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September 23, 2002

NEPA Task Force
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Subject: Response to the Council on Environmental Quality's Request for Comments, Federal Register (67 FR 45510 - 45512, July 9, 2002 and 67 FR 53931 - 53932, August 20, 2002)

Dear NEPA Task Force:

I was very pleased to learn the Council on Environmental Quality has established the National Environmental Policy Act (NEPA) Task Force to consider ways to improve and modernize the NEPA process. In conjunction with this evaluation of the NEPA process, I would like to suggest the NEPA Task Force examine the findings presented in a 1999 National Academy of Sciences/National Research Council (NRC) report entitled "Hardrock Mining on Federal Land." This report includes some valuable observations regarding the NEPA process and the optimal way in which federal land managers should use the NEPA process to evaluate environmental impacts associated with proposed mineral exploration and mining projects. Although the NRC Report is focused on mining on federal land, I believe the NRC's NEPA recommendations are applicable to the NEPA process in general, and should be considered by all federal agencies involved with preparing NEPA documents. I would thus like to take this opportunity to describe the comments in the NRC Report dealing with NEPA.

NRC Report Background

In 1998, Congress appropriated \$800,000 in the FY 1999 Omnibus Appropriations Bill for the NRC to study hardrock mining on federal lands. Congress asked the NRC to conduct a study with the following objectives:

- 1) Identify the federal and state statutes and regulations applicable to environmental protection of federal lands in connection with mining activities;
- 2) Consider the adequacy of statutes and regulations to prevent unnecessary and undue degradation of the federal lands; and
- 3) Make recommendations for the coordination of federal and state regulations to ensure environmental protection, increase efficiency, avoid duplication and delay, and identify the most cost-effective manner for implementation.

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In response to this directive, the NRC established the Committee on Hardrock Mining on Federal Lands and appointed 13 individuals with expertise and experience in the following disciplines relevant to mining on federal lands: environmental science, environmental laws and regulations, geoscience, resource management, biology, mining, and engineering. In addition to being technically diverse, the Committee represented a wide range of viewpoints, both pro and con, regarding mining.

The Committee conducted an evidence-based analysis that "concentrated on the intersection of three elements that form the context of hardrock mining on federal land: 1) minerals development and the factors that drive it; 2) the natural environment and how it can be affected by hardrock mining; and 3) federal and state laws and regulations."¹ The Committee accepted testimony from a diverse group of experts at five public meetings, went on three field trips to a variety of mines and exploration sites, and held three public participation forums. Sixty individuals representing federal and state agencies, environmental organizations, special interest groups, industry, and other institutions spoke at the Committee meetings. The public participation forums included presentations from 37 people. The Committee also asked for information from regulatory agencies in 12 western states.

The NRC selected 10 individuals to conduct a rigorous peer review of the NRC Report prior to publication. The reviewers were chosen for their diverse perspectives and technical expertise and include environmental regulators, mining experts, environmental attorneys, and university scientists. These reviewers followed procedures approved by the NRC's Report Review Committee with the objective of making this NRC Report as sound as possible and to ensure that it met NRC standards for objectivity, evidence, and responsiveness to the study charge. The NRC published the consensus findings of the Committee on Hardrock Mining in October 1999 in a 249-page report entitled "Hardrock Mining on Federal Lands."

NRC's NEPA Recommendations

One of the key findings of the NRC Report is that the NEPA process is ideally suited to evaluate the environmental impacts associated with mineral exploration and mining projects on federal land. However, the NRC Report makes the following recommendations for improving the way in which federal agencies participate in the NEPA process:

"The NEPA process is the key to establishing an effective balance between mineral development and environmental protection. The effectiveness of NEPA depends on the full participation of all stakeholders throughout the NEPA process. Unfortunately, this rarely happens in a timely fashion. Recommendation: From the earliest stages of the NEPA process, all agencies with jurisdiction over mining operations or affected resources should be required to cooperate effectively in the scoping, preparation, and review of

¹ NRC Report, page 12.

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environmental impact assessments for new mines. Tribes and nongovernmental organizations should be encouraged to participate and should participate from the earliest stages.”²

The NRC Report also reaches the following conclusion about the NEPA process:

“Inefficiencies and time delays in the completion of environmental review under NEPA, issuance of permits, and conduct of other administrative actions unnecessarily consume the resources and time of many stakeholders. Recommendation: BLM and the Forest Service should plan for and implement a more timely permitting process, while still protecting the environment.”³

As envisioned by the NRC, the NEPA process represents a meaningful opportunity to evaluate ways to make a proposed mine the best possible project for the community and the environment. The NEPA process affords stakeholders the ability to request detailed analysis of the potential impacts associated with a proposed project. The scope of this evaluation can go far beyond on-the-ground environmental resources and can include a number of far-reaching and subjective social and cultural issues.

The NRC Report confirms that the NEPA process is adequate in scope to accommodate all potential issues:

“The Committee believes that the NEPA process and its various state equivalents provide the most useful and efficient framework for evaluating proposed mining activities for three reasons.

First, the NEPA process provides the most comprehensive and integrated framework for undertaking these evaluations. The NEPA environmental assessment process includes the full range of environmental concerns, whether or not they are specifically addressed by some other regulatory program, as well as cultural and other concerns. It allows for clear identification of tradeoffs between different and sometimes competing values, and promotes a better understanding by all stakeholders of the implications of the many decisions involved in the preparation and approval of a mine’s operating plan. It also provides a framework for coordinating the diverse information requirements, concerns, and permitting decisions of the many regulatory

² NRC Report, pages 6 - 7, emphasis in the original, see also Recommendation No. 10, NRC Report, Page 111.

³ NRC Report, page 7, emphasis in the original.

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agencies and other stakeholders. No other regulatory program provides such a comprehensive, integrated mechanism for decision making.

Second, the NEPA process ensures that the decisions are based on careful analyses of site-specific conditions. For example, ore deposits occur in every conceivable type of geographic and geologic location from arid deserts to tropical rain forests to high mountains. The values and sensitivities associated with diverse types of environmental and cultural resources can vary at least as widely. An operating plan for mining activities must adapt and respond to these specific conditions and sensitivities. The NEPA process allows this responsiveness; regulatory programs relying on inflexible, technically prescriptive standards often do not....

Third, mining technology for a site can vary substantially, depending on the type of ore, the nature and extent of the ore deposit, and many other site-specific conditions. Mining technologies also have changed, and will continue to change. The NEPA process allows the agencies to be responsive to such technological differences. Less flexible regulatory approaches do not allow this flexibility and, as a result, can cause technologies to be "frozen," often with adverse impacts for both the mining operators and the environment."

For all these reasons, the Committee believes that the agencies should continue to rely to the maximum extent possible on the flexible, comprehensive NEPA evaluation process for making permitting decisions. However, the Committee also recognizes that the NEPA process is not perfect. The process is complex and time consuming and can be implemented inefficiently (see discussions under Recommendations 10 and 16).⁴

Recommendation No. 10 is described above. Recommendation No. 16 includes the following remarks about the NEPA process:

"NEPA reviews and permitting are complex and time consuming because of the wide range of environmental and other issues and the numerous stakeholders with diverse priorities. The collection of some baseline environmental data requires at least a full cycle of seasons, and sometimes longer. All deserve thorough consideration. At the same time, the review and permitting processes should be completed as soon as the work can be done properly, eliminating delays due to inadequate stakeholder cooperation, insufficient planning, or insufficient agency staffing. An efficient process

⁴ NRC Report, pages 108 - 110

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will require full disclosure of information related to a proposed operation, full public access to and participation in the process, and full cooperation of all stakeholders and agencies interested or involved in the proposed operation.

The efficiency of NEPA review and permitting is in large part a management matter. The land management agency with lead responsibility should set and achieve deadlines and have sufficient qualified staff to do so. More timely permitting will free the agency staff to better address all their other environmental responsibilities.”⁵

Discussion of Stakeholder Participation

The NRC Report clearly emphasizes the importance of meaningful stakeholder participation in the NEPA process, and strongly recommends that stakeholders participate fully in the early stages of a NEPA environmental review. The NRC Report also observes that poor stakeholder participation is one of the main reasons the NEPA process is often time consuming and inefficient. In response to the NRC's recommendations and observations regarding stakeholder participation, I would like to urge the NEPA Task Force to consider ways to improve stakeholder participation in order to improve both the quality and the efficiency of the NEPA process. In addition to the NRC's recommendations regarding stakeholder participation discussed above, I would like to offer the following suggestions for improving stakeholder participation in the NEPA process:

Modify NEPA to Emphasize Stakeholder Collaboration

It has been my experience that stakeholders view the NEPA process as an opportunity to advocate a position, either supporting or opposing the Proposed Action being analyzed in the NEPA document. Stakeholders rarely approach NEPA as a collaborative process and an opportunity to work with federal agency decision makers to make the Proposed Action the best possible action for the environment and surrounding community.

Currently NEPA is mainly a disclosure process that evaluates, compares, and contrasts the environmental impacts associated with a Proposed Action and Project Alternatives. The process is not designed (or at least is not currently implemented in a way) to foster meaningful stakeholder dialogue on how to improve a proposed project, minimize environmental impacts, or enhance environmental benefits. Changing the NEPA paradigm from confrontation to collaboration would result in better environmental decisions for all stakeholders.

Not All Stakeholders Should be Considered Equal

The NRC Report describes NEPA as a costly and time-consuming process. To a large extent, the cost and delay are attributable to federal agency practices to accord everyone equal standing, including

⁵ NRC Report, pages 122 - 123

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outsiders with no expertise or direct stake in the decisions to be made. These outsiders, typically anti-development groups, use the NEPA process as a powerful tool to thwart proposed projects.

I realize that all U.S. citizens have a right to voice their opinion regarding activities on federal land. However, I also believe that people living closest to the land affected by a Proposed Action should have a greater say in decisions about the Proposed Action. This approach would be consistent with the Bush Administration's preference to grant more control to local authorities.

I believe that federal agencies should place more weight on comments from local and state governments than out-of-state activist groups. Local and state governments are in an ideal position to carefully weigh the pros and cons of a Proposed Action. Additionally, local and state elected officials have to be sensitive to the viewpoints of their electorate (i.e., their stakeholders). Thus, placing more reliance on local and state governments would help achieve the important goal of balancing environmental and economic concerns.

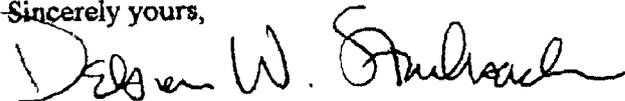
Develop Stakeholder Participation Guidelines

I would like to suggest that the NEPA Task Force consider developing some guidelines for stakeholder participation with the objective of implementing the NEPA and stakeholder participation recommendations in the NRC's Report on hardrock mining. These guidelines should clearly establish the importance of early stakeholder participation. This could be accomplished by setting a policy that stakeholder issues raised at the last minute in the NEPA process may not receive the same level of consideration as those developed early in the process (i.e., during public scoping).

Additionally, I recommend these guidelines provide federal agencies with accepted, routine procedures for handling and even dismissing eleventh-hour issues and public comments that focus on unlikely, worst-case scenarios. Agencies currently devote too much time dealing with last-minute concerns and improbable events in raised in public comments on Draft Environmental Impact Statements. Federal agencies should not be required to spend valuable resources addressing remote, extreme, and late issues.

I very much appreciate the opportunity to provide these comments to the NEPA Task Force and hope they are useful. Thank you for your consideration. Please do not hesitate to contact me if you have any questions.

Sincerely yours,



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MESSAGE:

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