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**Congressional Testimony
“An Examination of Federal Permitting Processes”**

**Before the U.S. House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Interior, Energy, and Environment**

**By Jim Iwanicki
Engineer-Manager of the Marquette County
(Michigan) Road Commission**

March 15, 2018

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Good morning Mr. Chairman, Madam Ranking Member, and other distinguished Members of the Subcommittee. Thank you for inviting me to testify on the federal permitting process under the Clean Water Act.

My name is Jim Iwanicki and I am the Engineer-Manager of the Marquette County Road Commission (MCRC) in the upper peninsula of Michigan. My public agency is responsible to provide a safe and efficient system of county roads and bridges. Our population is over 67,000 residents and we maintain over 1,274 miles of roads and 94 bridges in the largest county in the State of Michigan. Marquette County is over 1,873 square miles and is larger than the State of Rhode Island. Our area also has an annual snowfall of 184 inches per year. I am very familiar with the Clean Water Act permitting process because of my role as Engineer-Manager with the Marquette County Road Commission. Over the last 5 years we have averaged over 20 Clean Water Act permits per year to maintain our system of roads and bridges. I'm here today to testify about my experience trying to win approval for a new county road, County Road 595, to improve the quality of life, the health, the safety, and the welfare of our citizens. This experience opened my eyes to the problems with the Clean Water Act permitting process and how it is implemented by the Environmental Protection Agency.

County Road 595 would have had a positive economic impact on the Mining, Logging, Recreation, and Tourism Industries for Michigan, but the EPA vetoed the CR 595 permit that the Michigan State Department of Environmental Quality (MDEQ) stood ready, willing, and able to issue pursuant to the federal Clean Water Act. The EPA arbitrarily refused to allow us to move forward pursuant to the state's planned approval, leaving us unable to build the road without submitting a new permit application and starting over with the U.S. Army Corps of Engineers. That was unacceptable to us in terms of the years it would take and the money it would cost, and thus we are now in federal court seeking the opportunity to challenge that EPA veto.

Let me share some background of County Road 595 and Marquette County.

Background Facts

In January of 2012, the MCRC submitted a Section 404 permit application to fill approximately 26 acres of wetlands in order to construct 21 miles of road at a cost of \$83 million. Rio Tinto, a private commercial entity, intended to fund the construction through a public-private partnership. In addition, Rio Tinto spent millions in the—to date—futile effort to permit CR 595. (*See* Attachment 1 for a map of the area and where CR 595 would fit in the county.)

Rio Tinto took interest in funding the project because they planned to construct a new nickel and copper underground mine, the Eagle Mine, in northern Marquette County. The company also refurbished the old Humboldt Mill to process the ore, south of the mine. The mine and the mill have created about 300 direct new jobs.

The distance between the mine and the mill as the crow flies is about 19 miles. Using the existing road system to go from the mine to the mill would be approximately *60 miles one way*. CR 595 would have reduced travel time by an hour and about 40 miles each way. (*See Attachment 2 for a more detailed map of the area and CR 595.*)

The construction of CR 595 would have lasted two years and employed over 100 people during that time frame.

CR 595 would have been built in a working woods—not in pristine wilderness. The road alignment is based on existing public and private roads already in place and only after studying several alternative routes. (*See Attachments 3, 4, and 6-9.*)

CR 595 was the common sense solution to Marquette County's transportation needs.

But the EPA stopped the project. After we started the permitting process with the MDEQ by submitting a permit application in 2011, the EPA objected to our project's purpose. We revised the permit application and then the EPA held a public hearing on the pending permit application in August of 2012. We then revised the permit application again and submitted it to the state DEQ. The MDEQ informed the EPA that it approved the new permit application and was ready to issue it in September, 2012.

The EPA lifted its objection to the project's purpose on December 4, 2012, but had other objections to the revised permit application which needed to be satisfied by January 3, 2013 (within 30 days), or jurisdiction would move to the Army Corps of Engineers and we would be forced to start over.

Rio Tinto needed certainty in their transportation route by January of 2013. Failure to have a permit for CR 595 in January, 2013, caused Rio Tinto to pull their \$83 million funding commitment for CR 595 and they instead were forced to use the existing road system to truck the ore because the EPA refused to budge.

The EPA did not like how we proposed to mitigate the impacts of CR 595. Our proposed mitigation plan involved preserving over 1,576 acres of land (2.5 square miles) adjacent to

McCormick Tract in the Ottawa National Forest. The area included approximately 647 acres of high quality wetland (a 25:1 mitigation ratio) including an additional 929 acres of uplands (60:1 total acreage). (*See* Attachment 5.)

The EPA was very aloof during the whole permit process. EPA officials would not tell us what would be acceptable to them to win approval of the permit application that the state was ready to issue. In fact, during the last month of the project—December, 2012—they would not even tell us who the decision maker was going to be. They were unwilling to negotiate resolutions openly by telling us directly what would satisfy them.

There are several examples of the EPA's unwillingness to follow the Clean Water Act and implementing regulations in vetoing the permit application. For example, the EPA demanded additional wildlife protection and they proposed creating wildlife crossings (tunnels or bridges) large enough to accommodate moose, bear, and cougar, and to place fencing to guide wildlife to the crossing. But they would not tell us where these crossings needed to go. And these requirements were the kinds of requirements that perhaps we would have to meet pursuant to NEPA, but these were not requirements we were required to meet pursuant to the permitting process outlined in the Clean Water Act when a state has assumed approval authority for the 404 permit, as Michigan and New Jersey both have done.

The EPA also wanted to limit secondary road connections to CR 595 by placing deed restrictions on CR 595 so adjacent landowners could not connect to the road. In other words, they were demanding that we place restrictions on property rights of private property owners—legal authority we did not have and would not want to have.

The EPA Overreach

The Marquette County Road Commission believes the EPA overstepped its authority in the following areas:

1. EPA would not allow MCRC to use any creation (establishment) of wetlands for mitigation, forested wetlands in particular, as allowed by 40 C.F.R. parts 230.92 and 230.93(a)(2).
2. The preservation ratios EPA required (*i.e.* 20:1) were beyond what was reasonable and not compliant with 40 C.F.R. part 230. MDEQ rules allow a maximum replacement ratio of 12:1 for wetland preservation.

3. EPA imposed requirements that mineral rights be obtained for the wetland preservation areas. Federal rules only require that site protection should include measures to protect sites “to the extent appropriate and practicable” (40 C.F.R. part 230.97(a)(2)) in regard to mineral extraction and other threats.
4. EPA continually changed the “rules” in regards to what was required for mitigation on the project. EPA suggested that wetland preservation be at a 20:1 replacement ratio in June, 2012, to cover indirect and secondary impacts, but in December, 2012, it required additional mitigation measures to address secondary impacts and gave MCRC less than 30 days (including Christmas and New Year holidays) to come up with such measures. The EPA public hearing in this process was held over three months prior to the December 4, 2012, EPA letter and the timing of the letter did not allow sufficient time for MDEQ or MCRC to respond to the requirements of EPA’s letter due in substantial part to the holidays.
5. EPA would not allow the Marquette County Road Commission, Marquette County, or Michigamme Township (all legal governmental entities in the State of Michigan) to be the land steward of the proposed wetland preservation area, as allowed in 40 C.F.R. part 230.97(a) and when EPA was asked about having the Michigan Department of Natural Resources, which takes care of over 4.6 million acres for the State, as the land steward, the EPA said they would have to check into it. The EPA was not sure they were qualified.

Political Support for CR595

The objections from EPA officials in Chicago and Washington, D.C., flew in the face of the approvals that leaders in Michigan on both sides of the aisle had for this project. CR 595 was, and still is, supported by all local units of government in Marquette County where CR 595 would either go through or where the existing road to the mine goes through. This includes three cities (Marquette, Ishpeming, Negaunee), eight townships, the Marquette County Board, the two

Michigan State House of Representatives members who represented Marquette County at the time, the Michigan State Senate senator who represented Marquette County, 63 of the 110 members of the 96th Michigan State House, and 28 of 38 senators from the 96th Michigan State Senate, the Governor of the State of Michigan, Michigan Department of Transportation, Michigan Department of Environmental Quality, Michigan Department of Natural Resources, the Michigan State Police, Dan Benishek (R) U.S. House of Representative at the time, and both U.S. Senators Carl Levin (D), and Debbie Stabenow (D). Congress wrote the Clean Water Act specifically to allow states to assume Clean Water Act Section 404 permitting authority in place of the U.S. Army Corps of Engineers and EPA. When all relevant state officials and agencies want a project approved but bureaucrats in Chicago and Washington, D.C., can overrule them, then Congress's intent, as expressed in the plain language of the Clean Water Act, is overruled by Executive Agency bureaucrats who are unelected and accountable to no one. That was not the intent of Congress when it allowed states to assume permitting authority under the Act.

Result of EPA's Overreach

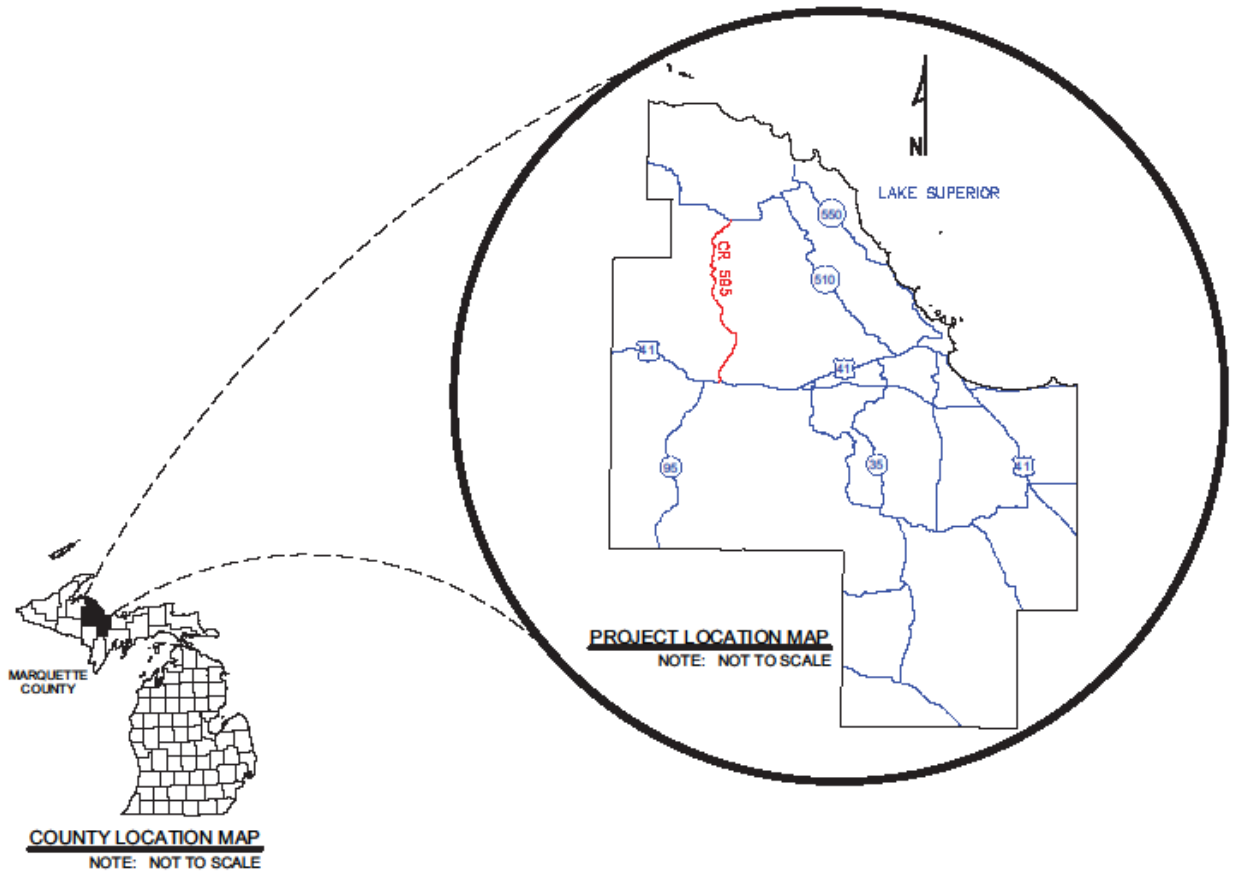
As a result of the EPA's overreach here, heavy truck traffic is now routed through the populated areas of Marquette County. That includes large trucks traveling each day adjacent to Northern Michigan University's campus, directly through small towns, and next to schools. Local units of government have been forced to address the safety issues created by EPA's lack of regard for the citizens of Marquette County. And this was all forced unnecessarily. The people of Michigan care greatly about their environment and the Michigan DEQ would not have approved the project if the concerns for pollution were not adequately addressed. The concerns *were* addressed. That's why the state DEQ wanted to approve the project. But instead I am here before you five years later testifying about the road that never was, and counsel for the MCRC is in court fighting for that road. Congress should do what it can to see to it that local and state elected officials who have acted in the best interest of their community, as the MCRC and state DEQ did here, can act without arbitrary and capricious interference from Washington EPA officials. That should not require Congress to amend the Clean Water Act, since Congress intended for a project like this one to be approved by the State of Michigan. But Congress should consider making explicit what is implicit in the law: when a state that has assumed Section 404 permitting authority intends to approve the project but the EPA objects, then the regulated party may challenge the EPA's objections as arbitrary and capricious in court.

Thank you.

**James M Iwanicki, P.E.
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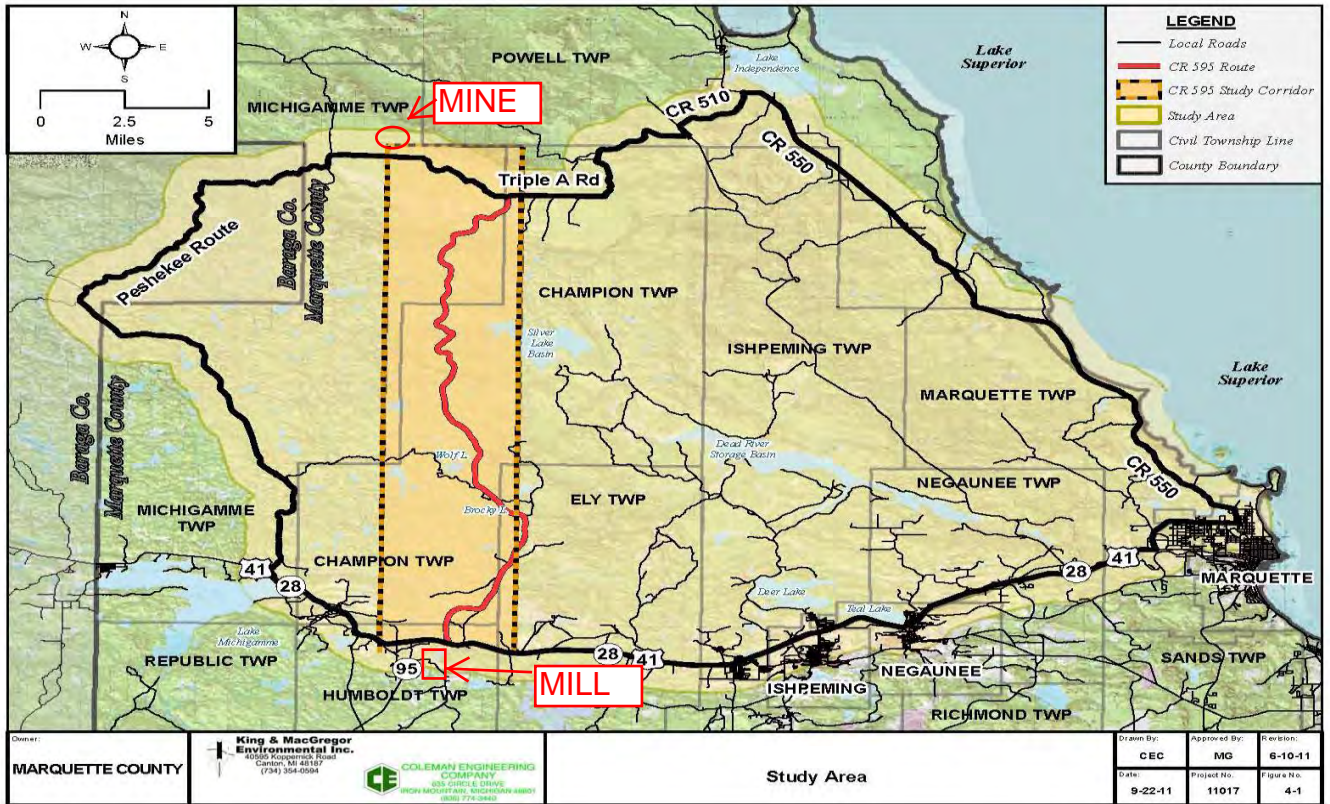
Attachment 1: Location of Marquette County



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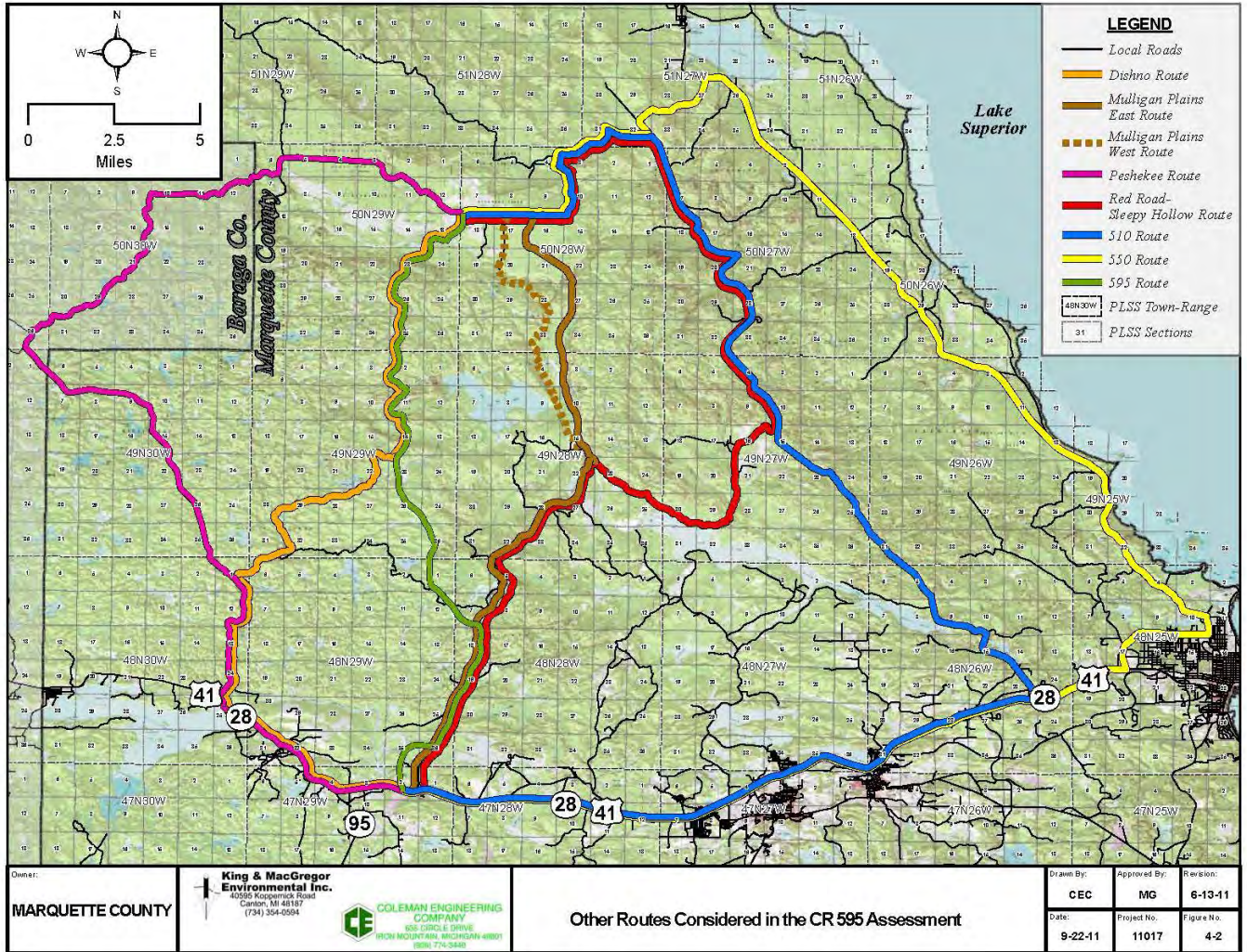
Attachment 2: Location of CR 595, Mine and Mill



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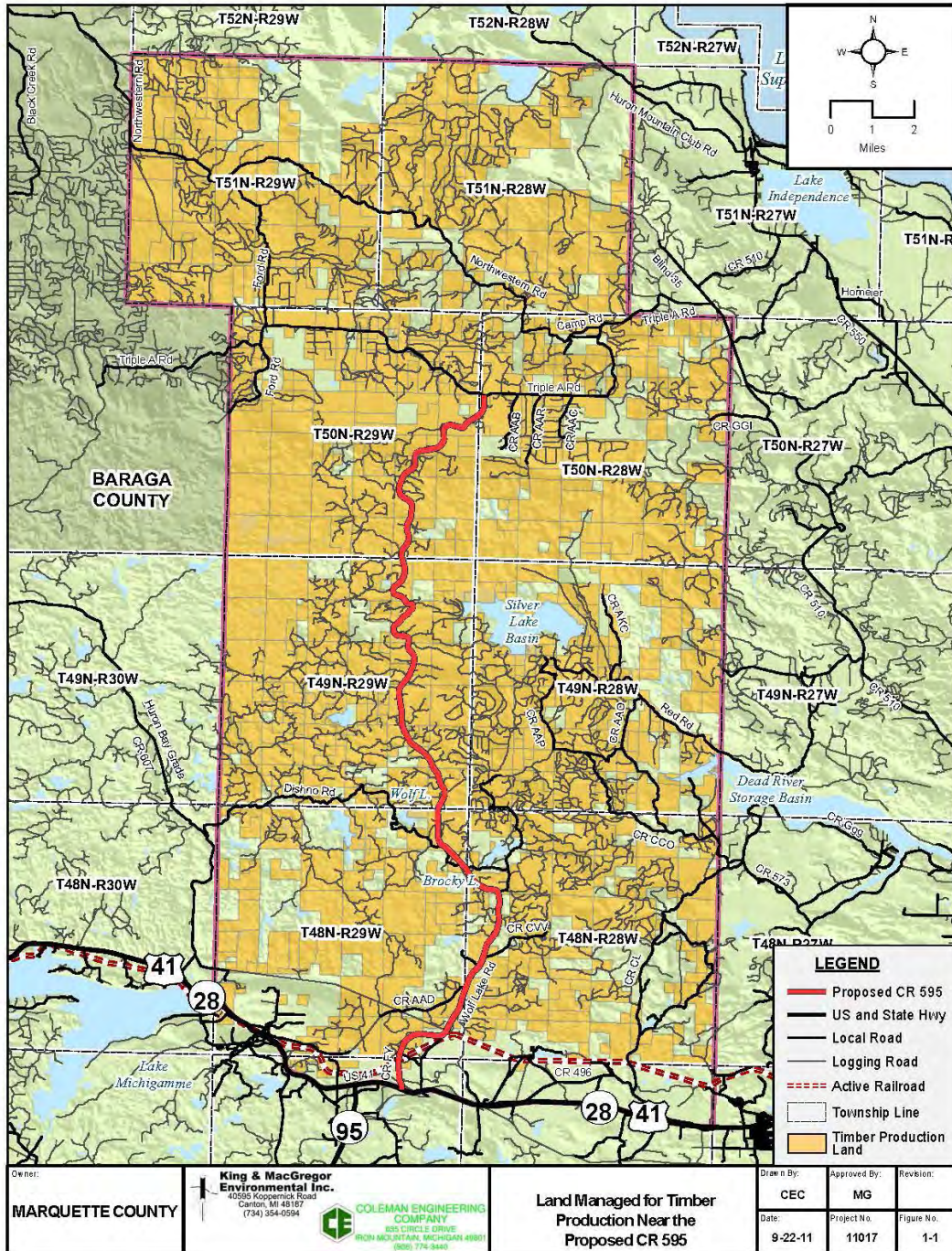
Attachment 3: Routes Studied



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Attachment 4: Existing Roads in Area

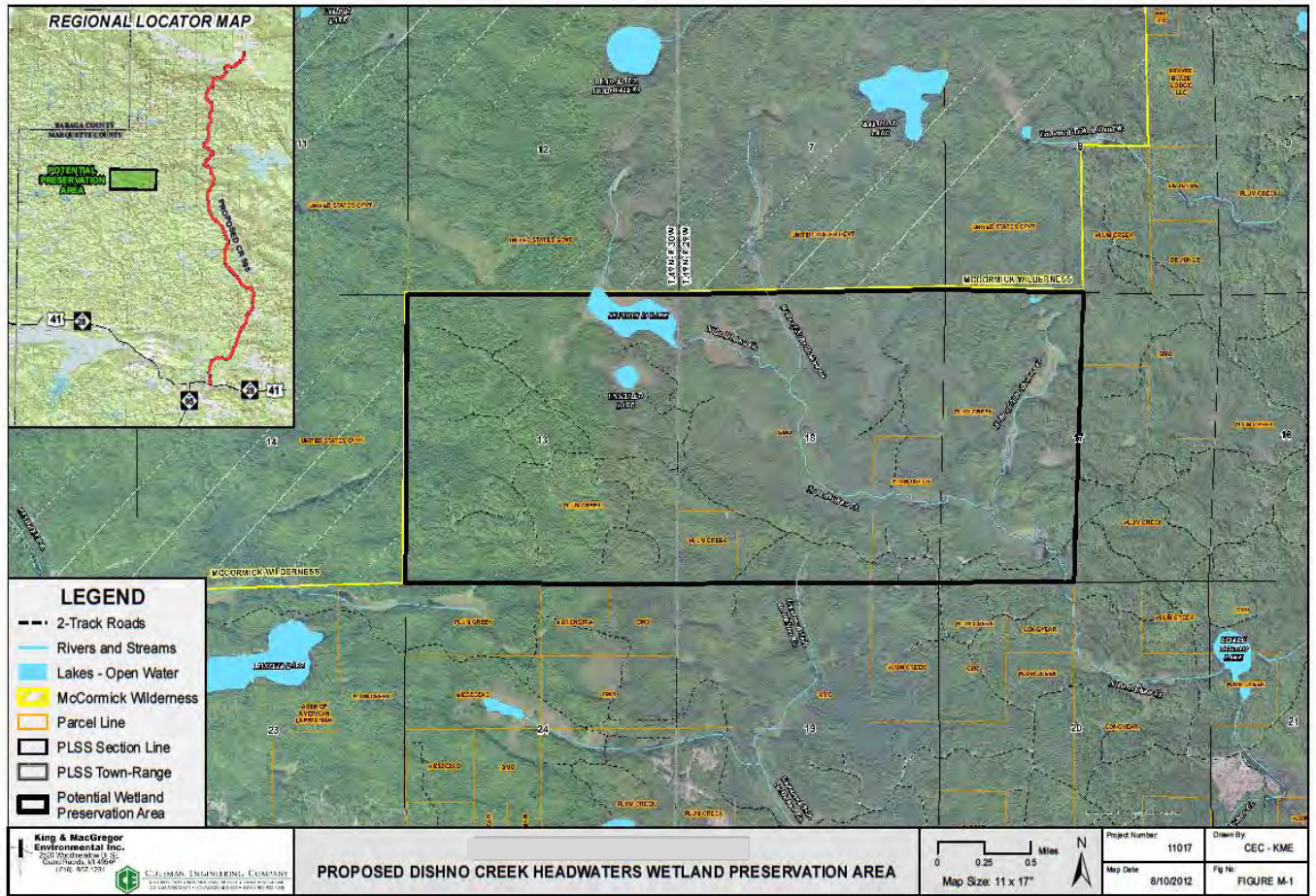


Owner: MARQUETTE COUNTY	King & MacGregor Environmental Inc. 45595 Koppersnick Road Carlton, MI 49817 (734) 354-0594  COLEMAN ENGINEERING COMPANY 855 CIRCLE DRIVE IRON MOUNTAIN, MICHIGAN 49801 (909) 376-3445	Land Managed for Timber Production Near the Proposed CR 595	Drawn By: CEC Date: 9-22-11	Approved By: MG Project No. 11017	Revision: Figure No. 1-1
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Attachment 5: Proposed Mitigation Area



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Attachment 6: Photo Along CR 595 Alignment



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Attachment 7: Photo Along CR 595 Alignment



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Attachment 8: Photo Along CR 595 Alignment



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Attachment 9: Photo Along CR 595 Alignment

