

December 10, 2008

**BY EMAIL, FAX, & U.S. MAIL**

Office of Inspector General  
U.S. Environmental Protection Agency  
Ariel Rios Federal Building  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

**RE: EPA damage to historic sites in violation of National Historic Preservation Act (NHPA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requirements.**

Dear Deputy Inspector General Roderick:

On behalf of Public Employees for Environmental Responsibility (PEER), we request that your office conduct a formal review of the U.S. Environmental Protection Agency's lack of compliance with National Historic Preservation Act (NHPA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) regulations.

As detailed in this letter, PEER believes that EPA is violating its legal and moral obligations. We urge you to address the following issues:

1. By not complying with the requirements of the National Historic Preservation Act, did EPA improperly and illegally manage a cleanup project at the Elem Indian Colony reservation?
  - a) If so, which specific officials were responsible and what, if any, adverse career consequences should they receive?
  - b) How does the EPA intend to compensate the Elem community and general public for the damage done to their non-renewable historic resources?
2. To what extent is the conduct of EPA at the Elem Indian Colony reservation typical? PEER has reports from employees, contractors and others that EPA noncompliance with the National Historic Preservation Act is widespread; and

3. What procedural remedies would the Office of Inspector General recommend to improve EPA compliance?

## ***Background***

The EPA is involved in an ongoing superfund cleanup project in Lake County, California and in many other CERCLA cleanup projects throughout the U.S.

It has been reported to PEER that on many of these projects, the EPA has failed to comply with NHPA regulations requiring that any Federal agency first determine if there are significant historic resources within their project area before proceeding (NHPA 36 CFR 800, Section 106). EPA's own CERCLA regulations require compliance with the NHPA as it is one of the "Relevant and Appropriate Requirements" indicated by 40 CFR 300.5:

"Those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not "applicable" to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site."

Other CERCLA regulations ignored by the EPA include inter-agency consultation required by 40 CFR 300.310, and the evaluation of damage done to resources and the development and carrying out of a plan for replacement of resources of equivalent value to those that were destroyed as required by 43 CFR 300.165.

## **I. Elem Indian Colony Project**

Between June and November 2006, EPA conducted a toxic mine waste cleanup project at the Elem Indian Colony reservation in Lake County, California. During this project, major violations appear to have occurred. By not having the project area inspected by an archaeologist during the planning phase (as required by the NHPA) the EPA was unaware that significant historic and prehistoric cultural resources existed immediately beneath the mine waste. EPA's project design called for the removal of contaminated soils as well as excavation into clean native subsoils (containing archaeological resources). The project also called for

infrastructure improvements requiring major grading and trenching through archaeological deposits.

As the excavation proceeded below the mine waste into subsoils, artifacts immediately came to light. Tribal monitors asked the EPA to slow down and stop. They were ignored.

EPA excavations continued for 2 months, ultimately destroying ~7,000 cubic meters of archaeological resources valued at between \$50,000,000 and \$70,000,000 <sup>1</sup> (the Tribe's cultural heritage).

During a planned break in the project, the EPA allowed the Tribe to call in a professional archaeologist to assist with NHPA compliance. That archaeologist discovered that not only had the EPA failed to follow the NHPA, but they had no intention of complying with the law even though an archaeologist was on-board to assist with compliance. EPA's Deputy General Counsel reportedly told the field supervisor not to comply because "if they did, it would set a precedent." Every few days the archaeologist was told that the EPA was "exempt" from the law.

Due to the tight construction schedule, the archaeologist was not allowed the time necessary to recover historical and cultural information from resource areas before grading and trenching destroyed them. This defiant attitude by the EPA field supervisor and construction contractors caused an additional 913 cubic meters of damage to cultural resources (an additional \$7 million to \$9 million in damage).

Had the EPA followed the NHPA (at least substantively) they would have known the resources existed long before the project began, allowing them to design the project around them. Their plans could have required excavation to stop as soon as cultural soils were encountered beneath the mine waste. Clean fill could have been placed over these cultural soils, capping and protecting the resources. In those areas where trenching into cultural soils could not be avoided, these areas could have been studied by archaeologists long before the project got underway, thereby preventing any delays during construction.

Here is what other entities have said about EPA's conduct on the Elem project:

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<sup>1</sup> Although it is impossible to place a monetary value on the information contained in an archaeological site, the value presented herein is based on that used by Federal courts as they enforce the Archaeological Resource Protection Act (ARPA).

**Don Klima (Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation) 12-11-07 Letter to Keith Takata, Director, Superfund Division, EPA San Francisco.**

“Prior to the start of cleanup, EPA did not initiate a formal Section 106 consultation as required by the National Historic Preservation Act (NHPA) for all undertakings that have the potential to affect historic properties.” “In the case of the Elem Colony CERCLA cleanup, a location-specific requirement that should have been adhered to was the NHPA.” “Regrettably, EPA’s reluctance to follow the procedures set forth in our regulations to comply with Section 106 resulted in confusion and disagreements among consulting parties and the public regarding the appropriate measures to effectively identify and evaluate historic properties and to consider measures to avoid, minimize, or mitigate adverse effects.”

**Dr. Dean Snow (President, Society for American Archaeology) 9-11-07 letter to Dr. John Parker, Elem Indian Colony consulting archaeologist.**

“The consensus of the Board is that while the EPA cleanup was important and timely, EPA failed in its responsibilities to comply with Section 106 regulations regarding cultural resources. We understand that the Elem Indian Colony Reservation case may soon be subject to legal action. While the SAA rarely becomes directly involved in legal actions, the Board will watch this case with great interest.”

**Executive Board (Society for California Archaeology) published in the December 2007 newsletter.**

1. In the first two months of the project, no attempt was made to comply with Section 106 regulations. There was no pre-construction archaeological survey, no sensitivity study, no attempt to identify resources that were eligible or potentially eligible for the National Register of Historic Places, and no effort to have in place some sort of formal treatment plan to address potentially significant resources that could be uncovered during construction.
2. Judging by the photographic evidence submitted by both parties, and archaeological reports by both Dr. Parker and John Holson (Pacific Legacy), a substantial portion of what appears to be an intact deposit was mechanically excavated and removed prior to the hiring of a qualified archaeologist.

3. The EPA did not begin consultation with the State Office of Historic Preservation (OHP) until the OHP received a complaint from Tribal Administrator Jim Brown III in July of 2006, a month after earth moving activities had started.

"Had the EPA followed Section 106 regulations, damage to this site could have been avoided, resources important both to the tribe and for archaeological research could have been protected, and both the EPA and Elem could have avoided a lawsuit."

"The lack of oversight and a formal process for complying with the law that this project illustrates is glaring, completely avoidable, and needs to be addressed immediately by the EPA."

"The lack of an EPA Cultural Resources Manager anywhere within Region 9, which covers Arizona, California, Nevada, Hawaii, and the Pacific Islands, clearly has resulted in a lack of oversight on this and presumably other EPA projects."

"The lack of an internal process for complying with Section 106, CERCLA, and other federal laws... has resulted directly in the destruction of at least a portion of what appears to be an important archaeological resource."

On this specific project, the Elem Indian Colony has lost a significant portion of their cultural history. EPA regulations require that the agency calculate the value of those resources and "Devise and carry out a plan for restoration, rehabilitation, replacement, or acquisition of equivalent natural resources" for preservation purposes to reimburse the public and the Tribe for the damage done (43 CFR 300.165).

## **II. NHPA Compliance Nationally by EPA**

Due to toxic materials, the EPA's CERCLA cleanup sites are normally fenced, guarded, and public access is restricted. It is rare that the general public ever gets to see the cleanup activities. It is even less likely that a professional archaeologist, State Historic Preservation Officer, or other cultural resource professional would have access. Even with such restrictions, cultural resource professionals have recorded the following NHPA violations by the EPA.

Just a few months after the Elem Indian Colony project, the EPA coordinated a CERCLA cleanup of toxic material at the Historic Abbott Mine, a few miles east of the Elem project. The Abbott Mine was the oldest quicksilver mine in Lake County and operated between 1870 and 1961. Many historic structures and pieces of mine equipment existed in the area prior to the cleanup process. In violation of the NHPA, no

historic or archaeological evaluation was made of these resources prior to the cleanup process. All were removed and most destroyed during the project.

Retired BLM archaeologist Mark Henderson reports that in 2005 “the EPA took the position that they had no responsibility for NHPA and Section 106 in their requiring remediation of the damage done by Union Pacific Rail Road to the Meadow Valley Wash Channel near Caliente, Nevada.” EPA had federal regulatory authority for the stream channel. One prehistoric site and several historic railroad structures were destroyed. “EPA officials repeatedly told UPRR that the historic railroad features that they destroyed as part of the reconstruction or remediation on BLM land were not EPA’s business”. “EPA left the impression with UPRR and BLM managers that EPA had no responsibility under the Historic Preservation Act.”

The Archaeologist for the Commonwealth of the Northern Mariana Islands (CNMI) reports that the “EPA was in noncompliance with Section 106 with the expansion of the Beach Road Sewer System project on the Island of Saipan in Feb. 2005.” The EPA turned over their responsibility for NHPA Section 106 compliance to the Commonwealth Utilities Commission, which granted the permit and passed the Section 106 compliance responsibility on to the Contractor. However, the Contractor did not initiate the Section 106 process until the project was stopped by the Historic Preservation Office Archaeologist when human remains were struck during bulldozing.

In 2002, the EPA was responsible for developing a landfill project on Marpi Point, a National Historic Landmark <sup>2</sup> on the Island of Saipan. It is believed that the project was quickly pushed through by the EPA and the CNMI Government. Furthermore, it is believed that the undertaking was not reviewed by the National Park Service nor was the Advisory Council on Historic Preservation given an opportunity to comment on the undertaking as required by the NHPA Section 106 process. Later, it was found that soil removed from the landfill project area contained human remains.

The Tribal Historic Preservation Officer (THPO) for the Caddo Nation of Oklahoma reports that the EPA was the lead agency in the permitting process for a giant Pilgrim’s Pride chicken processing plant near Mt.

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<sup>2</sup> Marpi Point is the location where the Japanese were driven off Saipan during WWII. This is where hundreds of Japanese committed suicide by jumping to their deaths off Bonsai Point, Bonsai Cliff, and Suicide Point.

Pleasant, Texas. The EPA issued a Notice of Intent for construction on 5 acres, however the EPA never monitored compliance and Pilgrim's Pride blasted and drilled over a 150 acre area containing Caddo cultural sites. Eventually the Tribe and Pilgrim's Pride (on their own) worked out a Memorandum of Agreement (MOA) and Scope of Work (SOW) for the necessary archaeological studies as required by the NHPA. According to the THPO, "[e]veryone signed off on the MOA, except the EPA...It was obvious that the EPA did not have a clue about NHPA or their role as a lead federal agency."

The Caddo Nation THPO also reported that EPA was the lead agency for the Sabine Mining Company project in east Texas. During the project, archaeological excavations took place. He reports "there were obviously human remains and associated funerary objects that were going to be dug up either by an archaeologist or later when they decided to pull lignite out of the ground." The Caddo Nation THPO states, "My concern is that the EPA as the 'lead federal agency' had the final call regarding the 'significance' of historic properties (which they knew absolutely nothing about) and what they believed to be 'mitigation' of the adverse effects to the historic properties may not be what we considered to be a proper way of mitigating the effects." The Tribe requested consulting party status with the EPA but the THPO said "I've never been to a meeting where they (the EPA) were involved in any way. The 106 process is being avoided. As someone representing the tribe, I was at a loss of who would be calling the final shots in the process."

### **III Conclusion**

Although all federal agencies must follow the requirements of the National Historic Preservation Act and Executive Order 11593, we have strong indications that the EPA feels that it is "exempt" from these laws and their own CERCLA regulations as they pertain to historic and prehistoric cultural resources.

Throughout the U.S., hundreds of ongoing and new EPA permitted and managed projects are taking place every day. Based upon the foregoing information, it may be assumed that there has been no compliance with the National Historic Preservation Act on any of these projects. This would mean that hundreds of significant historic and prehistoric cultural resources are being damaged and destroyed by EPA designed and permitted projects every day. National Historic Landmark sites (such as the one on Saipan) as well as cultural sites important to tribes such as the Elem in California or the Caddo in Oklahoma are being lost along with the information they contain about thousands of years of human history, technology, and environmental interaction.

PEER requests that your office take immediate steps to ensure that ALL EPA-permitted and in-house projects are brought into compliance with the NHPA and Executive Order 11593. As part of this request, it is vital that EPA develops and implements policy and procedure guidelines designed to carry out the requirements of the NHPA, Executive Order 11593, and their own CERCLA regulations.

Apart from the programmatic and personnel reforms that may be occasioned by this request, PEER believes that fundamental fairness dictates that EPA should reimburse the Elem Tribe for the damage done to their cultural heritage. As is outlined in CERCLA regulations, this can take place through the acquisition and preservation of cultural resources comparable to the ones damaged by their CERCLA cleanup project (43 CFR 300.165).

Thank you in advance for your consideration of this request.

Sincerely,

Adam Draper  
Staff Counsel

CC: Sen. Barbara Boxer (Chair, Senate Environment and Public Works Committee)

Sen. Dianne Feinstein (Chair, Senate Appropriations Subcommittee concerning Environment, Public Works and Related Agencies)

Rep. David Obey (Chair, House Appropriations Committee)

Rep. Norman Dicks (Chair, House Subcommittee on Interior, Environment and Related Agencies)

Dr. John Eddins (Advisory Council on Historic Preservation)

Dr. Dean Snow (President, Society for American Archaeology)

David Lindsey (Government Affairs, Society for American Archaeology)

Richard Moe (National Trust for Historic Preservation)

Milford Donaldson (California State Historic Preservation Officer)

Larry Myers (California Native American Heritage Commission)

Mark Allen (President, Society for California Archaeology)

Eagle Brown (Tribal Chairman, Elem Indian Colony)

Elem Tribal Council