

State of New Mexico
Energy, Minerals and Natural Resources Department

Susana Martinez
Governor

Tony Delfin
Acting Cabinet Secretary

Fernando Martinez, Director
Mining and Minerals Division



7012 0470 0000 0881 7791

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

September 8, 2016

Mr. Charles Mottley, President, CEO
El Capitan Precious Metals, Inc.
8390 Via de Ventura, Suite F-110
Scottsdale, AZ 85258

**RE: Permit Modification 16-1 - Federal and State Agency Review Comments
Notice of Non-Compliance, Capitan Iron Mine, Permit No. LI005ME**

Dear Mr. Mottley:

Within a Notice of Noncompliance dated April 21, 2016, and issued to El Capitan Precious Metals Inc. (“ECPMI”) by the Mining and Minerals Division (“MMD”), MMD included specific conditions by which ECPMI is required to modify Permit LI005ME, pursuant to the abatement of mining-related waste that had been placed and/or disposed of alongside Forest Road 489A (“FR 489A”) outside of the authorized Permit Area and outside of the approved 5-acre Phase I design limit. As required by MMD’s Notice of Noncompliance, an application requesting the modification of Permit LI005ME, (“Mod. 16-1” or “Application”) was submitted to MMD by ECPMI on June 20, 2016, and subsequently, MMD then began processing Mod. 16-1 by providing the Application to the reviewing state and federal agencies on June 29, 2016, requesting review and comment on the Application pursuant to §19.10.3.303.L NMAC and §19.10.5.505.B(3) NMAC of the NM Mining Act Rules.

MMD received responses (enclosed) on the review of Mod. 16-1 from the New Mexico Environment Department, New Mexico State Forestry Division, the New Mexico Department of Cultural Affairs, and the New Mexico Department of Game and Fish, and also the United States Forest Service (“USFS”). None of the comments received by MMD from the reviewing state agencies require response by ECPMI at this time; however, the July 28, 2016 letter, from the USFS contained information that will require a response from ECPMI. Within their letter, the USFS addressed the work done by ECPMI outside of its Permit Area along FR 489A, and indicated that because ECPMI had terminated its road use permit for access across National Forest System Lands, including FR 489A, ECPMI was no longer authorized with the rights necessary to utilize FR 489A for commercial purposes as the primary access road to the El Capitan Iron Mine. The USFS indicated within its letter that ECPMI must establish authorization from the USFS to use FR 489A by submitting a Mining Plan of Operations for commercial use of the road based on ECPMI’s assertion that the road is necessary for conducting mining operations on its private land.

Mr. Charles Mottley

RE: Permit Modification 16-1 - Federal and State Agency Review Comments
Notice of Non-Compliance, Capitan Iron Mine, Permit No. LI005ME

September 8, 2016

Page 2 of 2

Because the USFS has determined that any further commercial use of, or improvements to, FR 489A by ECPMI is not authorized, MMD is unable to further process Mod. 16-1 until such authorization is obtained from the USFS by ECPMI. As a result, ECPMI remains out of compliance with its permit until such time that processing of Mod. 16-1 may be resumed toward approval. Please provide MMD with a response to the July 28, 2016, USFS letter, so that MMD will be able to monitor progress toward a resolution to the road question. MMD is very interested in ECPMI returning to compliance with Permit LI005ME.

MMD is available to meet and discuss this letter at your convenience. Please contact Gabriel Wade, Assistant General Counsel at: (505) 476-3451, or via email at: gabriel.wade@state.nm.us if you would like to discuss further or to schedule a meeting.

Sincerely,



Holland Shepherd, Manager
Mining Act Reclamation Program/MMD

Enclosures: New Mexico Environment Department Letter, dated July 27, 2016
New Mexico State Forestry Division emailed comments, dated July 11, 2016
New Mexico Department of Cultural Affairs Letter, dated July 12, 2016
New Mexico Department of Game and Fish Letter, dated July 26, 2016
USFS Letter, dated July 28, 2016

cc: David Davidson, ECPMI
James Hollen, Senior Reclamation Specialist, MMD
Gabriel Wade, Assistant General Counsel, MMD
Christina Thompson, USFS Lincoln National Forest
Mine File LI005ME



United States
Department of
Agriculture

Forest
Service

Smokey Bear Ranger District

901 Mechem Drive
Ruidoso, NM 88345
575-257-4095
FAX: 575-257-6174

File Code: 2800
Date: July 28, 2016

Mr. James Hollen
Sr. Mine Reclamation Specialist
Mining Act Reclamation Program, Mining and Mineral Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Dear Mr. Hollen:

This letter is in response to your June 29, 2016, request for review and comment on the Minimal Impact Existing Mine Permit Modification Application submitted by El Capitan Metals, Inc. (ECPMI). The Lincoln National Forest has been working with ECPMI in order to get it in compliance with Forest Service laws and regulations. In particular, the only road access to the ECPMI private land where its mine is situated is across National Forest System Road (NFSR) 489A via NM Highway 246.

Prior to March 2016, ECPMI held a road use permit to haul mined material off of its private land using NFSR 489A. At the end of March, ECPMI terminated its road use permit for access across National Forest System lands, and erroneously asserted a purportedly vested R.S. 2477 right to use and modify NFSR 489A. ECPMI's position is not tenable,¹ and since terminating its permit ECPMI has no authorization or right to utilize NFSR 489A for access to their private property for mining purposes.

Please further note that ECPMI is not now, nor has it ever been, authorized to undertake road construction on NFSR 489A. All work that was conducted by ECPMI at the end of March to widen and shape NFSR 489A was done without the required environmental analysis and authorization by the USFS. This has resulted in resource damage on National Forest System lands, and an investigation is currently underway to ascertain the nature and extent of such damage to surface resources.

Moving forward, ECPMI must now obtain new authorization from the USFS to use NFSR 489A to access its private property for mining purposes. To obtain such authorization, and pursuant to 36 CFR 228 Subpart A, USFS requires ECPMI to submit a Mining Plan of Operations for

¹ The law is clear that a private entity, such as ECPMI, cannot hold an R.S. 2477 right of way and cannot state a claim to an R.S. 2477 right of way. Such a claim can only be made by a government entity. To our knowledge, Lincoln County has never stated an R.S. 2477 claim to NFSR 489A.



commercial use of the road based on ECPMI's assertion that NFSR 489A is needed for mining operations on its private land.

In closing, it is important for all parties to recognize that regardless of what the State of New Mexico's Mining and Minerals Division, the Mine Safety and Health Agency, or any other agencies require, ECPMI must have a valid authorization from the USFS to use NFSR 489A. Any further commercial use of, or improvements to, NFSR 489A by ECPMI at this time is not authorized, and is in violation of our regulations.

If you have any additional questions, please contact me at 575-630-3010 or hmnoel@fs.fed.us.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Heather Noel', is written over a light blue rectangular background.

HEATHER NOEL
District Ranger



SUSANA MARTINEZ
Governor

JOHN A. SANCHEZ
Lieutenant Governor

NEW MEXICO
ENVIRONMENT DEPARTMENT

Harold Runnels Building

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RYAN FLYNN
Cabinet Secretary

BUTCH TONGATE
Deputy Secretary

MEMORANDUM

DATE: July 27, 2016

TO: Holland Shepherd, Program Manager, Mining Act Reclamation Program

FROM: Larry Shore, Mining Environmental Compliance Section (MECS)
Alan Klatt, Surface Water Quality Bureau (SWQB)
Neal Butt, Air Quality Bureau (AQB)

THROUGH: Jeff Lewellin, Mining Act Team Leader, MECS

RE: **NMED Comments, El Capitan Precious Metals, Inc., El Capitan Iron Mine, Response to Notice of Noncompliance, MMD Permit No. LI005ME, Modification 16-1**

The New Mexico Environment Department (NMED) received correspondence from the Mining and Minerals Division (MMD) on July 5, 2016 requesting NMED review and provide comments on the above referenced MMD permitting action. The modification is in response to a Notice of Noncompliance (NNC) issued by MMD to the permittee on April 21, 2016. MMD requested comments within 20 days of receipt in accordance with Section 19.10.3.302.G NMAC. NMED has the following comments:

Background

The El Capitan Iron Mine is designated a minimal impact existing mine and was issued a NNC by MMD on April 21, 2016. The NNC cites placement of mining waste outside the authorized permit area and outside the approved five acre Phase I design limit. Specifically, as indicated in the response from El Capitan Precious Metals, Inc., .333 acres of stockpiled overburden and salvaged topsoil has been placed and used as berms alongside Forest Road (FR) 489A.

Air Quality Bureau

The Air Quality Bureau comments are attached under separate letterhead.

Surface Water Quality Bureau

The Surface Water Quality Bureau comments are attached under separate letterhead.

Ground Water Quality Bureau

Based on NMED's understanding of the geochemical characteristics of the material, placement of .333 acres of stockpiled overburden and salvaged topsoil on FR 489A is not likely to impair ground water quality.

NMED Summary Comment

NMED finds the proposed activities are likely to have a minimal environmental impact if the recommended best management practices provided by the Surface Water Quality Bureau are implemented.

If you have any questions, please contact Jeff Lewellin at (505) 827-1049.

cc: Trais Kliphuis, Division Director, NMED-WPD
James Hogan, Bureau Chief, SWQB
Richard Goodyear, Bureau Chief, AQB
Fernando Martinez, Division Director, EMNRD-MMD
James Hollen, Lead Staff, EMNRD-MMD
Kurt Vollbrecht, Program Manager, MECS



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NEW MEXICO
ENVIRONMENT DEPARTMENT

Surface Water Quality Bureau

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RYAN FLYNN
Cabinet Secretary
BUTCH TONGATE
Deputy Secretary

MEMORANDUM

DATE: July 18, 2016

TO: Jeff Lewellin, Mining Act Team Leader
Mining Environmental Compliance Section
Ground Water Quality Bureau

FROM: Alan Klatt
Environmental Scientist & Specialist, Surface Water Quality Bureau

RE: **Request for Comments,
Minimal Impact Existing Mine Permit Modification Application,
El Capitan Precious Metals Inc., El Capitan Iron Mine, Lincoln Co., NM,
Permit No. LI005ME, Modification 16-1**

The New Mexico Surface Water Quality Bureau (SWQB) has completed its review of the permit application: Technical Responses from the Operator, Modification 16-1.

On April 21, 2016 the New Mexico Mining and Minerals Division (MMD) issued a notice of noncompliance of the Capitan Iron Mine with specific conditions required by Permit LI005ME, Modification 14-1. The notice of noncompliance requires that the Permittee, El Capitan Precious Metals Inc. (ECPMI), provide an application for a permit modification to incorporate the new disturbance related to the access road into the mine permit. On June 4, 2016 ECPMI submitted Technical Responses on Proposed Modification LI005ME documenting 0.333 acres of new disturbance associated with the access road. Pursuant to the New Mexico Mining Act Rules, the SWQB has the following comments:

- The SWQB recommends that the Permittee consults with the Lincoln National Forest, USDA Forest Service to stabilize gullies along Forest Road 489A. During a July 7th, 2016 meeting with the MMD, the SWQB was informed of the presence of waist deep, headcut gullies. Gullies may indicate that erosion control measures are needed as required by Section 9.S of Permit LI005ME, Modification 14-1 which states that:

The Permittee shall implement BMP's in a manner that prevents direct impacts to surface water and ephemeral, intermittent, and perennial water courses. The

Jeff Lewellin
July 18, 2016
Page 2

Permittee shall implement erosion control measures that are designed, constructed and maintained using professionally recognized standards.

Gullies along FR 489A have the potential to transport sediment and mine waste which was placed as roadside berms into a nearby arroyo.

- The SWQB recommends that all General Obligations and Conditions in Permit LI005ME, Modification 14-1 be included in future permit modifications.

If you have any questions, please contact me at (505) 827-0388.



SUSANA MARTINEZ
Governor

JOHN A. SANCHEZ
Lieutenant Governor

New Mexico
ENVIRONMENT DEPARTMENT

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Ryan Flynn
Cabinet Secretary

Butch Tongate
Deputy Secretary

MEMORANDUM

DATE: July 22, 2016

TO: Jeff Lewellin, Team Leader
Mining Environmental Compliance Section, Ground Water Quality Bureau

FROM: Neal Butt, Environmental Analyst
Air Quality Bureau

RE: Request for Comments, Minimal Impact Existing Mine Permit Modification
Application, El Capitan Iron Mine, Lincoln County, MMD Permit No. LI005ME,
Modification 16-1

The New Mexico Air Quality Bureau (AQB) has completed its review of the above mentioned mining project. Pursuant to the New Mexico Mining Act Rules, the AQB has the following comments:

Air Quality Permitting History

The AQB issued New Source Review Permit # 5951 to El Capitan Iron Mine on 11/25/14.

Details

On June 20, 2016, the New Mexico Mining and Minerals Division ("MMD") received a Minimal Impact Existing Mine Permit Modification Application submittal from El Capitan Precious Metals, Inc. ("ECPMI"), dated June 4, 2016, as required by a Notice of Noncompliance issued to ECPMI by MMD for placing and/or disposing mining-related waste material alongside a road located on U.S. Forest Service lands and outside of the approved permit boundary of Permit LI005ME. The El Capitan Iron Mine is located approximately 5.5 miles north of Capitan, in Lincoln County, New Mexico.

In order to bring ECPMI into compliance with the permit and the Rules, and to avoid issuance of a Notice of Violation and penalty assessment, MMD requires that ECPMI submit a survey of the

current total acres of disturbance, including those areas of the FR 489A access road, that have been disturbed by mine wastes. ECPMI must also provide an application for a permit modification, to incorporate the new disturbance, related to the access road, into the mine permit. This survey of total acres of disturbance and permit modification application must be submitted to MMD within 60 days of the receipt date of the Notice of Noncompliance letter.

The AQB has no objection to the current request for modification to bring site into compliance.

Air Quality Requirements

The New Mexico Mining Act of 1993 states that “Nothing in the New Mexico Mining Act shall supersede current or future requirements and standards of any other applicable federal or state law.” Thus, the applicant is expected to comply with all requirements of federal and state laws pertaining to air quality. Current requirements which may be applicable in this mining project include, but are not limited to the following:

NSR Air Quality Permit number 5951, the Air Quality Control Act, and any applicable regulations and standards pursuant to NMSA 1978, Section 74-2-7-H.

Permit limitations include the following: Hours of operation of the mining and processing equipment (Not including truck traffic) are limited to 4,380 hours per year during daylight hours between sunrise and sunset; Limiting the number of haul road trips to 128-168 round trips per day; Truck traffic areas and haul roads shall be watered and treated by application of base course to control particulate emissions, this condition demonstrates compliance with the 80% control efficiency used in the permit application and modeling, this control measure shall be used on roads as far as the nearest public road, unless weather conditions would cause unsafe conditions, such as snow, ice, and mud; Night time operation of haul trucks and material handling equipment is authorized providing the following requirements are met for the trafficked roads and off-road surfaces used by this equipment. Dirt or gravel surfaces: 1. Water immediately prior to beginning traffic operations, unless weather conditions would cause unsafe conditions, such as snow, ice, and mud. 2. Additional watering shall be done whenever dust is observed to be higher than the headlights or taillights of a standard haul truck as it travels on the surface; Wet Dust Suppression System (WDSS). At a minimum, water sprays shall be placed at each crusher and screen, to minimize fugitive emissions to the atmosphere from emission points and to meet the emission limitations contained in the permit, after daily startup, if fugitive emissions at material transfer points are observed, additional water sprays shall be added or turned on to minimize the excess fugitive emissions; The material stored in storage piles at Unit(s) 19 shall have a material moisture content within the range of 0.55 to 2.88% (% by weight); and the permittee shall develop a Fugitive Dust Control Plan (FDCP) for minimizing emissions from areas such as aggregate feeders, bins, bin scales, storage pile, overburden removal, disturbed earth, buildings, truck loading/unloading, or active pits, sites of overburden removal and active pit areas shall be watered, dependent on existing wind speeds and soil moisture content, as necessary to minimize dust emissions, stock piles shall be maintained with standard industry practices and procedures to minimize fugitive emissions to the atmosphere.

In addition, pursuant to Subsection A of 19.10.3.303 NMAC, *Minimal Impact Existing Mining Operations*:

An existing mining operation that continues mining operations will not be considered a minimal impact existing mining operation if it exceeds 10 acres of disturbed land, or 40 acres of disturbed land in the case of dolomite, garnet, humate, perlite and zeolite operations that: (1) are located outside Bernalillo, Dona Ana and Santa Fe counties; and (2) are committed to perform concurrent reclamation of disturbed areas to the extent practicable. Permanent roads and areas within the permit area that are reclaimed will not be counted as part of the acreage limitation for a minimal impact existing mining operation. Reclaimed, for this purpose, means all financial assurance has been released, except the amount held to re-establish vegetation pursuant to Subsection A of 19.10.12.1204 NMAC. Construction of roads and access ways, the types of disturbances, and the applicant's previous history of compliance with the act and 19.10 NMAC will be major factors in the director's determination of minimal impact status. Notwithstanding the frequency for inspections of minimal impact mining operations specified in Paragraph (4) of Subsection A of 19.10.11.1101 NMAC, if a minimal impact operation permit is issued under this subsection for more than 10 acres of disturbance, the director shall conduct on-site inspections at least once per year during the term of the permit.

The above is not intended to be an exhaustive list of all requirements that could apply. The applicant should be aware that this evaluation does not supersede the requirements of any current federal or state air quality requirement.

If you have any questions, please contact me at (505) 476-4317.

GOVERNOR
Susana Martinez



DIRECTOR AND SECRETARY
TO THE COMMISSION
Alexandra Sandoval

DEPUTY DIRECTOR
Donald L. Jaramillo

STATE OF NEW MEXICO
DEPARTMENT OF GAME & FISH

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Las Cruces

July 26, 2016

James Hollen
Permit Lead
Mining Act Reclamation Program (MARF)
1220 South St. Francis Drive
Santa Fe, New Mexico, 87505

RE: Minimal Impact Existing Mine Permit Application, Modification 16-1, El Capitan Precious Metals, Inc., El Capitan Iron Mine, Lincoln County, New Mexico. Permit No. LI005ME. NMDGF No. 17195.

Dear Mr. Hollen,

In response to your letter dated 29 June 2016 regarding the above referenced project, the Department of Game and Fish (Department) does not anticipate significant impacts to wildlife or sensitive habitats, with implementation of the applicable mitigation or avoidance measures included within the project description.

Included below are sources of additional information:

1. For Biota Information System of New Mexico (BISON-M) species accounts, searches, and county lists go to bison-m.org.
2. For the Department's Habitat Handbook Project guidelines go to <http://www.wildlife.state.nm.us/conservation/habitat-information/habitat-handbook/>.
3. For custom, site-specific database searches on plants and wildlife go to nhnm.unm.edu, then go to Data, Free On-Line Data, and follow the directions.
4. For state-listed plants contact the New Mexico State Forestry Division at (505) 476-3334 or nmrareplants.unm.edu/index.html.
5. For the most current listing of federally listed species **always** check the U.S. Fish and Wildlife Service's Information, Planning, and Conservation website at <http://ecos.fws.gov/ipac/>.

Thank you for the opportunity to review and comment on your project. If you have any questions, please contact: Ron Kellermueller, Mining and Energy Habitat Specialist, Ecological and Environmental Planning Division at (505) 476-8159 or ronald.kellermueller@state.nm.us.

Sincerely,

A handwritten signature in blue ink that reads "Chuck L. Hayes".

Chuck L. Hayes, Assistant Chief
Ecological and Environmental Planning Division

cc: USFWS NMES Field Office

Hollen, James, EMNRD

From: Roth, Daniela, EMNRD
Sent: Thursday, September 8, 2016 8:43 AM
To: Hollen, James, EMNRD
Subject: RE: Minimal impact permit modification for the El Capitan Iron Mine (Permit No LI005ME,Modification 16-1)

Dear James Hollen:

Thank you for giving me the opportunity to review and comment on permit modification 16-1, for the existing minimal impact permit for the El Capitan Iron Mine in Lincoln County, NM (Permit No LI005ME,Modification 16-1).

The project area is in close proximity of a known site of the federally and state listed Kuenzler's hedgehog cactus (*Echinocereus fendleri* var. *kuenzleri*). For further information on this species please refer to <https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=Q1VW> and http://nmrareplants.unm.edu/rarelist_single.php?SpeciesID=70. I recommend clearance surveys of the project area during the appropriate survey period for the species and the development of avoidance and mitigation measures, if the species is found. Furthermore, the USFS and the USFWS need to be consulted on potential impacts resulting from the project to this species and its habitat, if plants are found in the project area.

Please let me know if I can be of further assistance,

Sincerely,

Daniela Roth

Botany Program Coordinator
EMNRD – Forestry Division
1220 S. Saint Francis Drive
Santa Fe, NM 87505
505-476-3347

<http://www.emnrd.state.nm.us/SFD/>

State of New Mexico
Energy, Minerals and Natural Resources Department

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Fernando Martinez, Director
Mining and Minerals Division



June 29, 2016

Michelle Ensey, Archaeologist
Historic Preservation Division
NM Department of Cultural Affairs
407 Galisteo Street, Suite 236
Santa Fe, NM 87503

JUL 01 2016

**RE: Request for Review and Comment,
Minimal Impact Existing Mine Permit Modification Application,
El Capitan Precious Metals Inc., El Capitan Iron Mine, Lincoln Co., NM,
Permit No. LI005ME, Modification 16-1**

Dear Ms. Ensey:


On June 20, 2016, the New Mexico Mining and Minerals Division ("MMD") received a Minimal Impact Existing Mine Permit Modification Application submittal from El Capitan Precious Metals, Inc. ("ECPMI"), dated June 4, 2016, ("Application") as required by a Notice of Noncompliance (enclosed) issued to ECPMI by MMD for placing and/or disposing mining-related waste material alongside a road located on U.S. Forest Service lands and outside of the approved permit boundary of Permit LI005ME. The El Capitan Iron Mine is located approximately 5.5 miles north of Capitan, in Lincoln County, New Mexico.

This notification of permit application is being submitted to you pursuant to 19.10.3.303.L NMAC and 19.10.5.505 NMAC. I have enclosed a copy of the Application including a site survey and a map showing the project location, for your information. The Application may also be viewed by visiting the MMD Website at:

<http://www.emnrd.state.nm.us/MMD/MARP/LI005ME.html>

MMD requests that you review this application and provide any comments you may have pursuant to 19.10.3.302.G NMAC, before July 29, 2016. Please contact me at (505) 476-3436, or via email at james.hollen@state.nm.us with any questions or comments you may have regarding the application or this request.

Sincerely,


James Hollen, Permit Lead Permit LI005ME
Mining Act Reclamation Program ("MARP")/MMD

NO COMMENT

John A. Estro July 12, 2016

Enclosure: April 21, 2016, Notice of Non-compliance, Capitan Iron Mine, Permit LI005ME

cc: Holland Shepherd, Program Manager, Mining Act Reclamation Program ("MARP") MMD
Mine File LI005ME