

**Dragoon Conservation Alliance | Amerind Foundation | Earthworks | Center
for Biological Diversity | Patagonia Area Resource Alliance | Arizona Mining
Reform Coalition | Sierra Club**

February 20, 2018

To:

U.S Environmental Protection Agency, Region 9
Drinking Water Protection Section, Mail Code WTR-3-2
75 Hawthorne Street
San Francisco, CA, 94105
Attention: Nancy Rumrill
Sent by email to: rumrill.nancy@epa.gov

**RE: Supplemental comments regarding Gunnison Copper Project Class III Draft
Underground Injection Control Permit**

Dear Ms. Rumrill,

The above organizations collectively appreciate the opportunity to submit supplemental comments on the Draft Class III Underground Injection Control Permit (UIC) for Excelsior Mining's Gunnison Copper Project located in Cochise County, Arizona. Due to the granting of a hearing on February 27th in Dragoon, and the associated extension of the comment period to that day, we would like to address some additional concerns regarding the development of EPA's interpretations of the Safe Drinking Water Act (SDWA) and implementing regulations, including the agency's interpretation of the Area of Review definition, as well as the lack of cumulative impacts analysis in the issued Draft UIC permit. Commenters recommend that EPA address these concerns and issue a supplemental Draft UIC and re-noticing of a comment period to ensure appropriate public involvement. These supplemental comments incorporate our original January 4, 2018 comments and Dr. Tom Myers' January 6, 2017 technical memorandum.

Area of Review Formation:

Earthworks has submitted a Freedom of Information Act request to the EPA to determine the extent of correspondence between Excelsior, its consultants including Clear Creek Associates, and the EPA regarding the formation of the Area of Review (hereafter "AOR") for the Gunnison Copper Project (hereafter "the Project"), as well as any other guidance that helped to determine how the EPA should implement its permitting authority under the Safe Drinking Water Act. Given that Region 9 has never permitted any commercial-scale in-situ leaching operations of any type anywhere in its jurisdiction, guidance used by EPA to determine such important issues as the size and scope of the AOR for the Project may not have been previously established by Region 9, or by any other EPA region, using public participation and an associated comment period. This potentially constitutes a de-facto rulemaking whereby EPA established precedential guidance without consulting the public, thereby violating the Administrative Procedures Act.

Only once before has EPA administered a class III UIC permit without the respective state being the lead on the permitting process. This is the ongoing process for the proposed Dewey-Burdock in situ leach uranium project in South Dakota. Through a similar FOIA request, stakeholders there learned that EPA's guidance was closely developed in conjunction with the mining company, Powertech, and did not involve the public at all. If the Gunnison Copper Project is relying on guidance established in the Dewey-Burdock project UIC permit application review, the same argument made by stakeholders for that project applies in the case of the Gunnison Project; since that guidance represents a de-facto rulemaking, if the same guidance was used in the Gunnison Project, it too represents a de-facto rulemaking and violated the Administrative Procedures Act. If guidance for the Gunnison Project was developed uniquely and is not primarily or entirely the same as the Dewey-Burdock guidance, and if such guidance sets a precedent that impacts the future permitting activities of Region 9 or any other EPA region regarding implementation of the UIC program, then such guidance is also rightfully considered a de-facto rulemaking.

Any such guidance is essential for us to understand, as it determines how the Area of Review was created for the Gunnison Project. As our primary comments submitted previously clearly indicate, a principal concern for the Gunnison Project is that the current monitoring program is woefully inadequate to detect contaminant migration from the current AOR, and that if contaminant migration does occur, it will not be detected beyond the AOR because there are no monitoring wells whatsoever beyond the AOR. It is our belief that the lack of monitoring wells elsewhere in the potentially affected area was determined by the small size of the AOR – a decision made potentially behind closed doors between EPA and Excelsior and its consultants – as EPA presumably lacks authority to require monitoring wells outside of the AOR. Indeed, the AOR is essentially the same as the area of hydraulic control, so the small handful of Point of Compliance Wells are located on the very edge of the area of hydraulic control. We request that EPA explain and justify defining the AOR as being essentially the same as the area of hydraulic control, as opposed to a much more comprehensive AOR that includes surrounding groundwater and cites monitoring wells some distance from the area of hydraulic control.

In the case of the Dewey-Burdock project, even acknowledging that the guidance created for that project may violate the Administrative Procedures Act, the AOR nevertheless included a 1.2 mile buffer zone from the Project Area (the area of hydraulic control). This differs tremendously from the Gunnison AOR, which essentially only includes the Project Area. Much more clarity is needed to understand these vastly differing approaches to determining the size and scope of the AOR for both projects, and the guidance used to create them. Had EPA Region 9 also used a 1.2 mile buffer zone and required monitoring wells throughout this broader AOR, we would be much more likely to believe that EPA is taking a holistic approach to its analysis of potential groundwater impacts, and requiring a monitoring program that is also holistic.

Until Gunnison Project stakeholders can better understand the guidance that determined EPA's authority in implementing the Safe Drinking Water Act -- in particular, but not limited to, the guidance that created the size and scope of the AOR – and why there is such a vast difference between the Gunnison Project and the Dewey-Burdock Project – we believe a final draft UIC cannot be issued for public review until these questions are answered. In addition, if such guidance and the nature of the AOR formation is found to be in violation of the Administrative

Procedures Act and constituted a de-facto rulemaking, EPA must make publicly available all documents and correspondence involved in creating the guidance and re-notice the draft UIC for a new 90 day comment period.

Cumulative Impacts Analysis:

The Code of Federal Regulations, 40 CFR 144.33 (c)(3) requires that cumulative analysis be completed during EPA's review of the UIC permit application. This time has already passed, yet no such analysis appears to have been completed for the Project, either as part of Excelsior's application package or as part of EPA's issued draft UIC permit. Therefore, EPA must complete a Cumulative Impacts Analysis in a revised/supplemental draft UIC. Once completed and incorporated into a revised/supplemental draft UIC, it should be re-noticed for a new 90 day public comment period.

Attached is the 155 page cumulative impacts analysis written for the Dewey-Burdock project. As this example demonstrates, a proper cumulative impacts analysis must consider a full range of past, present, and reasonably foreseeable actions and impacts. At minimum, this analysis must review the cumulative impacts to resources such as air, water, wildlife, cultural resources, and neighboring properties. Given the applicant's proposed use of existing facilities at a dormant Johnson Camp Mine, all cumulative impacts associated with the existing and foreseeable uses of this site must be analyzed, including potential resumption of surface or underground mining operations at the site.

While the commenters understand that EPA regulations do not require formal National Environmental Policy Act (NEPA) compliance for UIC permitting actions, this exemption is premised upon the EPA process providing the "functional equivalent" to a NEPA study. Without at least the same level of detail evident in the Dewey-Burdock example, the analysis for the Gunnison Copper Project cannot meet this standard.

Alert levels, radioactive materials, and cultural impacts:

The draft permit allows water quality parameters for Level 1 and 2 alert levels to be determined after the issuance of a final permit. These levels must be determined and included in the draft permit, and subject to public comment. Before a final permit is issued, EPA must establish both concentration and mass-based limits to all parameters. We reiterate that sampling requirements for Level 1 should be no more than monthly and level 2 shall be no more than quarterly.

In light of the prevalence of uranium and other radioactive materials often associated with Arizona copper deposits, the list of radioactive chemicals and elements sampled in monitoring wells should be expanded. Mass-based limits must be set and sampled monthly for all radioactive compounds. Sampling of the pregnant leach solution, the water treatment plant effluent, the pipeline drain pond, the evaporation pond, the raffinate pond, the recycled water pond, and the plant runoff pond for radioactive chemicals and elements should also be conducted on a regular basis.

The historic preservation review process for this permit is inadequate and needs to be revisited before a final permit may be granted. The historic preservation review process should include cultural and archeological surveys as well as any appropriate Tribal consultation. The assessment should also give attention to the landscape scale, indirect, and cumulative impacts to the well-known historic property complexes in the immediate vicinity.

While the draft permit requires a bond, the draft permit and supporting documents do not supply any information to the public about how this bond was calculated and whether it is sufficient to protect the public from any liability for cleanup if the bond is insufficient. The draft permit must contain the bond calculations and rationale and be reissued for public comment.

Conclusion:

Due to the lack of explanation as to the origin of EPA's interpretation of critical regulatory terms such as AOR, and the lack of a cumulative impacts analysis as required, as well as the additional issues we raise in these and subsequent comments, the draft UIC permit is incomplete. A revised/supplemental draft UIC permit must be completed and re-noticed for at least a 90-day public comment period.

We also hope that as EPA prepares these additional analyses, Earthworks' FOIA request will be fulfilled and stakeholders will be able to better understand the guidance that led to the formation of the AOR, and why it differs so much from the Dewey-Burdock Project's AOR.

Please don't hesitate to contact Pete Dronkers at (775) 815-9936 or pdronkers@earthworksaction.org to discuss further.

Thanks for your consideration.

Sincerely,

Ellen Cohen, Dragoon Conservation Alliance: ellenjc@msn.com

Pete Dronkers, Earthworks: pdronkers@earthworksaction.org

Christine Szuter, Amerind Foundation: cszuter@amerind.org

Sandy Bahr, Sierra Club: sandy.bahr@sierraclub.org

Roger Featherstone, Arizona Mining Reform Coalition: roger@azminingreform.org

Carolyn Shafer, Patagonia Area Resource Alliance: info@patagoniaalliance.org

Alli Melton, Center for Biological Diversity: AMelton@biologicaldiversity.org