guidance on what types of monitoring and management it would deem acceptable or what amounts of funding it would find sufficient.

361. USEPA required MCRC to adopt a plan to install additional wildlife crossings capable of accommodating “larger wildlife species such as moose, cougar, and bear” and “[f]encing along the road to guide wildlife to the crossings” but did not specify the design, number, or locations of such crossings and fencing USEPA would deem acceptable. Instead, USEPA stated that “[t]he design will depend on the target wildlife species and the physical characteristics of the road corridor” and that “the applicant shall coordinate placement of the crossings with the MDNR and [USFWS].”

362. *Third*, USEPA objected to MDEQ’s intention to grant the CR 595 Application on the basis that USEPA allegedly had not received “a comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts,” but then, within only 30 days for MCRC to cure the purported deficiencies, set forth an unreasonably vague and open-ended set of

“mitigation requirements” which did not satisfy USEPA’s statutory obligation to list “the conditions which such permit would include if it were issued by [USEPA].”

363. For example, apparently having found that neither MCRC nor Michigamme Township would be an appropriate third-party land steward for the preservation site, USEPA required, prior to permit issuance, identification of a third party land steward with “land management experience managing wetland preservation sites” and a “signed stewardship agreement with the land steward to maintain the proposed preservation area in perpetuity.”

364. Besides exceeding that which is required by the Guidelines and being plainly wrong, USEPA’s objection failed to identify any particular land steward it would deem acceptable.

365. Apparently having found insufficient the long-term management commitments outlined in MCRC’s Wetland and Stream Mitigation Plans and MDEQ’s long-term management permit conditions (which included monitoring, reporting, and funding), USEPA demanded, prior to permit issuance, a final “[a]daptive and long-term management plan for both stream and wetland mitigation that include a monitoring and reporting schedule and funding mechanism.”

366. Besides exceeding the temporal flexibility of the Guidelines which do not require such finalized plans prior to permit issuance, USEPA’s objection failed to explain how MCRC’s long-term management commitment or MDEQ’s long-term management permit conditions were deficient or what additional long-term management measures USEPA would deem suitable.

367. Apparently having found insufficient the financial assurance commitments outlined in MCRC’s Wetland and Stream Mitigation Plans and MDEQ’s financial assurance permit conditions, USEPA demanded, prior to permit issuance, “[d]emonstration that financial

assurances are in place for construction and long-term management of both stream and wetland mitigation.”

368. Besides exceeding that which is required by the Guidelines and being plainly wrong, USEPA’s objection failed to identify the amount and type of financial assurance it would require.

369. USEPA further required MCRC to demonstrate that “all necessary mineral rights to ensure that the wetland preservation area will be permanently protected have been secured,” but failed to explain what mineral rights would, in its opinion, be necessary to protect the preservation site or what type of demonstration would be sufficient to show that such mineral rights could be secured.

370. Because USEPA’s objections were ambiguous and open-ended and because USEPA failed to list the permit conditions it would require for the objections to be lifted, MCRC on numerous occasions (both by phone and written correspondence) requested USEPA to provide guidance as to how MCRC might resolve the objections.

371. Despite these repeated pleas by MCRC and others, USEPA refused to provide any reasonably understandable statement of reasons for its objections, or specify “the conditions which such permit would include if it were issued by [USEPA].”

372. USEPA’s failure to follow the objection requirements mandated by Congress in Section 404(j) of the CWA constituted a final agency action subject to judicial review under the APA.

373. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

374. There exists an actual and substantial controversy between MCRC and USEPA regarding the legality of USEPA's conduct. And, MCRC is currently and continuously injured by USEPA's unlawful action and inaction.

375. The case is currently justiciable because USEPA has asserted jurisdiction over MCRC's permit application and unlawfully objected to same.

376. Without this Court's intervention, USEPA's unlawful actions and inactions will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the Constitution, CWA, and APA.

WHEREFORE, MCRC respectfully requests that this Court enter an Order: (a) declaring that USEPA failed to follow the objection requirements mandated by Congress in Section 404(j) of the CWA; (b) remanding oversight of the CR 595 Application back to USEPA, directing USEPA to follow the objection requirements mandated by Congress in Section 404(j) of the CWA, and restoring MDEQ's assumed authority over the CR 595 Application; (c) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (d) granting to MCRC any further such relief this Court deems just and equitable.

COUNT IV

Declaratory Judgment Action

USEPA's Eleventh-Hour Objections Violated The Public Hearing And Temporal Requirements Set Forth In Section 404(j)(2)(B) Of The CWA

377. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein

378. Section 404(j)(2)(B) of the CWA provides that if USEPA objects to the issuance of a proposed permit, USEPA must hold a public hearing if requested by the State, and the State

may resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection.

379. USEPA violated this statutory mandate by asserting wholly new grounds in support of its December 4, 2012 objection but nevertheless demanding that MDEQ either resolve the new objections or deny the permit within 30 days.

380. USEPA's illegal conduct deprived MCRC from a public hearing and from the statutorily proscribed time during which it could have resolved USEPA's new objections.

381. USEPA's failure to follow the temporal objection process mandated by Congress in Section 404(j) of the CWA constituted a final agency action subject to judicial review under the APA.

382. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

383. There exists an actual and substantial controversy between MCRC and USEPA regarding the legality of USEPA's conduct. And, MCRC is currently and continuously injured by USEPA's unlawful action and inaction.

384. The case is currently justiciable because USEPA has asserted jurisdiction over MCRC's permit application and unlawfully objected to same.

385. Without this Court's intervention, USEPA's unlawful actions and inactions will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the Constitution, CWA, and APA.

WHEREFORE, MCRC respectfully requests that this Court enter an Order: (a) declaring that USEPA failed to follow the temporal objection process mandated by Congress in Section 404(j) of the CWA; (b) remanding oversight of the CR 595 Application back to USEPA and

restoring MDEQ's assumed authority over the CR 595 Application (c) allowing MDEQ to request a public hearing on USEPA's new objections, and/or affording MCRC the statutorily proscribed time to resolve USEPA's new objections; (d) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (e) granting to MCRC any further such relief this Court deems just and equitable.

COUNT V

Declaratory Judgment Action

The Corps' Failure To Act On The CR 595 Application Was Arbitrary And Capricious And Made In Violation Of The Corps' Own Regulations

386. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein.

387. Pursuant to Section 404(j)(2)(B), if a USEPA objection to a proposed wetland fill permit is not resolved within certain statutorily proscribed timeframes, the Corps "may issue the permit pursuant to subsection (a) or (e) of [Section 404 of the CWA], as the case may be, for such source in accordance with the guidelines and requirements of [the CWA]." 33 U.S.C. § 1344(j)(2)(B).

388. The USEPA's 404 State Program Regulations further specify that where a USEPA objection to a proposed wetland fill permit is not resolved within certain statutorily proscribed timeframes, the Corps "shall process the permit application." 40 C.F.R. § 233.50(j).

389. In this case, USEPA's objections to the CR 595 Application were not, according to USEPA, resolved within statutory timeframes set forth in Section 404(j)(2)(B) of the CWA.

390. The Corps, however, failed to take any action whatsoever with respect to the CR 595 Application in violation of the mandates of Section 404(j) of the CWA and the USEPA's 404 State Program Regulations.

391. The Corps' failure to take any action on MCRC's CR 595 Application constituted an impermissible constructive denial (presumably based upon the Corps' and USEPA's past objections which were arbitrary and capricious) and violated the Corps' 404 Permit Processing Regulations which, among other things, require all Corps permit denials to be in writing. *See* 33 C.F.R. §§ 320.1 *et seq.*; 33 C.F.R. §§ 331.4, 331.6, 331.12.

392. As a result of the Corps' unlawful constructive denial of MCRC's permit application, MCRC is unable to construct a critical road in northwestern Marquette County aimed at reducing dangerous heavy truck traffic through highly populated residential, commercial, and educational areas.

393. The Corps' constructive denial of the CR 595 Application and failure to act were arbitrary, capricious, an abuse of discretion, in violation of statutory authority, made without observance of congressionally prescribed procedure, unsupported by fact, and/or otherwise not in accordance with law.

394. The Corps' constructive denial of the CR 595 Application and failure to act constituted a final agency action subject to judicial review under the APA.

395. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

396. There exists an actual and substantial controversy between MCRC and the Corps regarding the legality of Corps' conduct. And, MCRC is currently and continuously injured by the Corps' unlawful action and inaction.

397. The case is currently justiciable because the Corps asserted jurisdiction over MCRC's permit application and unlawfully and constructively denied same.

398. Without this Court's intervention, the Corps' unlawful actions and inactions will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the Constitution, CWA, and APA.

WHEREFORE MCRC respectfully requests that this Court enter an Order: (a) declaring that the Corps' failure to take any action whatsoever with respect to the CR 595 Application violated Section 404(j) of the CWA, the USEPA's regulations, and the Corps' own regulations, and constituted an impermissible constructive denial of MCRC's permit application that was arbitrary and capricious; (b) setting aside the Corps' constructive denial of MCRC's permit application and directing the Corps to grant the requested permit as approved by MDEQ; (c) an injunction prohibiting USEPA from further objecting to or interfering with the permit as issued; (d) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (e) granting to MCRC any further such relief this Court deems just and equitable.

Date: July 8, 2015

Respectfully submitted,

CLARK HILL PLC

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EXHIBIT LIST

1. November 28, 2012 Farwell Letter
2. September 10, 2013 Elston Email
3. Supporting Documentation for Woodland Road Application for Permit
4. March 12, 2010 Corps Letter, March 15, 2010 USFWS Letter, and March 17, 2010 USEPA Letter
5. March 9, 2010 Deloria Email
6. April 9, 2010 and April 16, 2010 MCRC Letter
7. May 10, 2010 Battle Email
8. May 10, 2010 Smolinski Email
9. MCRC's October 18, 2010 Resolution
10. CR 595 Project Corridor Map
11. November 18, 2010 and June 2, 2011 MDOT Letters
12. January 11, 2011 MDOT Letter
13. July 18, 2011 MSP Letter
14. January 23, 2012 CR 595 Application Excerpts
15. Berglund Email Chain
16. January 20, 2011 Cozza Email
17. March 29, 2012 Corps Objection
18. April 5, 2012 USFWS Objection
19. April 23, 2012 USEPA Objection
20. April 12, 2012, May 7, 2012, and May 29, 2012 MCRC Letters
21. May 2, 2012 MCRC Letter
22. May 30, 2012 MCRC Letter

23. June 6, 2012 MCRC Letters
24. June 25, 2012 MDEQ Letter
25. June 29, 2012 Second Revised CR 595 Application
26. Unlabeled USEPA Mitigation Guidance
27. July 5, 2012 MCRC Letter
28. July 24, 2012 KME Letter and August 12, 2012 Summary of Third Revised CR 595 Application
29. Third Stream Mitigation Plan
30. Third Wetland Mitigation Plan
31. August 24, 2012 MDEQ Draft Permit Conditions
32. June 8, 2012 Haveman Email
33. July 11, 2012 Creal Letter
34. August 27, 2012 MDNR Letter
35. September 14, 2012 MCRC Letter
36. September 17, 2012 MDEQ Letter
37. October 3, 2012 Mitigation Task List
38. Fourth Wetland Mitigation Plan
39. December 4, 2012 USEPA Objections
40. Iwanicki/Hyde Email Chain
41. December 16, 2012 Partial Draft Response to USEPA's Objections
42. December 17, 2012 USEPA Letter
43. December 21, 2012 Senator Levin Letter
44. December 27, 2012 MCRC Letter
45. January 3, 2013 MDEQ Letter

46. Cronk and Dortman Emails