



EARTHWORKS

Testimony of Lauren Pagel Earthworks Policy Director

Testimony before the U.S. House Subcommittee on Energy and Mineral Resources on HR 4402, the National Strategic and Critical Minerals Production Act of 2012

April 27, 2012

Thank you Mr. Chairman for the opportunity to submit this testimony before your committee in opposition to HR 4402, the National Strategic and Critical Minerals Production Act of 2012. My name is Lauren Pagel, Policy Director for Earthworks. We are a non-profit organization dedicated to protecting communities and the environment from the destructive impacts of mineral and energy development. We work closely with a broad coalition of local governments, Native Americans, citizen groups and other conservation organizations to improve the policies governing hardrock mining and oil and gas development.

The proponents argue that while the United States has vast mineral resources, according to the opinion of one consultant we rank near the bottom of 25 major mining countries in permitting delays. Implied, but not directly stated in the bill's findings, is that because of these delays the U.S. is not an attractive mineral investment destination.

We believe this premise is flawed. In fact, according to a survey of the mining companies themselves federal mining policies – if anything – encourage mineral investment in the U.S.

What is certain: HR 4402 would negatively impact the environment of publicly owned lands within mining states. And it would seriously impair the public's ability to review and provide input on the uses of its lands.

ATTRACTIVENESS OF THE UNITED STATES FOR MINERAL INVESTMENT

According to the University of Nevada Reno, more than 80% of Nevada's surface area is public land managed by the federal government in trust for all Americans by the Bureau of

Land Management and the U.S. Forest Service. Consequently, federal law – and NEPA in particular – applies to the vast majority of Nevada.

As a result, if permitting delays imposed on public lands were so burdensome, one would expect that Nevada would be unattractive relative to other potential mineral investment destinations.

The opposite is true.

The Fraser Institute – a center-right Canadian think tank – conducts an Annual Survey of Mining Companies. The Fraser Survey is one of the most prominent and comprehensive analyses of the impacts of mining regulation on willingness to invest in mineral exploration. It surveys mining exploration decision-makers from around the world (802 companies in the 2011-2012 edition). It relatively ranks every region in the world on a variety of criteria.

The most important of these criteria is policy attractiveness:

“The Policy Potential Index is a composite index that measures the effects on exploration of government policies including uncertainty concerning the administration, interpretation, and enforcement of existing regulations; environmental regulations; regulatory duplication and inconsistencies; taxation; uncertainty concerning native land claims and protected areas; infrastructure; socioeconomic agreements; political stability; labor issues; geological database; and security.”

Note what is absent from that ranking: mineral potential. The ranking is based on policies, and things that result from policies, alone.

In the most recent survey (2011-2012 edition), Nevada -- in terms of the aggregate effect of the various policies that apply to mining within the state -- is the 8th most attractive mineral investment destination in the world. Wyoming, another state known for its abundance of public lands, ranks 2nd. Utah, another public lands state, follows close behind.

Because the aforementioned Policy Potential Index includes areas in which Nevada would score well, but are conceivably not directly attributable to regulation (e.g. infrastructure, political stability), one might still conclude environmental regulation and permitting is a drag on mineral investment in Nevada and the rest of public lands in the United States.

Fortunately, the Fraser Survey addresses this issue. It also includes a ranking of the relative attractiveness of regions’ “current mineral potential with no regulations in place and assuming [only] industry best practices”.

If existing regulations actually restrict mineral investment in Nevada and federal public lands around the nation – then one would expect survey participants to find the absence of regulations increase Nevada’s appeal for mineral investment.

Instead, the opposite is true. According to the Fraser Survey, when mining industry insiders were asked to assume no government regulations, Nevada's world ranking as a potential mineral investment destination dropped to 17th.

Taken as a whole, the Fraser Survey is a direct refutation for the need for this bill. From this survey, the only reasonable conclusion to make is that Nevada's policies governing mining – including federal policies like NEPA – are a relative competitive ADVANTAGE, not disadvantage

UNEMPLOYMENT IN MINING-CENTRIC COMMUNITIES: LOWER, NOT HIGHER

As of February 2012 (the latest date for which county level data was available), Nevada's unemployment rate was 12.2% -- considerably higher than the national rate of 8.3%.

Every year, the Nevada Bureau of Mines and Geology breaks down the major mines in the state by county. In its most recent edition, Major Mines of Nevada 2010, it lists the following counties with hardrock mines: Elko, Eureka, Humboldt, Lander, Mineral, Nye, Pershing, and White Pine.

According the Bureau of Labor statistics, the average unemployment rate for those counties is 8.9% -- or below the Nevada state average of 12.2%.

Furthermore, if we take out the two counties that are least hardrock mining dependent (those with only 1 mine – Mineral and Nye counties) then the average unemployment rate of Nevada's most heavily mining dependent counties drops to 7.4% -- or below the national average of 8.3%.

Thus, while Nevada's statewide unemployment is quite high, existing mining regulations – including NEPA -- are not the cause.

DEFINITION OF STRATEGIC MINERALS

The bill broadly defines critical and strategic minerals as those that “support domestic manufacturing, agriculture, housing, telecommunications, healthcare, and transportation infrastructure.” In other words, all minerals including gold, the most valuable mineral mined in Nevada.

Gold is particularly inappropriate for designation as a critical or strategic mineral for the simple reason that the majority of it in the U.S. -- 54% in 2011 according to the USGS -- is used in jewelry fabrication. 54% is actually quite low in terms of jewelry's historic percentage of U.S. gold demand. As recently as 2008, it was 84%.

Since jewelry fabrication is neither a critical nor strategic use for gold, then no critical or strategic purpose is served by exempting its mining from our most basic environmental protections like NEPA review.

THE IMPORTANCE OF PUBLIC PARTICIPATION, PUBLIC LANDS, AND ENVIRONMENTAL PROTECTION

When the National Environmental Policy Act (NEPA) was enacted in 1969 by an overwhelming bi-partisan majority and signed by President Richard Nixon, the goal of the legislation was to create a process by which the environmental impacts of large industrial projects could be explored, weighed and eventually mitigated.

NEPA makes sure that in addition to government and industry input, everyday citizens can take part in the development and oversight of projects that affect our social, economic, and environmental health. The NEPA process provides citizens an opportunity to learn about proposed federal actions and offers agencies an opportunity to receive valuable input from the public.

Under current law, agencies must fully evaluate the environmental impacts of actions that may significantly affect the environment. Though, it is important to point out that the law does not require that the decision-making agency choose the most environmentally-friendly option, it only requires that they weigh all the options.

Furthermore, the NEPA process is the public's window on how a mining operator plans to comply with environmental law. Without NEPA, the public is forced to rely on the mining company, and the permitting agency, to verify that mining operator's plan of operations can realistically do so.

While such faith is touching, the facts indicate it is sadly unfounded.

In a unprecedented 2008 research paper commissioned by Earthworks, conducted by a member of the National Academies of Science Earth Science Board, and reviewed by regulators and industry, mining industry promises of environmental compliance for "major" mines undergoing full NEPA review were compared against what actually happened at the mines. The most disappointing finding: 100% of mines in the study predicted environmental compliance; 75% of them did not.

The only reason we know of industry (and permitting agencies') failure to adequately govern mining operations: NEPA review. If not for NEPA, citizens would not know how badly the mining industry performs, nor be able to use this information to pressure permitting agencies to improve its behavior.

So this legislation would run roughshod over the values of transparency and public participation that are at the heart of NEPA – essentially taking public review out of potential uses of our public lands.

And for what purpose? The mining industry, because of the 1872 Mining Law, already has an additional advantage over all other potential public land uses in the permitting process. Under the 1872 Mining Law, mining is considered the "highest and best use" of public

lands. As such, federal land managers cannot, and do not, deny mine proposals. This, in part, explains why the Fraser survey ranks many Western states like Nevada so favorably for mineral investment.

While mining on public lands helps stimulate economic activity, protection of those lands is also vital to the western economy. Last year, over 100 economists including 3 Nobel laureates, sent a letter to President Obama stressing the importance of the protection of our public lands to our national economy. They said:

“The rivers, lakes, canyons, and mountains found on public lands serve as a unique and compelling backdrop that has helped to transform the western economy from a dependence on resource extractive industries to growth from in-migration, tourism, and modern economy sectors such as finance, engineering, software development, insurance, and health care.”

They also note, “increasingly, entrepreneurs are basing their business location decisions on the quality of life in an area. Businesses are recruiting talented employees by promoting access to beautiful, nearby public lands...Together with investment in education and access to markets, studies have repeatedly shown that protected public lands are significant contributors to economic growth.”

Section 103 reprioritizes the entire field of public land and environmental law regarding mineral operations, making “development of the mineral resource” the “priority of the lead agency.”

Under current law, the federal land agencies are subject to a variety of congressional mandates that attempt to balance mineral production with the protection of human health, water and air quality, wildlife, etc. For example, if a mining project may adversely affect a threatened or endangered species, then as the Supreme Court has held pursuant to the Endangered Species Act, “Congress intended endangered species to be afforded the highest of priorities.” *TVA v. Hill*, 437 U.S. 153 (1978). If the ESA is not applicable, then other congressional policies apply, such as the prevention of “unnecessary or undue degradation” to public land under the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1732 (b). See *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 33 (D.D.C. 2003)(discussing competing congressional mandates for mining operations on Interior Department lands).

HR 4402 essentially eliminates these long-standing congressional mandates, and subjects the BLM and Forest Service to a new “maximize mineral development” standard. Although Section 103 states that the agency must “mitigate environmental impacts,” that vague language does little to protect environmental values in light of the new overarching development standard. For example, under current environmental law, “mitigation” can mean simply “minimizing impacts” or “reducing the impact over time.” 40 CFR 1508.20. Coupled with the “maximize development” priority, as well as the requirement that the agencies ensure that “more of the mineral resource can be brought to the market place,” an agency’s “mitigation” authority is thus severely curtailed.

EQUAL ACCESS TO JUSTICE ACT

HR 4402 also allows regulators to exempt mining projects from the Equal Access to Justice Act (EAJA). The EAJA is the legislation that makes nonprofit environmental law firms possible. In many cases, affected communities cannot afford to hire a lawyer, much less the litany of scientific and technical experts needed to mount a serious challenge to a major multinational mining corporation. The practical effect of this provision would leave many communities unable to sue for the contamination of their lands and waters.

CONCLUSION

In sum, environmental reviews and legal challenges do not substantially affect mining investment, employment, or the reserves of certain critical minerals. The market has long ago priced in these costs and the result is that many of our Western states are among the best places for mineral investment and have substantially lower unemployment rates than surrounding communities. This is not an issue of too many lawyers or regulators; it's an economics issue. Mining occurs where the target mineral price makes the process economically viable.

NEPA has been in place for more than forty years. Federal government agencies and the mining companies they regulate understand the process well and value the market certainty NEPA creates and investors crave. Dismantling this well-established process could undermine the purported purpose of this bill of encouraging investment and securing more critical mineral resources.